RESERVED JUDGMENT

Case Nos. 2300549/2016
2301719/2016
2300414/2017
2301738/2017
2303957/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr J Edwards

Respondents:
1. The National Union of Rail, Maritime and Transport Workers
2. Michael Cash
3. Karen Mitchell
4. Sean Hoyle
5. Stephen Hedley
6. Michael Lynch
7. Scott Perkins
8. Andrew Gilchrist

Heard at: Manchester

Over 26 days on: 25 April – 31 May 2022 (excluding 5, 13, 17, 26 and 27 May) and in chambers in absence of parties on 25 to 28 July, 2 September and 31 October and 1 November 2022.

Before: Employment Judge Cookson
Ms L Atkinson
Mr S Anslow

REPRESENTATION:

Claimant: In person
Respondents: Mr D Panesar (King's Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The claimant's claims under the Employment Rights Act 1996, Employment Relations Act 1999, the Equality Act 2010 and the Trade Union and Labour

Relations (Consolidation) Act 1992, as list in the List of Issues agreed by the parties at the outset of this hearing and attached to this judgment, are not upheld.

2. All of the claimant's claims in the above proceedings are dismissed.

This is a long judgment. To aid navigation I have included a list of contents

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REASONS

INTRODUCTION

1. The claimant in this case, Mr Edwards, referred to as "the claimant" throughout, was engaged by the first respondent, a well-known trade union, as an in-house employment solicitor.

2. At the date of this hearing the claimant was 52 years of age. He was employed from 7 August 2013 until 24 November 2017 when he resigned claiming that he had been constructively dismissed.

3. After pursuing early conciliation in each instance, the claimant brought a series of Employment Tribunal claims. Claim one was submitted on 22 March 2016, claim two on 7 September 2016, claim three on 27 January 2017, claim four on 28 June 2017 and claim five on 19 December 2017. A response form with grounds of resistance was submitted in respect of each claim in turn.

4. As well as bringing claims against the RMT, "the first respondent" the claimant has brought claims against various senior officers and employees. The list of issues refers to these individuals as "R2" and "R3", but it is clear that at times mistakes have been made and references have been made to the wrong individuals. To aid comprehension and to avoid falling into the same error we have referred to the various individual respondents by name. Any reference to the "respondent" is to the RMT.

5. This case was complex procedural history. It was the subject of a series of preliminary hearings first in London Central where the proceedings were initially lodged, and later in the Manchester Employment Tribunal; after the proceedings were transferred. In light of the volume of issues determined and orders made in the course of the preliminary hearings those have not been summarised here, except to the extent necessary to explain how some matters raised by the claimant in the course of this hearing were dealt with and how they were determined.

6. The claimant has brought a significant number of individual claims - there is some duplication and overlap, but we are told by Mr Panesar that there are 133 – a number not disputed by the claimant, in 5 sets of legal proceedings which have been identified and particularised in light of the orders of the various employment judges involved in case management. In the course of those case management proceedings the issues to be determined by this Tribunal were set out in a tabular format. Following the hearing on 20 December 2019 before Regional Employment Judge Franey at which a number of amendment issues were determined, a final List of Issues was prepared by the respondent and sent to the claimant. Although the document

had been largely agreed, the claimant had included a number of comments in the table and the document had never been finalised which meant the List of Issues was not in a final form which this Employment Tribunal panel could simply adopt.

7. The list of issues runs over many pages and lists 157 numbered paragraphs although as already noted there is significant duplication, and some numbered paragraphs refer to several claims. The document is attached in the annex to our judgment. Some time was spent on the first day going through the draft List of Issues included in the bundle which enabled an agreed List of Issues to be finalised. Although the panel did not find the document an easy one to work with, the parties told us they were satisfied with it and given the time available to us and the time that would have been required to go through the document in any detailed way, we proceeded on that basis. The issues identified in this Judgment and the Reasons below reflect what was agreed at the hearing in this regard.

8. In reaching our judgment the Employment Tribunal has considered:

   (1) A joint bundle of documents prepared by the respondent which runs to some 4,677 pages in 15 files to which a small number of additional documents were added in the course of the hearing;

   (2) A supplemental bundle of documents submitted by the claimant;

   (3) The evidence in witness statements and given orally for the respondent by:

      a. Mr Gilchrist, now retired but at the relevant time the first respondent's education officer;

      b. Ms Mitchell, now retired but at the relevant time Head of the RMT's legal department;

      c. Mr Perkins, who holds various roles but in particular is head of HR and constitution;

      d. Mr Croy, head of the national policy unit;

      e. Mr Carey, head of industrial relations;

      f. Mr Welch-May, a solicitor in the legal department;

      g. Ms Henderson, who at the relevant time was a trainee solicitor and is now a solicitor from whom we received a statement and a supplementary statement;

(4) The evidence given in the claimant's witness statement which runs to some 919 paragraphs and 299 pages, and orally by him and by his witness Mr McDonnell from the Wimbledon branch of the RMT;

(5) We also had before us a witness statement from Mr Nixon who had accompanied the claimant to the capability meetings but who was unable to attend this hearing, and Mr McGowan a former official. A witness order in respect of Mr McGowan, granted on the application of the claimant, was rescinded because the claimant accepted that he could not attend this hearing for health reasons.

(6) An opening skeleton argument submitted by the respondent and later slightly updated;

(7) Written and oral submissions from both parties.

Adjustments for the claimant and timetabling

9. We recognised that the claimant in this case was an experienced employment law solicitor but in these proceedings he was also a disabled litigant in person. With that in mind, and in order to assist us as tribunal to deal with this case in a way which is proportionate to the legal issues involved, we told the claimant that we did not need him to challenge every single thing which he disagrees with in the respondent's witness statement or to put to them every detail of his witness statement where it conflicts with the respondent's evidence. Rather we asked the claimant to concentrate on two things: the disputes of fact which are relevant to the claimant's case set out in the list of issues; and those matters which the claimant said were facts which could show that the reasons why things happened were in main or part on the ground of or because of a protected ground or act so that we could understand the matters from which the claimant wished us to draw an adverse inference.

10. We agreed an approach to the day in terms of breaks and sitting time and stressed to the claimant that if he required additional breaks he could ask for those.

11. Various issues arose in the course of this hearing in relation to adjustments which are recorded in brief terms here. The claimant sought additional adjustments such as a delay for submissions and additional time at the end of the respondent's evidence to re-read his witness statement. He also asked to be allowed to record the proceedings. All of those things were objected to by the respondent. The claimant was asked to produce medical evidence in support of those requests because we had already allowed the claimant a generous allocation of time for his cross examination of respondent witnesses and we were concerned about the case going part heard. The claimant did not produce any medical evidence in support of these requests and in the circumstances we found the requests to be beyond what was reasonable.

Difficulties in this case

12. The claimant in this case raises wide ranging allegations relating not to particular events, but also the procedure adopted by his employer and its senior managers in responding to his complaints.

13. An order had been made for a chronology to prepared by the respondent to assist the tribunal. It is matter of some concern that this was not done. A chronology would not only have assisted the tribunal in the course of the hearing, it would also have made the fact-finding process for the panel considerably easier and shorter. In the absence of that chronology and in seeking to properly consider the complaints made by the claimant, the tribunal panel had little choice but to create our own chronology when we undertook our fact-finding exercise. In any event the vague procedural allegations made by the claimant also gave us little choice but to consider and make detailed findings about the process and that is reflected in the long findings of fact set out below. Inevitably that extended the deliberation process in this case quite significantly given the period of time covered by these allegations. It is clearly disappointing that there a failure to comply with a tribunal order requiring that this be prepared by the respondents where a chronology was so obviously required.

14. As for the claimant's case, in the absence of a focused case, the vague nature of the allegations and the sheer number of claims, the extraordinary length of witness statement of the claimant (which runs to some 400 pages with a further 90 pages of submissions), resulted in the deliberations in this case taking a very considerable amount of time. The tribunal panel did not find it an easy process. Not only were we not assisted with clear list of issues and a chronology, we had also been presented with some 16 volumes of documents. Documents are not included in the bundle in simple date order, they are grouped by categories in a way we did not always find helpful or obvious. There are hundreds of pages in the bundle we were never referred to. There is considerable duplication in the bundle, with some documents appearing in the bundle in different locations in numerous places and we were referred to the same document in different places in the course of the hearing which we also found unhelpful. The index is not always clear. In short simply trying to navigate the documents was difficult and time-consuming.

15. The panel were mindful throughout that the claimant is disabled person, but it is also clear that he has assistance from friends and family. At one point he was taking his own legal advice, and he is an experienced employment lawyer. The trade union and other respondents have been represented throughout by a prominent and specialist firm of solicitors. It is unfortunate in those circumstances that the panel should have faced the difficulties described above. In short we did the best we could.

16. Unfortunately, the deliberation process was also impacted by illness amongst the panel and the industrial action affecting public transport. We apologise to the parties for the delay in providing this judgment.

Matters arising in the course of this hearing

17. On a number of occasions, the claimant sought to question respondent witness about a particular document, a grievance lodged by Karen Mitchell, a copy of which had been sent to Thompsons solicitors. As this appeared to be potentially entering into the territory of exploring legal advice and in the light of concerns raised by Mr Panesar, the claimant was asked to explain this line of questioning. He asserted that this question was relevant because he says that Mr Patel from Thompsons solicitors had misled the tribunal about the existence of this document and this issue was therefore relevant to determine whether a fair trial was still possible, could form the basis of a strike out application and could be relevant to costs.

18. On each occasion Mr Panesar objected on the basis that this was an abuse of process. The issue about whether Mr Patel had misled the employment tribunal was considered by Employment Judge Leach at a preliminary hearing to determine a strike out application. Employment Judge Leach had heard witness evidence on this matter and had accepted that a mistake had been made by Thompsons, but this was simply human error. The strike out application had been refused as a result. The tribunal panel accepted Mr Panesar's objections and did not allow the claimant to pursue that questioning because a judicial determination on that matter had been made and it appeared that the claimant wished to relitigate that before us. The parties were told that submissions could be made in the future on the question of costs and the tribunal panel records that there is outstanding costs application to which this may be relevant.

"The 2020 Investigation"

19. At various points in the hearing, the claimant sought to introduce evidence about, or cross examine respondent witnesses in relation to, an investigation conducted in 2020. We were told that was a union investigation into the conduct of Mr Cash. Mr Panesar objected to that because this had formed the basis of an application to amend which had been refused by Regional Employment Judge Franey. The panel accepted Mr Panesar's objections in this regard. It had been determined that this matter would not form part of the claimant's case. In the circumstances we determined that it would have been disproportionate and not in accordance with the overriding objective for questioning on that to be allowed in case which already had so much to cover, and the claimant was stopped from raising this matter in cross examination on several occasions.

Recall of Sarah Henderson

20. One last procedural issue of note is that the respondent was allowed to recall Ms Henderson and present a supplemental witness statement despite objections raised by the claimant. This was because after Ms Henderson's cross examination had been completed, the claimant pursued a line of questioning with Ms Mitchell which appeared to suggest some dishonesty on the part of Ms Henderson which had not been put to her. The claimant objected to Ms Henderson being recalled but

the panel accepted that it was in accordance with the overriding objective and fairness that Ms Henderson be given the opportunity to answer the allegations made about her to other witnesses and we allowed her to be recalled to present additional witness evidence.

THE RELEVANT LAW

Claims under the Employment Rights Act 1996 (" the ERA")

Constructive unfair dismissal

21. Section 95(1)(c) of the ERA provides an employee is dismissed if: - *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."* An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, i.e. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract. The conduct of the employer must be more than just unreasonable or unfair to constitute a fundamental breach. We should ask the following questions: -

    a. What are the relevant terms of the contract said to have been breached?

    b. Are any of the alleged breaches made out (the burden of proof being on the employee)?

    c. If so, are those breaches fundamental?

    d. Did the claimant resign, at least in part, in response to the breaches not for some other unconnected reason and do so before affirming the contract?

22. If the answers to questions (b), (c) and (d) are affirmative, there is a dismissal.

23. If there is a dismissal it is for the respondent to show the reason for dismissal.

Establishing fundamental breach of contract

24. Contractual terms may be express or implied. Whether a breach of any of those terms, including the implied term of trust and confidence, is fundamental is essentially a question of fact and degree. In terms of the implied duty of trust and confidence, an employer must not, without reasonable and proper cause, conduct themselves in a manner which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee (Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL).

25. It is not necessary for the employee to show the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's

conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."

26. The employer's motive is irrelevant. The test of fundamental breach is purely contractual, and the surrounding circumstances are not relevant, at this stage. Although they may be relevant to the reason for the dismissal.

27. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period when taken together may cumulatively amount to a breach. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. An entirely innocuous act by the employer cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets it as hurtful and destructive of their trust and confidence in the employer.

Employee's response to the breach

28. Resignation in a case of constructive dismissal is the employee's acceptance of the employer's fundamental breach of contract thereby bringing the contract to end. Conversely, the employee may expressly or impliedly affirm the contract and thereby lose the right to resign in response to an antecedent breach. Delay of itself does not mean the employee has affirmed the contract but if it shows acceptance of a breach, then in the absence of some other conduct, reawakening the right to resign, the employee cannot resign in response to the earlier breach.

29. Even if there has been a fundamental breach which has not been affirmed, if it is not at least in part an effective cause of the employee's resignation, there is no dismissal.

30. If the claimant shows that he has been dismissed, we then turn to consider the reason for dismissal. In this case the claimant says that he was unfairly dismissed contrary to s103A (whistleblowing) and s98(4), fairness.

Reason for dismissal if the employee has shown they were dismissed:

31. It is for the employer to show that it had a potentially fair reason for dismissal in any case where a dismissed employer has more than 2 years continuous service. Even a constructive dismissal may be fair if the respondent shows a potentially fair reason for its breach and that it acted reasonably.

32. *Section 98(1)*

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

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

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

33. Valid reasons include that it relates to the employee's conduct or capability. If those, or some other substantial reason, is shown, s98(4) is engaged:

"Where an employer has fulfilled the requirements of subsection (1), the determination of .. whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in all 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

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

Automatically unfair dismissal

34. Section 103A Employment Rights Act 1996 ("Protected disclosure") provides

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

35. In a constructive dismissal case such as this, the question for our consideration is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment that precipitated the resignation. If it was, then the dismissal will be automatically unfair.

36. Section 103A ERA recognises that there may be more than one reason for a dismissal. An employee will only succeed in a claim of unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. The question of whether the principal reason for dismissal a protected disclosure was is a question of fact. As a tribunal we must ask ourselves why did the person responsible for dismissal act as they did? What, consciously or unconsciously, was their reason and in that context it is helpful to bear in the guidance provided to the tribunals in relation to victimisation under discrimination legislation which is also relevant in this case (and in particular *Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065, HL).

37. If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under S.103A will not be made out. This can be contrasted with the position in relation to detriment which is referred to further below. A detriment claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas S.103A requires the disclosure to be the primary motivation for a dismissal.

38. In terms of the burden of proof, the burden is on the employer to show the reason for dismissal was a fair one. In terms of the claimant's case, insofar as he says the real reason for the things which he says led to his alleged dismissal reason for dismissal are an automatically unfair reason the claimant must show — without having to prove — that there is an issue which warrants investigation, and which is capable of establishing the automatically unfair reason advanced. However, once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal.

Unlawful Detriments

39. The claimant has asserted that he was subject to detriments on a number of different unlawful grounds. The legislation contains some common principles, such as what amounts to a detriment, but each unlawful reason has its own considerations.

Workplace companion (claim under the Employment relations Act 1999)

40. The complaints about being a workplace companion: Section 12 Employment Relations Act 1999 ("ERelA")

41. *s12. Detriment and dismissal*

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he—

(a) exercised or sought to exercise the right under section 10(2) or (4), or

(b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

(2) Section 48 of the Employment Rights Act 1996 shall apply in relation to contraventions of subsection (1) above as it applies in relation to contraventions of certain sections of that Act.

(3) A worker who is dismissed shall be regarded for the purposes of Part X of the Employment Rights Act 1996 as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he—

(a)exercised or sought to exercise the right under section 10(2A), (2B) or (4), or

(b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

…

(7)References in this section to a worker having accompanied or sought to accompany another worker include references to his having exercised or sought to exercise any of the powers conferred by section 10(2A) or (2B).

42. In order to apply s12 it is necessary to identify the particular elements of s10 of the ERelA.

43. *Section 10 Right to be accompanied provides*

"(1)This section applies where a worker—

(a)is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b)reasonably requests to be accompanied at the hearing.

(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

(a)is chosen by the worker; and

(b)is within subsection (3).

2B) The employer must permit the worker's companion to—

(a)address the hearing in order to do any or all of the following—

(i)put the worker's case;

(ii)sum up that case;

(iii)respond on the worker's behalf to any view expressed at the hearing;

(b) confer with the worker during the hearing.

(2C) Subsection (2B) does not require the employer to permit the worker's companion to—

(a)answer questions on behalf of the worker;

(b)address the hearing if the worker indicates at it that he does not wish his companion to do so; or

(c)use the powers conferred by that subsection in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.]

(3)A person is within this subsection if he is—

(a)employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992,

(b)an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or

(c) another of the employer's workers.

Health and safety grounds

44. The complaints about leaving the workplace on alleged health and safety grounds: Section 44 Employment Rights Act 1996 provides

s44 (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that

[…]

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger .

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) This section does not apply where the detriment in question amounts to dismissal (within the meaning of Part X).

45. Under section 100(1)(d), the danger must be one which the employee "could not reasonably have been expected to avert". Section 100 gives effect to the Framework Directive (European Directive 89/391/EEC). Article 8(4) provides *"workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national laws and/or practices.*

Protected disclosures

46. Section 43A of the Employment Rights Act 1996

A protected disclosure is a 'qualifying disclosure' (a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' set out in section 43B has occurred, is occurring or is likely to occur); which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H.

47. In this case the claimant says that he made qualifying disclosures that he reasonably believed to be disclosures of information that were made in the public interest and tended to show the relevant failures set out in subsections 43B(1)(a), (b) and (f), that is:

that a criminal offence has been committed, is being committed or is likely to be committed (sub-section 43(1)(a));

that a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject (sub-section 43(1)(b)); and

that information tending to show any matter falling within any one of the prescribed grounds under section 43B of the ERA has been, is being or is likely to be deliberately concealed

48. The method of disclosure relied on by the claimant is section 43C, this section provides that a qualifying disclosure is a protected disclosure if it is made to the worker's employer.

49. Section 43B(1) requires both that the worker has the relevant belief, and that their belief is reasonable. This involves a) considering the subjective belief of the worker and also b) applying an objective standard to the personal circumstances of the worker making the disclosure. In this case the parties agreed however that the key issue was the dispute of evidence about whether the alleged assaults and instruction to change the "RW minutes" had happened. The claimant accepted that that if those things had not happened he could not have had a reasonable belief in the disclosures that he made about those things

Protected disclosure detriment

50. Section 47B of the Employment Rights Act 1996 says

"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

What does "detriment" mean?

51. The term 'detriment' is not defined in the ERA, but it has a broad scope which has been given extensive consideration in case law and we understand the term to have a similar meaning to the same term in the similar context of the anti-discrimination legislation. *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337, HL tells us that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment, which be applied by considering the issue from the point of view of the worker.

"On the ground of"

52. The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure or any other protected act, is set out in *Fecitt and ors v NHS Manchester* [2012] IRLR 64. What needs to be considered is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the worker. This means in determining the grounds upon which a particular act was done, it is necessary to consider the mental processes both conscious and unconscious of the employer. It is not sufficient to simply apply a 'but for' test to the facts.

53. There must be a causal connection between the employee's protected act or status and the employer's decision. In other word we must ask what was the reason for the employer's act or omission (not the reason for the detriment)? However, the motive behind the employer's act or omission is immaterial, in the sense that it does not matter why the employer should wish to treat a protected employee differently and it does not matter whether there is or is not an intent to discriminate against the protected employee, in the sense that it does not matter whether the employer intended to subject him to a detriment.

The burden of proof in detriment cases

54. s48 ERA: Complaints to employment tribunal

55. *s48 (2) On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

56. S48 does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent (whether employer, worker or agent) must disprove the claim. The claimant must show that all the other necessary elements of a claim

have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment. If they do, the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure or did a protected act.

57. The tribunal has to determine the reason or principal reason for the detriment on the basis that it is for the employer to show what the reason was. If the employer has not shown to the satisfaction of the tribunal that the reason was that asserted by him, it is open to the tribunal to find that the reason is that asserted by the employee. However, it is not correct to say that the tribunal has to find that if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. It is open to the tribunal to find that the true reason for dismissal was not that advanced by either side. In other words, if a tribunal rejects the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party depending of course on the findings of fact made in the case.

Drawing inferences.

58. We recognise that there will often be little or no evidence to show why a worker has been subject to a detriment. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the detriment complained of, we recognise that it may be appropriate for a tribunal to draw inferences as to the real reason for the employer's (or worker's or agent's) action on the basis of its principal findings of fact. This approach originated in discrimination law (where it has now been replaced by statutory provisions) but has frequently been adopted by tribunals considering claims under S.47B and other unlawful detriment grounds as it fits neatly with the stipulation in S.48(2) that it is for the employer (or worker or agent) to show the ground on which it acted, or deliberately failed to act.

Time Limits s48 Employment Rights Act

59. *S48….*

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer.. shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done."

Equality Act claims ("EqA")

Victimisation

60. Section 27 EqA says: *"(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"

61. 'Protected act' is defined in section 27(2). It includes:

"(a) bringing proceedings under this Act;

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

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

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

….

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

Disability discrimination

Disability

62. Section 4 EqA identifies "disability" as a protected characteristic. Section 6(1) defines disability:

A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Here it was conceded that the claimant was disabled by reason of his PTSD and depression.

Discrimination arising from disability

63. Section 15 EqA precludes discrimination arising from a disability

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

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

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

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

64. Section 15 EqA is aimed at protecting against discrimination arising from or inconsequence of the disability rather than the discrimination occurring because of the disability itself, which is covered under direct discrimination. The term unfavourably rather than the usual discrimination term of less favourably means that no comparator is required for this form of alleged discrimination. So, for example, where a disabled employee was viewed as a weak or unreliable employee because she had taken long periods of disability-related absence and this had caused her dismissal, the person may not suffer a detriment because they were disabled as such, but because of the effect of that disability.

65. The burden on a claimant to establish causation in a claim for discrimination arising from disability is relatively low. It will be sufficient to show facts from which the tribunal could reasonably conclude that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. The employer's motivation is irrelevant. s15 EqA requires unfavourable treatment to be because of something arising in consequence of the disabled person's disability. If the something is an effective cause – an influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously), the causal test will be satisfied.

66. Even if a claimant succeeds in establishing unfavourable treatment arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled

Failure to make reasonable adjustments

67. The Equality Act (EqA) imposes a duty on employers to make reasonable adjustments for disabled people. The duty comprises three requirements, in this case, the first requirement is relevant. This is set out in sub-section 20(3) and references to A are to an employer.

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

69. Paragraph 20(1)(b) of Part 3 of Schedule 8 of the Equality Act says that the duty to make reasonable adjustments does not arise if the employer: *"does not know and could not reasonably be expected to know –*

(b) …that an interested person has a disability and is likely to be placed at the disadvantage referred to…

70. *S21 of the Equality Act provides*

"Failure to comply with duty

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

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

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

71. It is for the claimant to show that the "provision, criterion or practice" it is alleged they have been subject to. The term is not defined in the EqA. However, some assistance as to the meaning of 'PCP' is afforded by the EHRC's Employment Code, which states that the term 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A [PCP] may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' (para 4.5).

72. Where a disabled person claims that a practice (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the alleged practice must have an element of repetition about it and be applicable to both the disabled person

and his or her non-disabled comparators. It is common for complaints to be raised about decisions where it might not be clear whether this part of "practice".

73. *Ishola v Transport for London* 2020 EWCA Civ 112, CA, is a case about a claimant who argued that requiring him to return to work without a proper and fair investigation into his grievances was a PCP which put him at a substantial disadvantage in comparison with persons who are not disabled. An employment tribunal found that this was a one-off act in the course of dealings with one individual and not a PCP. After that was upheld by the EAT, the Court of Appeal looked at the extent to which all "one-offs" could be said to be practices. Lady Justice Simler accepted that the words 'provision, criterion or practice' were not to be narrowly construed or unjustifiably limited in their application, but she identified that it was significant that Parliament had chosen these words instead of 'act' or 'decision'. Her explanation is helpful. As a matter of ordinary language, it was difficult to see what the word 'practice' added if all one-off decisions and acts necessarily qualified as PCPs. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The act of discrimination that must be justified is not the disadvantage, but the PCP. To test whether the PCP is discriminatory or not it must be capable of being applied to others. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words 'provision, criterion or practice' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Although a one-off decision or act can be a practice, it is not necessarily one.

74. In terms of how we should assess whether an adjustment is reasonable for not the Code of Practice says this,

"*What is meant by 'reasonable steps'?*

6.23

The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24

There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25

Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff –and so may still be a reasonable adjustment to have to make.

…..

6.28

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

• whether taking any particular steps would be effective in preventing the substantial disadvantage;

• the practicability of the step;

• the financial and other costs of making the adjustment and the extent of any disruption caused;

• the extent of the employer's financial or other resources;

• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

• the type and size of the employer.

6.29

Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

Can failure to make a reasonable adjustment ever be justified?

6.30

The Act does not permit an employer to justify a failure to comply with a duty to make a reasonable adjustment. However, an employer will only breach such a duty if the adjustment in question is one which it is reasonable for the employer to have to make. So, where the duty applies, it is the question of 'reasonableness' which alone determines whether the adjustment has to be made."

Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)

Section 64 and 65 Trade Union and labour Relations Act 1992

75. ***s64 Right not to be unjustifiably disciplined***

(1) An individual who is or has been a member of a trade union has the right not to be unjustifiably disciplined by the union.

(2) For this purpose an individual is "disciplined" by a trade union if a determination is made, or purportedly made, under the rules of the union or by an official of the union or a number of persons including an official that—

(a)he should be expelled from the union or a branch or section of the union,

(b) he should pay a sum to the union, to a branch or section of the union or to any other person;

(c) sums tendered by him in respect of an obligation to pay subscriptions or other sums to the union, or to a branch or section of the union, should be treated as unpaid or paid for a different purpose,

(d) he should be deprived to any extent of, or of access to, any benefits, services or facilities which would otherwise be provided or made available to him by virtue of his membership of the union, or a branch or section of the union,

(e) another trade union, or a branch or section of it, should be encouraged or advised not to accept him as a member, or

(f) he should be subjected to some other detriment;

and whether an individual is "unjustifiably disciplined" shall be determined in accordance with section 65

76. In *Transport and General Workers' Union v Webber* 1990 ICR 711, EAT, the Appeal Tribunal held that a 'determination' must be something that finally disposes of the issue.

77. ***Section 65 Meaning of "unjustifiably disciplined".***

(1) An individual is unjustifiably disciplined by a trade union if the actual or supposed conduct which constitutes the reason, or one of the reasons, for disciplining him is—

(a) conduct to which this section applies, or

(b) something which is believed by the union to amount to such conduct; but subject to subsection (6) (cases of bad faith in relation to assertion of wrongdoing).

(2) This section applies to conduct which consists in—

…..

(c)asserting (whether by bringing proceedings or otherwise) that the union, any official or representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law

OUR FINDINGS IN THIS CASE

Credibility of witnesses

78. The Tribunal was required to determine several important factual disputes between the parties which necessarily involved reaching conclusions about the credibility of the witness evidence.

79. In his closing submissions, Mr Panesar reminded the Tribunal that the nature of the allegations of assault and conspiracy to pervert the course of justice made against solicitors and more generally the allegations of unlawful discrimination and detriment made against employees of a trade union would have important consequences and risk potential reputational damage for the respondents and their witnesses. Mr Panesar described the claimant as a dishonest witness who had fabricated these allegations.

80. The claimant was equally adamant in his submission that the respondents' witnesses were being dishonest, and he asserted in strong terms that he was telling the truth.

81. Both parties were agreed that this is a case that turns on the credibility of witness evidence.

82. We make this point. Tribunals are rarely able to determine with certainty who is telling the truth. We are required to assess the evidence and make findings upon which party's evidence is preferred on the balance of probabilities. Of course, we recognise the significant of our findings of fact in this case and have sought to explain why we reached the conclusions that we did.

Findings of Fact

Background matters

83. We have made our findings of fact in this case on the basis of the material before us, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

84. We received extensive evidence in this case. We have not made findings of fact about every contested matter of evidence before us but only those which we considered to be relevant and necessary for us to determine the legal claims.

85. The first respondent, the National Union of Rail, Maritime and Transport Workers is referred to as "the RMT", the trade union or the respondent in this judgment. The RMT is a well-known trade union. It has some 80,000 members but we were told it has a small employed workforce. We have not been given more precise evidence than that, but it was not disputed by the claimant. The in-house legal team at the RMT is also a small one. During the relevant period for these proceedings, it had comprised Karen Mitchell (who was Head of the Legal Department and is the third respondent in these proceedings); the claimant, who was an experienced employment solicitor at the time of his appointment and second only to Ms Mitchell in legal experience; Mr Liam Welch-May, a solicitor, who was junior to the claimant and who is Ms Mitchell's son; and Ms Sarah Henderson who had joined the team as a legal secretary at around the same time as the claimant, then secured a training contract, eventually qualifying as a solicitor with the department in 2015. The in-house team was relatively new at the time we were concerned with, and the claimant had been the second to join after Ms Mitchell had begun to establish the in-house legal team.

86. The claimant has alleged that what happened to him in relation to the matters in dispute in these proceedings can be related back to before his employment began. In 2013 the claimant was interviewed for the role of in-house employment solicitor by Mr Bob Crow (the then General Secretary of the RMT), Ms Mitchell and Craig Stewart. He was appointed and began employment on 7 August 2013 and was confirmed in post following completion of a probationary period on 3 February 2014.

87. The claimant alleged that he later found out that it had been Mr Crow who had wanted to appoint him, and that Ms Mitchell did not. He alleged that Ms Mitchell had been hostile towards him from the start. That was disputed by Ms Mitchell on the straightforward basis that, as head of legal of the legal department, if she had not wanted to appoint the claimant she would not have done so. Whilst little turned on this, we found Ms Mitchell's evidence more plausible and preferred her evidence in this regard.

88. The claimant made much of a dispute in evidence about his confirmation in post although at this hearing there did not seem to be significant factual dispute between the parties. There was a mid-probation meeting in November 2013 during which Ms Mitchell had indicated that, as far as she was concerned, the claimant could be regarded as being confirmed in post. We noted that this was somewhat inconsistent with the claimant's evidence that Ms Mitchell was hostile and had not wanted to employ the claimant but had be forced to do so at Mr Crow's insistence. If she had wanted to end the claimant's employment, finding that the claimant had been unsuccessful in his probation would have been an obvious way to do that. Although Ms Mitchell was happy to confirm the claimant in post, perhaps surprisingly, the claimant said he wanted his probation to continue. The claimant described this in his evidence as his probation "being extended". There was a second meeting a couple of weeks later, and on this occasion the claimant confirmed he was happy for his appointment to be confirmed. There was no further meeting, but the claimant's successful completion of his probation was not formally confirmed until the end of the six-month probationary period set out in his contract of employment, on 3 February 2014.

89. The claimant said the reason was that he was not happy and had not wanted to have his position confirmed was because of how he was being treated by Ms Mitchell. Ms Mitchell told us that she had been happy to confirm the claimant in post, but she had raised an issue with the claimant about a lack of attendance notes on a file which had proved problematic when a complaint had been raised by a member. She told us that the claimant reacted badly to that, perceiving it as Ms Mitchell saying she did not trust the claimant. Ms Mitchell told us she did not see it that way, for her it had been about reinforcing the need for good file discipline.

90. The reason why this became significant was because when the claimant later told Mr Carey during the first investigation process that his probation had been extended, Ms Mitchell and Mr Croy had disputed that.

91. The panel concluded that the later dispute between the claimant and Ms Mitchell about his probation, which Mr Croy was drawn into, was a somewhat semantic and trivial matter. The claimant said that his probation was extended at his request. That was not correct. His employment was confirmed at the end of the six-month period referred to in his contract. It is correct to say that it was the claimant's decision that it did not end earlier and that there were two meetings about that. We accept and prefer Ms Mitchell's evidence that the underlying cause had been the claimant being unhappy about the criticism of his file, but we also accept that the claimant perceived that Ms Mitchell did not like him and felt that they did not good working relationship.

The Somers Coffee House Incident (the first alleged assault)

92. In January 2014 the claimant says there was an incident between him and Ms Mitchell at an event to celebrate the election of Mr Sean McGowan as an official at the Somers Coffee House. It is alleged by the claimant that in the course of a

disagreement about politics, and after some lewd conduct by Ms Mitchell and her husband, Ms Mitchell slapped the claimant's face hard and with an open palm. The claimant's version of events is supported by Mr McGowan in his written statement submitted to this tribunal, but Mr McGowan did not attend to give sworn evidence and we had to give careful consideration to the weight which we could attach to that statement as a result. We do not draw any adverse inference from Mr McGowan's failure to attend the tribunal per se because the claimant did not dispute the medical reason given, but we had to give weight to the respondents' inability to challenge in cross examination what was clearly controversial and disputed evidence.

93. On balance, the panel concluded that we could not accept Mr McGowan's unsworn evidence in support of the claimant's case. There is a clear dispute about what happened. Mr McGowan is no longer an elected official and we understand this is a consequence of him having raised his own concerns about his treatment by the RMT and stepped down from his role. The respondent argues that this means that he could have his own motives for saying what he did in his statement which the respondent did not have the opportunity to challenge. We were also told that Mr McGowan had subsequently withdrawn these allegations about Ms Mitchell in 2020 and apologised for making them. The tribunal statement from Mr McGowan was signed in 2020. It refers in brief terms of what happened in 2014 but makes no reference to any later events or his own dispute with the trade union. He does not explain why, if as an elected official he witnessed an assault of a newly appointed solicitor by the head of legal department, he had not reported it himself to the union, his branch, or the police. In light of the conflicting evidence about this, we decided that we could attach very little weight to Mr McGowan's evidence. Instead reached our conclusions based on our assessment of the credibility of the evidence of Ms Mitchell and the claimant. We concluded that we preferred Ms Mitchell's evidence

94. In terms of the reliability of the claimant's evidence, we took into account the following factors. As the respondent pointed out, the incident was not reported by the claimant to his GP or the police at the time and he had not raised any grievance or concern about it with anyone at the RMT. At that time the general secretary was Bob Crow who was someone the claimant expressed great respect for. The claimant told us several times that he regarded Bob Crow has a man of the utmost integrity and who the claimant believed had chosen him for his job over a candidate Ms Mitchell preferred. It appears that the claimant was on good terms with Mr Crow or at the very least would have could have contacted him with little difficulty. Despite this, the claimant told us that he had not reported the alleged assault at the time because it would be bad for his career and because he was concerned about the implications for Mr McGowan. We did not find the claimant's expressed need to protect Mr McGowan by not reporting the assault to be credible. Mr McGowan was an elected official and so had a different status from an employee and without the obvious vulnerability of a relatively newly appointed employee. Given what the claimant told us about Mr Crow, we could not accept that it was

likely that the claimant would have had concerns about going to Mr Crow, with Mr McGowan as his witness, if he had been assaulted.

95. The alleged assault was also not mentioned when the claimant raised his formal grievance in January 2015 to the new general secretary, Mr Cash, despite that grievance making various complaints related to his employment (about the removal of the travel allowance but also his pay compared to the trainee solicitor and lack of appraisal referred to below).

96. The claimant relied on the fact that he had told lawyers about the alleged assault in 2016 and 2018 to support the truth of what he said However, we did not find that to be significant. By that time the claimant was already in dispute with Ms Mitchell and the RMT and those statements to his lawyers are self-serving.

97. In summary we simply did not find it credible that if the claimant had been the subject of an assault in a public setting by a senior RMT employee in the presence of other senior employees and an elected official, he would have felt unable to raise that with Mr Crow or elsewhere. We find as a matter of fact that there was no such assault.

The claimant's travel card and grievance

98. When the claimant began his employment with the RMT the claimant had rented a flat in London's "Zone 2" from an independent landlord. However, the claimant was offered the opportunity to rent a flat at a subsidised rent of £750 per month from the RMT at Maritime House in Clapham, which he accepted. That rent did not increase at all during his employment. The claimant accepted in evidence that represented a significant discount on the rent he would have had to pay in the private rented sector and indeed in his evidence acknowledged he paid less to rent the RMT flat than he had for accommodation in Birmingham and Bristol, despite the generally higher cost of rented accommodation in London.

99. The claimant worked in offices in Euston at first and, in accordance with the RMT's travel scheme, as a result the claimant received a travel card to cover his travel to and from work. However, in the spring of 2014 the legal department moved from Euston to Maritime House in Clapham where the claimant lived. As a result, the claimant's commute to work was reduced to getting the lift a few floors down from his flat to the office. In consequence the claimant was told that he would no longer be entitled to retain the benefit of the paid for travel card. The claimant objected to that, despite the generous benefit of the subsidised flat which was not a contractual entitlement under his contract of employment and argued he should be allowed to retain the travel card because he could also use it for his own personal travel. The travel card benefit was provided via a monthly payment through payroll each month and it continued to be paid for several months after the legal department moved locations.

100. The claimant told us that he perceived as a result the RMT had agreed he could retain the benefit and therefore he was aggrieved when it was finally removed. Mr Perkins told us it was just that it took some time for the change to be adjusted through payroll. This might have been the case in any event, but Mr Crow's sudden death in March 2014 had thrown the union into turmoil. The claimant was never told that an exception was being made to the travel allowance policy to allow him to retain the benefit of the travel card.

101. On 28 July 2014 the claimant raised informal concerns about the removal of this travel allowance. Mr Perkins informed the claimant that he was not entitled to the travel allowance because the location of his discounted accommodation at Maritime House meant he did not incur travel costs. Mr Perkins' initial response was confirmed by Mr Cash on 21 August 2014.

102. The claimant raised a formal grievance on 20 January 2015 about the removal of the travel allowance and two other issues: the fact that he was the same pay scale as the trainee solicitor and the lack of appraisal arrangements. That grievance was considered by Mr Croy who informed the claimant on 19 February 2015 that his grievance had not been upheld. That decision was not appealed.

103. The panel concluded that the claimant's sense of grievance that he had been subjected to an unfairness in this regard was misplaced. The claimant was not entitled to a travel card under the terms of the RMT travel scheme which was to cover work related travel as he would no longer have any commuting costs. He was right that he would also lose the ancillary benefit of cheap personal travel but on the other hand he was benefiting significantly from subsidised accommodation, a benefit which is not enjoyed by all RMT staff and which would no doubt be envied by many of its members. The fact that the union had, in effect overpaid the claimant for a number of months after he began working at Maritime House did not justify his sense of grievance.

The "RW matter" (the incident leading to allegations of perverting the course of justice and victimisation)

104. In the course of 2014, the claimant and Ms Mitchell had been dealing with allegations of sex and race discrimination by a trade union member, RW. Initially she had brought complaints against her employer but after the trade union, on the advice of counsel, determined that it would not support her race discrimination claim, she complained about her treatment by the trade union. Those complaints would eventually become the subject of tribunal proceedings relating, at least in part, to a delay in handling of those concerns. EAD solicitors were instructed to act on behalf of the RMT in relation to those proceedings on the recommendation of the claimant who had previously worked with a partner there, Mr Pinder.

105. RW's complaints about the trade union were investigated by a senior manager, Mr Ken Usher. In January 2015 Mr Usher met with RW and Ms Henderson attended the meeting to take minutes. At the end of the meeting as they were

packing up, and after her laptop had been put away, Ms Henderson says that she told RW that she would type up the minutes next day. Ms Henderson says that she did that and sent them to Mr Usher for his approval to send out.

106. In May 2015 RW had contacted ACAS and indicated her intention to bring proceedings against the trade union. On 19 May, Ms Henderson, Ms Mitchell, and the claimant were discussing the claim and one of the issues discussed was the issue of delay. It appears that RW had complained that she had never been sent the minutes. The claimant now alleges there was a discussion about whether Mr Usher had sent out his report and he alleged that Ms Mitchell had told Ms Henderson to look at the minutes of the meeting and if they referred to a date when the minutes would be sent, to change them. The claimant says that he made clear at the time that he disagreed with this.

107. The parties agree that if the instruction to change the minutes was given that would be a serious act of misconduct by a solicitor. This was another of the key factual disputes between the parties.

108. As the respondent witnesses have pointed out there has been a change in the claimant's evidence about this matter. In an email which on its face was sent on 20 May 2015, the claimant emailed himself the following "*..Ms Mitchell instructed the trainee Ms Henderson to look at the minutes of [RW] with Ken Usher and if those minutes contain a date by which Mr Usher would report back to RW regarding her complaint into race discrimination then it should be deleted (as no report had been prepared or notes given to Ms RW regarding her meeting with Ken this would aid her claim of race discrimination/victimisation*)" (the underlining in the two paragraphs is our emphasis to highlight the difference). The claimant says that if this did not happen, he would have had no reason at the time to send himself that email as it was long before the later disputes arose between him and Ms Mitchell.

109. At this hearing the respondent cast doubt on the authenticity of the email but we had no evidence before us, such as meta data, from which we determine when the email was created and sent in straightforward terms. We could only resolve this dispute by making findings on the credibility of the witness evidence before us.

110. In the course of the later investigation, Ms Mitchell told Mr Croy that on 20 May she had contacted Mr Usher to chase up the return of the minutes and to seek a timeline from him because she was concerned that RW would say an inference of discrimination could be drawn from Mr Usher's failure to send out the minutes.

111. Ms Mitchell and Ms Henderson deny that the claimant's account is correct.

112. Ms Henderson told us that there had been a discussion about what had been said to RW, but she denied that Ms Mitchell had given her any improper instruction. She told us that she knew she had sent the minutes to Mr Usher the day after their meeting with RW and had told RW she planned to do that and that she had become worried that what she had said to RW might have led RW to expect the minutes at

that time. After Ms Mitchell had left the office, she had discussed her concerns with the claimant and was grateful when he had reassured her that RW had simply misunderstood, and she had done nothing wrong.

113. Ms Mitchell also denied the claimant's account. She disputed that she would tell Ms Henderson to change the notes of the meeting and pointed out that in his email to himself, the claimant referred to when RW had been told she would receive the report whereas he later said that the instruction was to make that change in relation to the minutes. More significantly in our view, she suggested that she would simply have had no motive to suggest any change be made to the minutes. She pointed out that she and Ms Henderson knew that the minutes had already been sent to Mr Usher so a suggestion that Ms Henderson change them would have not only have been serious, but it would also have been a waste of time because the version of the minutes attached to the email to Mr Usher would have been different. The claimant on the other hand says that it would be the legal department who would send out the minutes and Ms Mitchell knew they had not been sent to RW because RW had already complained about that.

114. The panel did not find this dispute about this an easy one to resolve. On one hand we acknowledged the potential significance of the email of the claimant had sent himself as potential corroboration of his version of events. However, we also found it difficult to reconcile the seriousness of the claimant's allegations with his actions at the time. He told us that in his view there had been an instruction to pervert the course of justice and he believed this to be an act of unlawful victimisation against RW. If that is what he had thought at the time, the claimant could have approached the Solicitor's Regulatory Authority if he believed that Ms Mitchell had tried to pervert the course of justice and had conspired with Ms Henderson to do so. He could have sought guidance from the Law Society. He could have gone to the General Secretary or to his branch. Even if he had not felt able to do any of those things, he was clearly on good terms with Mr Pinder having recommended EAD to be instructed to represent the RMT in the RW matter and the claimant could have contacted Mr Pinder directly. On the claimant's own account, he did none of those things. The claimant also asserted that Ms Mitchell should have reported his concerns to RW in the subsequent disclosure exercise in the RW litigation, but the claimant himself had not done that. In conclusion if the claimant was aware of something which he genuinely believed was subject to legal duty to disclose, it seems unlikely to the tribunal that he would not have complied with that duty given his professional obligations as an officer of the court.

115. Further even when the claimant later raised concerns about Ms Mitchell in November 2015 and January 2016 to Mr Perkins and Mr Cash, the claimant made no mention of this very serious allegation. Instead he raised it, almost in passing, to support an allegation that Ms Mitchell had a tendency to lose her temper in his discussions with Mr Carey in February 2016. It only seemed to have become a matter of principle to the claimant after that as he sought to pursue his own grievances.

116. The claimant placed great reliance of the email of 20 May 2015. He relies on that on as a contemporaneous or near contemporaneous account which he says lends credibility to his account. The consistency of witness evidence with contemporaneous documents is significant. However, we had some concerns about the weight we could attach to the email. Although the claimant denied that it was a fabrication, we observed that the claimant had not produced the original email itself but rather a version of the email that he appears to have forwarded to himself in January 2016 and even then did not refer to that in the documents he prepared at the time. That means the 2015 email could have been created in 2015 but the earliest date when we can see an email being sent with it is in 2016. We concluded that we could not accept the forwarded email of 14 January 2016 was contemporaneous evidence of something which happened in 2015.

117. On the balance of probabilities, we accepted the evidence of Ms Henderson and Ms Mitchell about this matter. If events had happened as the claimant described, we are satisfied that it is more likely than not that he would have raised it at the time because of the seriousness of the issue.

Bringing the trade union's tribunal casework in-house (the disputed team meeting)

118. The legal department had a plan to bring employment tribunal work in-house from Thompsons. As part of this a new case management system was to be used. A significant dispute arose before us about when this was discussed and what happened.

119. The claimant says that there was a team meeting on 29 June 2015 when he had raised concerns about Ms Mitchell consulting with the other members of the team about this and not him. In support of his case the claimant relies on an email that he sent himself which says this

On the 29th Karen Mitchell informed me that the plan to bring the work in house had changed and after a meeting with Sarah and Liam it was decided to bring the work in slowly
I was not consulted and protested that it was wrong to make such decisions after only consulting 2 members of the team
I then arranged my consultation which Km cancelled

Sent from my Sony Xperia™ smartphone

120. Ms Mitchell, Ms Henderson and Mr Welch-May dispute the claimant's account and told us that the meeting happened on 16 July 2015. Ms Mitchell had produced handwritten notes of that meeting at which she says the claimant behaved aggressively and inappropriately. She explained that they developed a plan about bringing the work in-house, but then Ms Henderson and Mr Welch-May had raised concerns with her about the speed of the project and the new case management

system in light of their lack of employment law experience. As a result, Ms Mitchell had made changes to the pilot plans. When she had raised that at the meeting the claimant had become angry.

121. There were two matters that were raised with us. First the claimant told us that the date on the minutes was wrong and suggested that the minutes had been created retrospectively by Ms Mitchell and that the legal team had colluded to give false evidence supporting Ms Mitchell's account of the meeting and confirming the accuracy of the minutes. Second, the claimant denied that he had behaved as alleged.

122. In support of Ms Mitchell's account Ms Henderson produced evidence from the team calendar showing that on 29 June 2015 Ms Mitchell had other meetings but no team meeting, and an appointment for a team meeting on 16 July.

123. The panel did not always find the claimant's evidence about this easy to follow. At some points he suggested that he accepted that there might have been a meeting on 16 July when presented with the evidence of that in the form of calendar appointments, but we understood his evidence to remain that the meeting about moving the work to which Ms Mitchell's disclosed notes relate, had happened at a team meeting on 29 June and he relied on his email as evidence of that.

124. The significance of this matter is that the claimant says his email is evidence of both what happened at the team meeting, but perhaps more importantly relies on it as evidence that the rest of the legal team colluded with each other to support what he says was Ms Mitchell's misleading evidence and to corroborate her notes. In his submissions Mr Panesar suggested the claimant's case about this confusing and we have to agree.

125. We reached the following conclusions about the dispute of evidence.

126. The claimant's email of 29 June gives no indication that he is referring to a team meeting and indeed the wording suggests to the panel that Ms Henderson and Mr Welch-May were not there because he says, "told me" and there is no reference to his colleagues or the context. The claimant told us that he had objected to Ms Mitchell changing the plans for the pilot project without consulting him but having spoken to the team members

127. It seems plausible to us that on 29 June Ms Mitchell told the claimant about the meeting she had had with Ms Henderson and Mr Welch-May which might have caused the claimant to send himself the email, but the team discussion about the new plans happened at a team meeting on 16 July and it is that meeting which Ms Mitchell's notes relate to. These events are now some considerable time ago. It would be surprising if there have not been some lapses of memory by all concerned.

128. The other matter was the claimant denied that he had behaved as alleged. Rather he told that us that he had objected to Ms Mitchell changing the plans for the pilot project without consulting him but having spoken to the team members.

129. On the question of the claimant's behaviour at the team meeting, we accepted the evidence of Ms Henderson, Ms Mitchell, and Mr Welch-May. It was clear from the claimant's own evidence that he was not happy about the way the plan had been changed. The claimant may not have intended to be aggressive and may not have appreciated that that was how he came across, but we accept that in the opinion of the others in the meeting the claimant had behaved inappropriately when he expressed his views.

130. We also accepted Ms Mitchell's evidence that the claimant's sense of grievance was misplaced. Concerns had been raised with her as the senior manager that the junior members of the team might struggle to cope with the original plans. It was right for her as the team manager to reflect on those concerns and take steps to ensure the plans were changed if that was appropriate. The logic of the claimant's argument is that Ms Mitchell should have sought to agree the changes with him and if he disagreed, she should have been prepared to force the changes on the more junior members of the team despite their concerns. It is difficult to see how that could be regarded as a fair or reasonable thing for a manager to do. If it was not, there was no reason to consult with the claimant. We accepted Ms Mitchell's evidence that this was a senior management decision which was up to her. We cannot find that Ms Mitchell acted inappropriately in this regard.

The Sun Public House Incident (the second alleged assault)

131. On 27 August 2015 the claimant, Ms Mitchell and others including Ms Mitchell's son, Mr Welch-May, went out for lunch with Mr Cash to the Sun Public House which is close to Maritime House. They stayed in the pub into the evening. The claimant's evidence was that after the others had left and quite late in the evening, while Mr Welch-May was in the toilet, an argument developed between him and Ms Mitchell about tensions in their working relationship arising from comments Ms Mitchell was alleged to have made about the claimant to members of the legal team at Thompsons Solicitors. The claimant alleged that in the course of this Ms Mitchell had grabbed him by the throat and as he had tried to break her hold, she had scratched his chin and bruised his wrist.

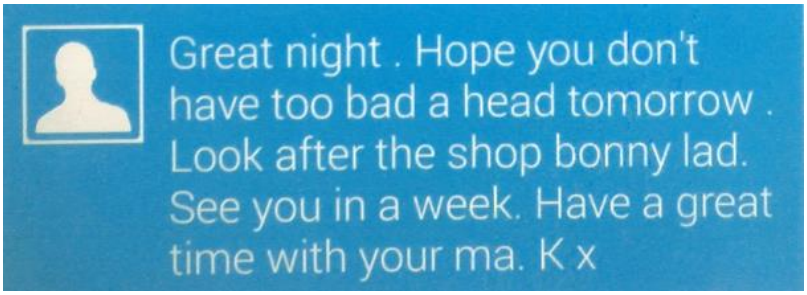
132. Ms Mitchell denied that account. She told us that after Mr Cash left, the claimant had become loudly critical and rude about him. She had tried to make him stop and had encouraged the claimant instead to behave in a way which was more consistent with being her deputy, a role the claimant was keen to move to. This had led to a discussion about the claimant's attitude and in her words, she told him he needed to "step up to the plate" but this had led to the claimant becoming aggressive in his demeanour towards her. Mr Welch-May had told the claimant that he was becoming uncontrollable. At this the claimant had turned on Mr Welch-

May and was very abusive towards him, using crude language it is unnecessary for us to repeat here.

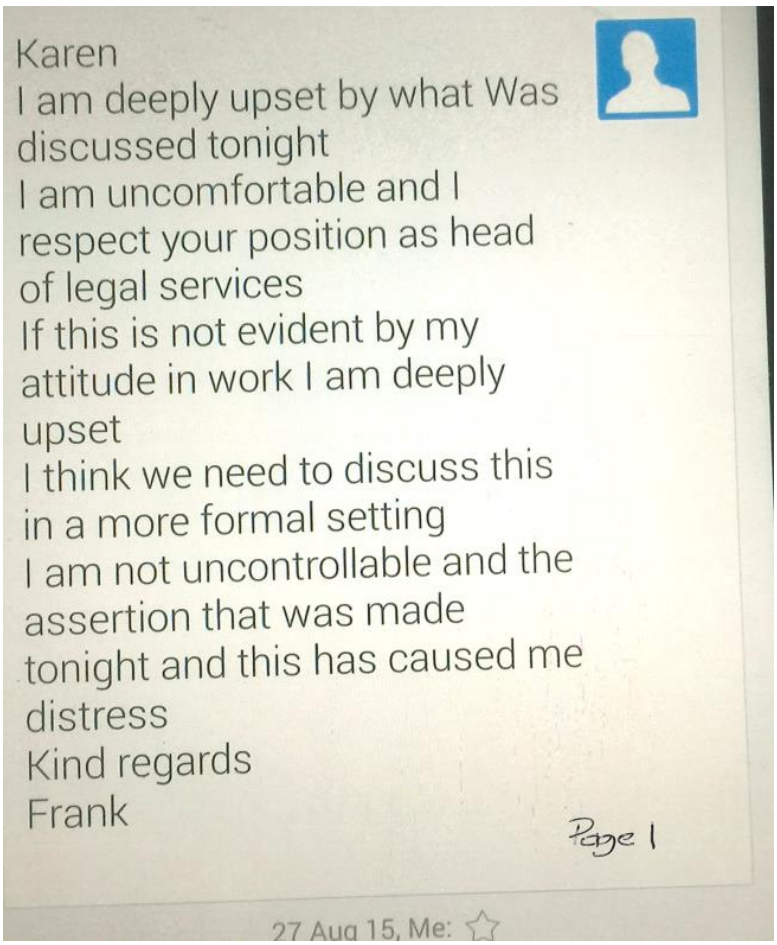
133. We have explained below what we concluded about what happened but what happened later that evening and the next day is also relevant.

134. Ms Mitchell was going on holiday the next day and needed to leave to get to home some distance away and pack. It is common ground between the parties that shortly after the confrontation, whatever it involved, Ms Mitchell and her son left the pub. On their way home and the following day, the claimant and Ms Mitchell sent each other a number of text messages.

135. Ms Mitchell sent the message set out below on her way home. We accept that she did so hoping to draw a line under what had happened and enable everyone to move on, although in the circumstances it was perhaps a mistake. The message said this

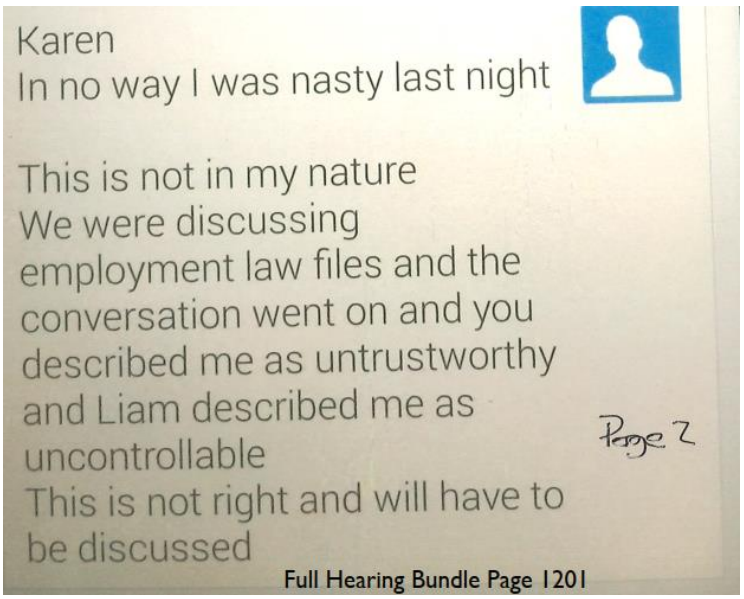


136. The claimant sent a reply which said this:


Karen
I am deeply upset by what Was discussed tonight
I am uncomfortable and I respect your position as head of legal services
If this is not evident by my attitude in work I am deeply upset
I think we need to discuss this in a more formal setting
I am not uncontrollable and the assertion that was made tonight and this has caused me distress
Kind regards
Frank
Page 1
27 Aug 15, Me:

137. We found that reply from the claimant to be consistent with Ms Mitchell's account of what had happened.

138. In reply Ms Mitchell sent a text saying, "you were very drunk, I don't bear any grudges" and which said that everyone needs to let off steam. That prompted a further response from the claimant.


Karen
In no way I was nasty last night

This is not in my nature
We were discussing
employment law files and the
conversation went on and you
described me as untrustworthy
and Liam described me as
uncontrollable
This is not right and will have to
be discussed

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139. This text is consistent with the accounts of Ms Mitchell and Mr Welch-May.

140. The claimant told us that when he left the pub he went home the short distance from the pub to Maritime House. He told us that he had decided not to refer to the assault he says he had been subject to, but the next morning he woke up to find marks on his wrists and face and decided to email Ms Mitchell pictures of those injuries taken on his mobile phone. Those photographs were not sent to Ms Mitchell using the number he had used for the text messages above, but instead were sent to her RMT phone. Ms Mitchell denies receiving those texts and points to the fact that it was a work phone with limits on the size and sort of files that it could accept.


18% 18:08
Karen Mitchell 2
07884657863
Karen
You have one hell of a grip
Page 4
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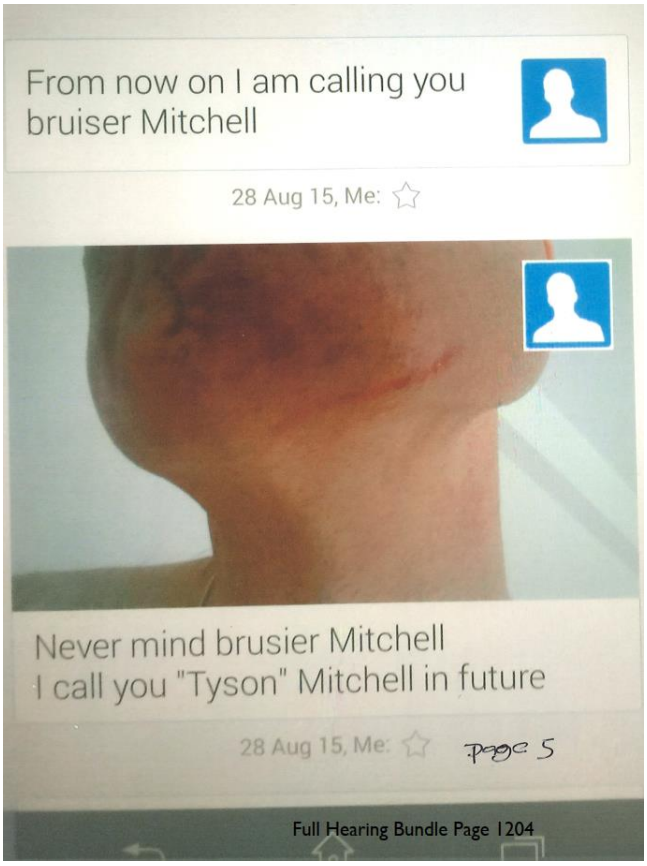
From now on I am calling you bruiser Mitchell
28 Aug 15, Me:
Never mind brusier Mitchell
I call you "Tyson" Mitchell in future
28 Aug 15, Me:
Page 5
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141. The claimant asserts that the green "smiley face", which can be seen in the top corner in the image of the text of his wrist above, meant the contents or attachment to text had been seen, as opposed to simply indicating that the text had successfully sent, but the tribunal had no evidence to support that contention. Ms Mitchell told us that she did not receive them and there is no response from her to the pictures.

142. It is not in dispute that the claimant did not make a formal complaint about the alleged assault at the time. He told us that this was because he said he was concerned about the impact on his career, and he thought he would resolve things with Ms Mitchell informally when she got back from holiday.

143. On his own account, the claimant did not tell anyone else about the alleged assault. He did not go and see any of neighbours (who were after all RMT employees and officers) or report it to a colleague or senior manager which he could have done while Ms Mitchell was on holiday. He did not report it to the police, and he did not mention to his GP until after the incident on 10 November 2015 referred to below, despite the fact in his witness statement he refers to suffering significant psychological symptoms such as flashbacks and nightmares and despite the fact the claimant did go to see his GP around this time with eye problems. The respondent pointed out that this contrasted with the claimant's behaviour in the past. For example, when he had been subjected to an alleged assault in a previous employment he had gone to his GP and he had also gone to his GP after he suffered minor injuries following a number of road traffic accidents.

144. The claimant would later report the alleged assault to the police, in February 2016, after he was interviewed by Mr Carey. Ms Mitchell was then interviewed under caution by the police and denied the assault. She subsequently instructed an experienced forensic pathologist, Dr Rouse, to examine the pictures of the claimant's injuries. He produced a report at the time was prepared with an express acknowledgement of his duty to the court and which Ms Mitchell refers to in her witness statement.

145. In the report which Ms Mitchell refers to in her evidence, Dr Rouse concluded that mark shown could be a scratch from a fingernail, but that the injuries to the forearm are consistent with being a topical traumatic injury and had appeared to be suggestive of contact dermatitis, which is not consistent with the allegations made by the claimant. Dr Rouse makes clear that he means the lesion could not have been caused by the mechanism/pathology described by the claimant. He highlights in his report that the marks on the claimant's arms have "well defined linear edge along the lateral edges".

146. We acknowledge that the claimant disputes Dr Rouse's findings. We also acknowledge that Dr Rouse's evidence is opinion evidence which is presented as expert evidence but without it having been approved by the tribunal and Dr Rouse did not give evidence to enable the claimant to challenge this evidence.

147. We did not treat this evidence as expert evidence to this tribunal, but we do accept that the contents of that report tend to corroborate Ms Mitchell's evidence.

148. More significantly however, we found the claimant's description of how he said he had been assaulted difficult to reconcile with the panel's own assessment of the photographs, in particular the picture of his wrists which does not appear to show an injury consistent with what the claimant said happened. We accepted Mr Panesar's argument that whenever the pictures were sent to Ms Mitchell, that is not evidence of when they were taken, and it seemed improbable that they were photographs of injuries caused by Ms Mitchell. The claimant did not provide any meta data or other evidence to show us when the photographs were actually taken.

149. On the balance of probabilities, we concluded that Ms Mitchell did not assault the claimant as alleged. We also did not find the claimant's account of what had had happened to be plausible. The claimant is considerably taller than Ms Mitchell. On the basis of their own descriptions of each other, he is also much fitter and stronger. That, of course, would not mean that Ms Mitchell could have not assaulted the claimant, but we accept her assertion that he would have been able to overpower her with ease. We found it implausible that if this had happened in a pub as described by the claimant that it would not have been seen by someone and reported to the pub management. Most significantly, we found it implausible that if the claimant had been assaulted and suffered the injuries alleged, that he would not have reported it to someone at the time or that he would not have visited his GP. We have no evidence from any third party confirming that the claimant had these injuries at the time. Weighing the evidence, we found Ms Mitchell's account to be more credible. The text messages from the evening itself tend to corroborate Ms Mitchell and Mr Welch-May. Accordingly, on the balance of probabilities, we found that the assault had not happened.

150. It is not disputed that the claimant and Mr Welch-May spoke by telephone the day after the alleged assault. The claimant told us that Mr Welch–May had phoned him the next day to discuss what happened. The claimant had asked Mr Welch-May if he wanted to discuss the fact that his mother had assaulted him, and Mr Welch-May had said that they did not want any bad feelings and had suggested trying to resolve matters when the claimant was back from holiday.

151. Mr Welch May disputed this. He told us that he had decided to phone the claimant because he wanted to challenge the claimant about the offensive comment the claimant had made to him and clear the air between them. He had expected the claimant to apologise and had been taken back when the claimant made assault allegations against his mother. He called Ms Mitchell on holiday and told her what the claimant had said. In turn Ms Mitchell contacted Mr Cash to tell him she thought the claimant would make a false accusation of assault against her, in her words, to give him "the heads up".

152. We had not contemporaneous or external evidence to help us resolve this dispute about the call. However, we had already drawn adverse conclusions about

the claimant's other evidence, and we found Mr Welch-May's evidence about the call to be more plausible. We preferred his account.

The meeting on 1 October 2015 about Mr Edwards acting as a companion

153. Ms Mitchell was abroad on holiday and then the claimant was away on leave too, so they saw little, if anything, of each other during September. The claimant and Ms Mitchell met for a one-to-one meeting on 1 October 2015 when they were both back from leave. There is also a significant dispute about what happened at that meeting. The bundle of documents contains copies of notes which Ms Mitchell says are broadly contemporaneous with the meeting. The claimant disputes that.

154. The claimant told us that he spoke to Ms Mitchell at this meeting about the possibility of him acting as workplace companion for an RMT employee but without naming the individual. He told us that she agreed he could and, as evidence of that, said that she had told him that Mr Carey, despite being head of industrial relations, had been a workplace companion for an employee in a hearing she had conducted. The claimant suggested that this detail was relevant because he would not have known about that if Ms Mitchell had not told him that and relies on that as evidence to corroborate his account. However, in cross examination the claimant conceded that he had seen Mr Carey arrive with the individual in question for the meeting with Ms Mitchell so he would not have needed to be told this by Ms Mitchell to be aware of it. The claimant told us that he also expected Ms Mitchell to apologise for the alleged assault on 27 August 2015 at that meeting and he had been surprised and disappointed when she had not.

155. Ms Mitchell told us that that she accepted that the claimant had raised acting as a companion, but that this had been in the context of conversation about him becoming her deputy and he had suggested that it would help him to refuse if she said he could not act because he had been approached by someone. Ms Mitchell told us that she thought this could give rise to a conflict of interest for the claimant as a solicitor, because as an inhouse solicitor the union was his client, that she had told the claimant this and that she had offered to speak to whoever it was who had approached the claimant.

156. We accept that Ms Mitchell's notes, while not made at the meeting, are broadly contemporaneous and were made very shortly after the meeting. We accepted and preferred Ms Mitchell's evidence about that meeting and that the claimant had been told that he should not represent a fellow employee.

157. The claimant had been speaking to an employee, KH, about concerns he had raised. The claimant described the allegations KH had raised as being bullying allegations. However, we accept that these were not what would usually be understood as allegations of bullying, but complaints about decisions Mr Carey had taken about rostering arrangements and access to training. The claimant told us that after KH had submitted his initial grievance they had a meeting one afternoon

in a pub to discuss matters and, in the claimant's words, so he could understand the grievance.

158. Although the claimant told us that he did not give KH legal advice about the grievance, he did tell us that he had "applied the correct legal labels" to the matters KH described. It was not disputed that shortly before the grievance hearing KH had submitted additional grievances which we were told, and the claimant did not dispute, raised allegations of philosophical belief discrimination. The claimant denied that he drafted those new grievances, but this was at some point after the claimant's meeting with KH. The claimant said he did not give KH legal advice because he did not advise him about time limits and early conciliation, but that he recognised he would "have to withdraw" if legal proceedings were issued by KH. He told us that at this stage KH was being encouraged to bring legal proceedings, but the claimant did not consider that he was "contemplating legal proceedings". The claimant had agreed with KH that he would act as a workplace companion at his grievance hearing, although it appears that KH cannot have told anyone at the union about that.

Ms Henderson's qualification celebration (which led to allegations of detriment and victimisation)

159. Ms Henderson qualified as a solicitor in October 2015. On 15 October 2015 Ms Henderson and her boyfriend went with Ms Mitchell, and the claimant to the Sun Pub in Clapham for drinks to celebrate her achievement. Ms Mitchell said that the claimant came along uninvited, but that was not Ms Henderson's account and we accept the claimant was invited by Ms Henderson.

160. The claimant gave us a significantly different account of the evening from Ms Henderson and Ms Mitchell. In his statement the claimant says that he had simply urged Ms Henderson's boyfriend not to buy drinks with Ms Henderson's debit card as the claimant was willing to buy all the drinks. However, Ms Henderson told us that the claimant behaved in a hostile way towards her partner and she described the claimant as aggressive. Ms Mitchell told us that the claimant's attitude towards Ms Henderson's partner had caused tension. Ms Henderson's her partner left, and Ms Henderson said this was because of the claimant's attitude which had made him uncomfortable. The claimant did not dispute that Ms Henderson's partner left early. We concluded that although the claimant may not have intended to do so, he had created a difficult and tense atmosphere. We accepted that the claimant had acted in a way which had caused others present to feel uncomfortable.

161. The claimant referred to this evening because at one point, after Ms Henderson had left Ms Mitchell said to him that he "would not be able to do anything about what happened the last time we were here because she had spoken to someone at the RMT". The claimant said that he took that as a threat. The claimant says the fact that that Ms Mitchell had in fact spoken to Mr Cash about the assault allegations from her holiday, something which he would otherwise have no reason

to know about, is evidence that his account is truthful. Ms Mitchell denies that it was said at all.

162. On the balance of probabilities, we prefer the claimant's evidence about that. We accept that Ms Mitchell did make some reference to the allegations the claimant had made about the last time they had been in the pub and to the fact she had made "someone", in fact the General Secretary, aware of that. However, we were unable to draw the inference that the claimant invited us to. The claimant asked us to infer that Ms Mitchell had made an admission that the assault on 27 August had taken place. Even on the claimant's account the words referred to could just as easily have referred to the fact that she had told Mr Cash about the conversation between Mr Welch-May and the claimant and the fact that she thought the claimant was going to make a *false* allegation of assault.

163. We gave careful consideration to the fact that we had concluded that we should prefer the evidence of the claimant in this regard and whether, as the claimant suggested, if we rejected Ms Mitchell's evidence about this, we should reject all of her evidence where it conflicted with his version of events. We did not reach that conclusion because we found Ms Mitchell's evidence about the alleged assault to be both plausible and credible and we did not find the claimant's evidence about that to be credible nor consistent with the text messages, the photographic evidence, and surrounding facts, for the reasons explained above. We were mindful that due to the passage of time in this case it was possible that the memories of all of the witnesses will have faded and we did to find any one witness intrinsically more reliable than all the others about all matters. In short, our conclusions about this dispute of facts did not alter the conclusions we had drawn about whether the assault had in fact occurred.

Mr Perkins' request for legal advice

164. On or about 30 October 2015 Mr Perkins sought the claimant's advice about the revised grievance which had been lodged by KH. Those were the grievances relating to decisions taken by Mr Carey referred to above, but Mr Perkins sought advice because of the new discrimination allegations which had been raised at a very late stage. Ms Mitchell was on leave at this time. She had told managers to speak to the claimant in her absence. Although the claimant disputed that it was part of his role to give employment advice to the union about internal staffing matters, he accepted that it was a reasonable management instruction for Ms Mitchell to have asked him to provide that cover, although he had not known he might be asked to advise about KH specifically.

165. The claimant replied to Mr Perkins to tell him that he would not be able to assist with the query because he was acting as KH's workplace companion and in the claimant's words "he would have a conflict of interests". The claimant went on to suggest a possible way to resolve the grievance so that it would not go any further, in other words a way to settle the dispute. The panel accepted the respondents' evidence that this suggestion was significant.

166. On the facts before us, we accept that Mr Perkins genuinely and reasonably believed the claimant had stepped beyond the bounds of simply acting as a workplace companion when the claimant declined to give Mr Perkins advice on the basis of a conflict of interests and he had proposed terms on which KH's grievance could be resolved. Mr Perkins understood the claimant's email to be that of a representative seeking to negotiate on KH's behalf and we accept that was a reasonable conclusion for him to reach.

167. The claimant did not think he had done anything wrong. He told that us that in past employment at a law firm he had been the shop steward and despite being part of the in-house employment law team, no concerns had ever been raised with him representing members of the law firm's workforce. We thought this was significant because the claimant had translated his experience at that law firm to his situation as part of the in-house team at the RMT, without having considered what if any difference there might be in terms of expectations of the respondent when he was working in-house nor indeed does the claimant appear to have considered the extent to which as shop steward he would act as a companion and a representative, for example negotiating on a member's behalf. The claimant believed that he had the right to act as a workplace companion which the respondent could not object to, and did not perceive that, for example, proposing settlement terms, went beyond the role of a statutory companion. It was this that formed the basis of the disagreement between the claimant and the union managers.

168. Mr Perkins was not happy with the claimant's email and raised a concern with Mr Cash and Ms Mitchell that the claimant had said he had a conflict of interest and could not advise the union because he was representing the union's employee. Mr Cash asked for Ms Mitchell's comments and she picked up this email on her return from leave on 10 November.

Events on 10 November 2015 (leading to Mr Edwards beginning sickness absence)

169. Ms Mitchell had come into work early on that first day back and was catching up on emails. When the claimant arrived for work it was still before 9am and, at least at first, they were the only two in the department.

170. It is not disputed that Ms Mitchell raised Mr Cash's email about the conflict point with the claimant, although there was a dispute about how she did that and the tone she adopted. What is clear from both sides, is that however the conversation started, it quickly became heated.

171. The claimant says this about what happened in his statement *"At that point Ms Mitchell's body language started to become aggressive, she started to raise her voice and shout. I immediately was transported back to the time she physically assaulted me on the 27th of August 2015 and I put my arm out and placed palm open hoping she would stop. I felt the acid rush in my stomach and rise to my*

throat. Ms Mitchell continued in an aggressive manner, accused me of pointing and informed me to not be a work-place companion, she seemed to become more aggressive and we were alone and I feared another assault. I stated I had enough, as I could not take this any longer and I informed Ms Mitchell that I was going to raise a complaint. As I got up to get my coat and leave, the Third Respondent shouted again the accusation that I was brining [sic] claims against the RMT, made personal derogatory comments, stating that I did not like to take orders. I do consider Ms Mitchell instructing me not to be a work-place companion and being aggressive was a detriment for being a workplace companion".

172. Ms Mitchell says this *"I read Scott's [Mr Perkin's] email out to the Claimant asked why he was acting as a workplace companion when it created a clear conflict of interest…I repeated to the Claimant that he was not just an employee but he was also one of the union's solicitors and the union was therefore the Claimant's client. I told him he was acting against the Union, his client. The Claimant immediately became agitated and aggressive, he pointed at me and jumped up out of his seat and accused me of shouting at him saying that I was accusing him of acting against the union… he jumped up and stormed into his office next door stating that he would seek advice from the Law Society… when the Claimant jumped up out of his seat towards me for one moment I thought he was going to strike me. I believe at that time that I told him to sit down as I did not want him to come towards me as he was visibly angry… I believe I made a cup of tea and after about 30 mins or less of the claimant typing the Claimant started to leave the office, putting his coat on as he did so. I asked him where he was going and he said "out"*."

173. The panel think it is likely that both become somewhat overwrought and did not hide their feelings of frustration with the other. We have no doubt that voices were raised on both sides and that, at least to some extent, both lost their temper.

174. It is not disputed that the claimant got up to walk out, and it was not disputed that Ms Mitchell told the claimant that if he left she would take disciplinary action against him. Ms Mitchell us told that this was because she needed to provide an urgent reply to Mr Cash's email, and she did not think it was acceptable for the claimant to walk out in those circumstances, although the panel found it difficult to see why the sensible thing would not have been to let the claimant leave and let matters clam down.

175. We concluded that the most likely course of events fell somewhere between the two accounts we received. The claimant was aggrieved because, notwithstanding what Ms Mitchell previously said about being a workplace companion, he considered that he was entitled to act in that role, so she was not entitled to criticise him. Ms Mitchell was annoyed because she felt the claimant had deliberately ignored her instructions and had embarrassed the in-house legal team. She was cross and she expected the claimant to stay while made she made her feelings and dissatisfaction clear. She regarded the claimant making to walk out on to be akin to insubordination.

176. The claimant made much of the fact that all of this happened before the official start of the day at 9 am, but we did not find that much turned on that. As far as Ms Mitchell was concerned, the claimant had started work, they were having a work meeting and she expected him to stay until that meeting was concluded. Equally we did not think it was unreasonable of the claimant to try to walk from that heated exchange. It was unreasonable of Ms Mitchell to threaten disciplinary action in that moment, and it was untrue for her to say she had no option about that.

177. Significantly however, we did not think that the claimant could have any reasonable belief that his safety was in danger or that he was at risk of assault. It was an angry confrontation that the claimant sensibly wanted to walk away from, but the claimant did not need, nor could he sensibly believe, that he needed to leave the workplace to ensure his safety. In the course of his cross examination the claimant conceded that if the alleged assault in August had not happened he could have not reasonably believed that in the circumstances that there was a serious and imminent risk of being assaulted that morning. This panel had found on the evidence before us that the assault had not taken place and on the basis we do not consider that he could have believed in a serious and imminent risk.

178. The claimant had been going to walk out of the office but in response to the threat of disciplinary action he went back to his office and began typing an email to Mr Perkins and Mr Cash setting out his version of events. At the same time Ms Mitchell was doing the same.

179. The claimant sent an email to Mr Perkins and Mr Cash at 8.46am to tell them that he had felt threatened by Ms Mitchell, that had made him feel very stressed, and he had left work as a result. He told them that Ms Mitchell had threatened disciplinary action against him.

180. Ms Mitchell also emailed Mr Perkins within a minute or so of the claimant's email. She said that she had told the claimant he might be disciplined, but her account was that it had been the claimant who had acted aggressively towards her and that she had referred to the possibility of discipline because of that and because he had appeared to indicate that he was about to walk out of the office without authority when Ms Mitchell needed to urgently resolve what she was going to say to Mr Cash about the conflict issue.

181. The claimant alleges that Ms Mitchell's email of 8.47 am was retaliation for his email because she knew he would make a complaint about her. We were not persuaded by that. As Mr Panesar put to him, the claimant must have known that Ms Mitchell was likely to raise concerns about his actions, both in terms of having continued to represent KH and in light of the argument they had just had. In straightforward terms we accept that it was likely that he "knew he was in trouble" and might face some sort of disciplinary action so it is equally plausible that in his email the claimant was seeking to take the offensive by getting his version of events first. We could not see that there was any significance to which of the two managed to finish typing and send their email first. Both emails were written without knowing

what the other would say. We thought it was likely that both individuals anticipated this dispute was going to go further and wanted to put their version of events down on record. We did not accept we should draw the inference from the email that the claimant wanted us to.

182. Over the course of that day there was an exchange of emails between the claimant and Ms Mitchell which were copied to Mr Perkins and Mr Cash about the role of a solicitor and whether the claimant had a conflict of interests when he agreed to act for KH and was acting inappropriately. At one point the claimant said that he would seek the advice of the Law Society although he never did so, nor did he contact the Solicitors Regulatory Authority (which would have been the correct regulatory body) or undertake any of his own research about the conflict position.

183. That evening the claimant emailed Mr Perkins to tell him that it was not the first time that he had felt threatened by Ms Mitchell and he reported that he had previously been the subject of a physical assault by her, although no further details were provided at that time. We accept that Mr Perkins did not appreciate the significance of what the claimant said about that given the vagueness of the allegation.

The aftermath of events on 10 November 2015 – claimant's sick leave and the grievances

184. The next day, on 11 November 2015, Ms Mitchell raised a grievance about the claimant and his alleged aggression towards her.

185. On 12 November 2015 the claimant was signed off sick with acute stress. He emailed Mr Perkins and his covering emails refers to a safe working environment

186. On 13 November 2015 Ms Mitchell raised two formal concerns about the claimant, including that he had been responsible for a security breach by leaving the offices unlocked as well as matters relating to the alleged conflict of interest and the confrontation between the claimant and Ms Mitchell on 10 November.

187. The claimant alleges that on 13 November 2015 he had conversation with Mr Perkins during which Mr Perkins told him that he would receive an update by 19 November 2015. Mr Perkins denied that this happened. He says that the conversation was about the claimant's health and that he did not make any promises about the 19 November. He says that in light of the juggling of diaries which would be required in order to identify an investigator he simply would not be in a position to make a promise like that. Mr Perkin's notes made shortly after the conversation say, "happy to catch up next week". The panel found it more likely than not that Mr Perkins had agreed to a suggestion from the claimant that they speak the following week, and it is possible that the claimant mentioned that he expected a response by the 19th, or perhaps just perceived he would have a reply by then. However, we found it implausible that Mr Perkins gave the claimant any firm commitment that the claimant would be told either who the investigator was to

be or to give any firm timetable for an outcome to the concerns the claimant had raised by then. By that stage Mr Perkins knew that Ms Mitchell had also raised concerns and it must already have been clear that this was going to be complex situation. The dispute involved two senior legally qualified professional employees. Although the claimant referred to himself as a junior employee, he was the second most senior solicitor in the legal team. He was by any measure a senior employee, so it would be clear to Mr Perkins that he faced a situation which would require the involvement of members of the small senior management team, and he knew he would have to juggle busy diaries.

188. On 17 November 2015 Ms Mitchell provided a formal report setting out her conduct allegations to Mr Perkins. This was an expansion of the allegations she had raised previously but the claimant was never provided with a copy of this document.

189. On 30 November 2015 the claimant emailed Mr Perkins to complain about not receiving the update the claimant said he had been promised and to provide a "fit note" from his GP which signed the claimant off work until 24 December 2015 with acute stress disorder.

190. The claimant argued before us that at this point Mr Perkins should have considered suspending Ms Mitchell. Mr Perkins told us that it would not have been proportionate or appropriate to suspend Ms Mitchell. The claimant was off work due to ill-health for at least 4 weeks and indeed that absence continued until his employment ended. Ms Mitchell was head of the legal department and she performed a key role for the RMT. The claimant was the second most senior lawyer in the team if Ms Mitchell had been suspended and the claimant remained off work, the legal department would have faced considerable difficulty given the need for an appropriately senior lawyer to supervise Ms Henderson and Mr Welch-May. We accepted that as a reasonable position for Mr Perkins to take.

191. On 7 December 2015 the claimant emailed Mr Perkins again and copied in another member of the HR team, Ms Yvonne Scarrott. That email made clear that the claimant considered that he raised serious concerns including allegations of assault, a breach of the Protection from Harassment Act, that he had been subject to detriments for being a workplace companion and on health and safety grounds because the claimant said he was subject to a detriment because he was threatened with a disciplinary when he left the office "for his own safety" and he requested an acknowledgment and update about his grievance.

192. On 14 December 2015 Ms Mitchell emailed Mr Perkins and Mr Croy raising issues about the claimant including questioning the claimant's ability to progress a case to the employment tribunal and raising further concerns about his conduct. The claimant says that this email was a detriment because it was a retaliation for the concerns he had raised about her. In response to an issue raised in the document by Ms Mitchell about the claimant's ability to progress a case to hearing, the claimant referred to an instance where he had taken on a wages claim case for

a member of the union that Thompsons had turned down as being without merit and for whom the claimant had secured a settlement. However, the claimant did not point to a situation where he had managed a case through to a final contested hearing, although it also not clear that there was any specific case that Ms Mitchell had asked him to manage which he had failed to progress. The claimant is obviously upset about this, but we did not find it relevant to the legal issues.

193. Ms Mitchell also referred to other conduct matters and again referred to the incident on 10th November stating that she had been made to feel "intimidated, frightened and old" by the claimant and she also referred to the claimant's conduct at the team meeting on 16 July 2015 which she described as aggressive.

194. The claimant was never sent copies of Ms Mitchell's emails of 17 November and 14 December. The claimant asserted that the failure to provide him with the document of 17 November was a deliberate act so that he could not fully defend himself, but we accept he was aware from other information provided to him what Ms Mitchell's allegations were, it was just that he did not receive the further detail contained in the statements. We concluded that this was an oversight by the respondent and perhaps an unfortunate consequence of the flurry of allegations and counter allegations raised by the claimant and Ms Mitchell about each other which resulted in Mr Perkins being somewhat inundated with emails.

195. The panel found it difficult to see why it was necessary for either Ms Mitchell or the claimant to send quite so many separate versions of essentially the same allegations about each other and we have some sympathy for the situation Mr Perkins found himself in.

196. There was no advantage to the respondent in withholding the documents sent by Ms Mitchell from the claimant either at the time or subsequently in the litigation process and we drew no inference from this. We accept that the claimant was upset because he had believed there was another document and asked for it and when he later found that there had been a failure to provide it to him this fuelled his belief that the respondent had conspired against him. However, there was no advantage to respondent and indeed the failure reflects somewhat badly on their HR practices. We find, on balance, that it was likely to have simply been a matter of human error.

197. On 17 December 2015 the claimant provided a GP note relating to his sickness absence and in the covering email set out a number of formal grounds of legal complaint. In the case before us the claimant says that this was a qualifying protected disclosure. He alleged that he had been the subject of a criminal assault, that he had been subjected to harassment contrary to the Protection of Harassment Act and that there had been a breach of the Employment Relations Act 1999 by subjecting him to a detriment for undertaking duties as a workplace companion, and that he had had to leave the office by reason of his own safety, raising issues under section 44 of the Employment Rights Act 1996.

198. Mr Perkins emailed the claimant on 4 January 2016 and arranged to meet him on 5 January 2016. At that meeting the claimant explained his intention to raise a formal grievance and said that he would provide additional information by 11 January 2016. He explained that he was seeking legal advice. Mr Perkins had thought there might be a possibility of the claimant returning to work and working from Euston under the supervision of partner from Thompsons and that was discussed. We accept that was not pursued because it quickly became apparent in the following days and weeks that the claimant would not be well enough to return to work, at least until the internal processes were resolved. In any event the claimant objected to that because he felt it would mean he would be subjected to a detriment by being moved when he had raised concerns about Ms Mitchell, Mr Perkins told us that it was essential that Ms Mitchell stayed at Maritime House so that she could supervise the remaining members of the legal team.

199. Mr Perkins determined that the issues raised by the claimant and Ms Mitchell should be investigated as allegations of bullying. On the 6 January 2016 he sought their consent to this approach. Ms Mitchell gave her consent by return. The claimant replied to the email seeking his consent, but he did not address the issue of procedure. Instead in essence he continued to reiterate and expand upon his grievances and request further documents including a copy of Ms Mitchell's grievance about him. The claimant also referred to being referred to occupational health and for the first time objected to Mr Carey investigating the concerns because Mr Carey was KH's manager – so Mr Carey was the manager whose decisions were the subject of the internal process at which the claimant had been going to attend as a workplace companion. The claimant perceived this as meaning that Mr Carey could not act impartially. He never explicitly dealt with the request for consent, but it would become clear that he objected to this and wanted his allegations dealt with under the grievance procedure.

200. It was a significant element of the claimant's case that this approach to classifying the allegations as bullying was the wrong one. He raised a number of matters. In his statement the claimant states that his complaint should have been investigated under the Equal Opportunities Policy and that by looking at Ms Mitchell's complaints about him alongside his allegations about her conduct, he was being subjected to a detriment because he argued that Ms Mitchell's concerns had been reprisals for his concerns which he says amounted to protected acts.

What the RMT policies say

201. The trade union has various policies set out in the staff handbook. Unfortunately, there appears to be no explanation of what approach will be taken when policies overlap to explain which policy takes precedence or who within the organisation has the final say about which procedure should be followed.

202. The equal opportunities policy says this

EQUAL OPPORTUNITIES STATEMENT

Introduction

1. RMT is committed to becoming an equal opportunities employer.
2. It is our policy that no present, future or potential employee shall receive less favourable treatment on the grounds of social status, age, colour, disability, ethnic or national origin, marital status, religion or belief, sex or sexual orientation or trade union activities or membership.
3. This policy will be implemented in accordance with all relevant legislation. Full account will be taken of any official codes of practice which are issued from time to time.
4. The Union will ensure that recruitment, selection, training and promotion of staff and the application of any other benefits in employment are based solely on the criteria of merit, ability and relevant experience.

Investigation of breaches of this Procedure

11. Individual allegations of unlawfully discriminatory behaviour by individual employees will be dealt with through the disciplinary procedure where appropriate. Individuals are entitled to use the grievance procedure to raise any individual allegations of discrimination. Where either the Union or Staff side wishes to raise an issue with the operation of this policy or equal opportunities within the organisation more generally, the matter will be raised through the Negotiating Machinery by either party.
12. The Union will also investigate fully any reported harassment of members of staff by lay members of the RMT or visitors to Union buildings.

203. The RMT does not have a grievance procedure in the traditional sense. The staff handbook provides that grievances are dealt with under the "Machinery of negotiation" process.

MACHINERY OF NEGOTIATION

RMT STAFF

INDIVIDUAL GRIEVANCES, MATTERS RELATING TO DAY TO DAY ADMINISTRATION & THE INTERPRETATION AND IMPLEMENTATION OF POLICY

Head Office Staff	Regional/Branch Office Staff
Direct Supervisor	**Direct Supervisor**
In the first instance, matters as referred to above should be raised (informally) with a Member of Staff's direct supervisor i.e. Head of Section/Departmental Manager as appropriate.	In the first instance, matters as referred to above should be raised (informally) with the individuals direct supervisor, i.e. Regional Organiser.

Departmental Manager

Matters not resolved with the individuals direct supervisor, should be raised with the Departmental Manager. In those instances where the Departmental Manager is the direct supervisor, the matter may be referred direct to the "Appeal" Stage.

Appeals

In those cases where a satisfactory conclusion cannot be reached at the "Departmental Manager" level of the Machinery, matters can be referred to an Appeal Stage. The composition of this Stage will be the Senior Assistant General Secretary and one other who shall not be the Departmental Manager involved in the earlier stage. Individuals shall have the opportunity to be represented by the Staff Representatives, or where appropriate, by a full time official at the Appeal stage.

(This representation will reflect the matters to be discussed i.e. Head Office/Regional Representatives.)

UNRESOVED MATTERS

Where an Item has not been resolved at the "Appeal" Stage, if the matter raises a point of principle, it may be referred across to the appropriate level of the Negotiating Machinery.

NEGOTIATION MACHINERY

Negotiation and Consultation matters relating to general policy, matters of principle, rates of pay, conditions of service of the Union's Administrative Staff and appeals against matters not resolved within the Individual Grievance Procedures/Primary Machinery.

General Secretary

In the first instance, matters as referred to above to be discussed with the General Secretary who, on the Management Side will be accompanied by the President and a Member of the Council of Executives. The Staff side will comprise of two accredited representatives of the GMB and the Regional Staff Representative. (See Explanatory Notes below.)

Council of Executives

Matters not resolved at General Secretary level together with proposed agreements requiring the endorsement of the Council of Executives, e.g. matters relating to the review of Rates of Pay, Conditions of Service etc., to be placed before the Council of Executives. In respect of "failed to agree items" the Council of Executives will refer the matter to a Staff Negotiating Forum for attention.

The Staff Negotiating Forum comprising of four members of the Council of Executives, one of whom will be the General Secretary and four members of the Staff, one of whom can be a GMB representative, will receive and discuss claims and matters referred to them relating to RMT Staff. This Forum will, having fully considered the submissions, make their recommendations to the Full Council of Executives. Where there is a failed to agree within the Staff Negotiating Forum, the Council of Executives to be advised clearly of the reasons.

The Council of Executives may refer matters back once to the Staff Negotiating Forum for further negotiation where they feel unable to ratify a Report.

Where claims are declined, the Council of Executives, via the General Secretary, will give a full explanation as to the reasons for this.

204. The bullying procedure says this

BULLYING POLICY

The following is the RMT Policy as it relates to all its employees.

Employees have the right to be treated with dignity and respect. Bullying is harmful; it causes distress and can lead to accidents, illness, and poor performance. Bullying is defined as any unsolicited or unwelcome act that humiliates, intimidates or undermines the individual involved. No form of bullying will be condoned at work; or outside work if it has a bearing on the working relationship. The RMT welcomes the support of the Staff Side in seeking to eradicate bullying.

PROCEDURE

The aim of this procedure is to protect employees from bullying and to enable them, if necessary, to make a complaint or assist in an investigation without fear of reprisal.

When appropriate, every effort will be made to resolve the situation informally. Some incidents, however, by virtue of their serious nature will need to be dealt with immediately under the formal procedure.

205. The bullying policy gives the following examples of bullying behaviour:

Examples of Bullying

1. Employees who are bullied often feel vulnerable and isolated and believe it is best not to complain as their complaints will not be taken seriously.
2. If an employee feels bullied, the matter must be taken seriously. The employee must decide whether to ask for confidential counselling, and whether to proceed with a formal complaint. Examples of bullying behaviour include:

   (a) derogatory remarks
   (b) insensitive jokes or pranks
   (c) insulting or aggressive behaviour
   (d) ignoring or excluding an individual
   (e) setting unrealistic deadlines
   (f) public criticism
   (g) substituting responsible tasks with menial or trivial ones
   (h) withholding necessary information
   (i) constantly undervaluing effort.

This list is not exhaustive. The actions listed above must be viewed in terms of the distress they cause the individual. It is the perceptions of the recipient that determine whether any action or statement can be viewed as bullying.

206. The bullying procedure provides for an informal stage, if that fails or is inappropriate the formal complaint procedure provides for investigation (which should be completed within 4 weeks) and if the complainant is dissatisfied with that they may make a written request for a reconsideration within 7 days. Decisions about disciplinary action are taken either in the recommendation of the

investigating manager or if the matter was referred for reconsideration, by the general secretary.

207. Looking at the allegations the claimant and Ms Mitchell had raised about the other relating to events on 10 November, the claimant's allegations of assault and counter allegations of aggression made by Ms Mitchell against the claimant, we accept that it was reasonable for Mr Perkins to categorise the allegations which needed to be looked at as "bullying" within the definition used by the union above. Although the claimant argued that he could not have "bullied" Ms Mitchell because she was senior to him, we accept that Ms Mitchell was accusing the claimant of undermining and humiliating her. Mr Perkins told that us that given the nature of the allegations it was clearly sensible for there to be one investigation into what had happened given the directly contradictory accounts presented. We accept that was a sensible approach as if two separate investigations had been conducted it would be possible they would reach conflicting conclusions about significant matters such as which employee's account should be preferred, which in turn would give rise to an impossible disciplinary situation. We can also see however that arguments could be made for other policies being used and that the claimant felt aggrieved that the union did not follow the policy that he felt was most appropriate.

208. Mr Perkins told us that identifying the managers to deal with the process created a particular problem for him. He explained that the senior management team is small and each of the senior management team have large portfolios meaning resources can be thinly stretched. He had to identify someone to carry out the investigation taking into account diary commitments and workloads and he would have to be mindful that other senior managers might be required s decision makers depending on matters progressed.

209. Mr Carey told us that he did to regard himself as having any difficulty in carrying out the investigation. He had not taken the KH grievances personally and did not see himself as having any conflict of interest. By this time KH had withdrawn his grievances and in fact no grievance hearing had gone ahead. The claimant also challenged the appropriateness of Mr Carey because he said that Ms Mitchell and Mr Carey are friends. Mr Carey pointed out that the senior management team at the RMT is very long-serving and the managers work together on friendly terms, but he disputed that this meant that they were friends as such or that this would impact on his ability to make difficult decisions if he had to. We accepted his evidence about that.

210. Mr Carey explained that on the other issues of bias that the claimant had not raised any grievance against Mr Carey himself, he did not suggest there had been any ill-will between them and the two had worked together from time to time on industrial relations matters. The claimant offered us no reason why Mr Carey would have been biased expect that the claimant was, in his words, going to be KH's companion. That in itself would not be a reason for Mr Carey, an experienced

trade unionist who had often represented members himself many times, to harbour any bias against the claimant.

211. In relation to the occupational health referral, Mr Perkins told us that he did not make a referral to occupational health at that time because there was no sign of the claimant's immediate return to work and as his letter of 6 January had identified, he had thought the claimant was going to get his own medical advice. His evidence about that is consistent with the terms of the letter he sent confirming what had been discussed the previous day.

212. On 11 January 2016 the claimant submitted a further detailed formal grievance which included pictures of the injuries he says he had received at the hands of Ms Mitchell (and referred to above). This was the first time detailed allegations were made about that alleged assault the previous August. He raised objections to Mr Carey being a decision maker in relation to his grievance and identified that he thought his grievances should be considered by a Deputy General Secretary of the trade union. Although the claimant did not refer to refusing consent to the bullying policy approach, he was expressing a desire for the grievance process described above to be used.

213. The claimant also raised that he felt that that because both he and Ms Mitchell were members of the trade union his considered that Mr Perkins was subjecting him to harassment contrary to the RMT's Rulebook and his complaints should be considered separately as a breach of those rules.

214. The detail of the claimant's grievance referred to a number of matters beginning with the claimant's selection for his role. He gave a detailed account of events on the evening of 27 August 2015 and to having felt shocked and upset by the incident involving Ms Mitchell. He also referred to having expected an apology on his return from leave, but that none had been forthcoming. He also described the events on 15 October 2015 and alleged that Ms Mitchell had told him that she had informed someone in the union of what had happened in the pub in August, that he would not be able to use that against her and that the claimant perceived that as threat. The claimant also referred again to the incident on 10 November 2015 and that he had been fearful that he would be subject to a physical attack, he had been accused him of bringing claims against the union, being aggressive and had been told he must drop being a workplace companion.

215. It can be seen that in essence this was a repetition of matters already raised. Both the claimant and Ms Mitchell raised the same matters and several occasions without allowing time for their first complaints to be resolved. The claimant would continue to do this throughout the rest of his employment, and it was clear to the tribunal panel that Mr Perkins found it challenging to manage the sheer volume of complaints being raised with him.

216. In reply Mr Perkins emailed the claimant with copies of the RMT rule book and staff handbook. In response to the claimant's objection to Mr Carey conducting the

investigation, Mr Perkins told the claimant that the union was satisfied that Mr Carey would act impartially and professionally. Mr Perkins appears to have overlooked that he had originally asked the claimant to consent to the bullying policy being used. By this stage Mr Perkins had decided that this was what was going to happen. However, by seeking consent previously Mr Perkins had given the claimant an expectation that he would have a say on which procedure would be used and this change in approach created a sense of grievance on the claimant's part.

217. On 26 January 2016 Mr Perkins emailed the claimant to say that because the incidents he had complained of had arisen in the course of his employment he did not consider that there was any need to depart from the procedure set out in the staff handbook, and he could not see a reason to separately deal with complaints under the rulebook but if the claimant wished to do that he could submit a complaint to Mr Cash.

218. On 26 January 2016 the claimant emailed Mr Perkins referring again to the legal issues he identified as having raised in his grievance and asking why he had not been informed who would be considering his grievance and alleging that if he had assaulted Ms Mitchell he would have been dismissed by now. At around this time the claimant also contacted ACAS to begin the early conciliation process to bring a tribunal claim.

219. On 28 January 2016 the claimant emailed Mr Perkins again to raise concerns about Mr Carey who had been appointed as the investigatory officer, on the basis that he was the subject of the bullying complaint in which the claimant had agreed to be the workplace companion, and it was also asserted that Mr Carey was on friendly terms with Ms Mitchell and therefore the claimant did not believe he would receive a fair and impartial hearing. He also asserted that he believed that Mr Carey was not of appropriate seniority to conduct the investigation because he was the same grade as Ms Mitchell.

220. In his reply Mr Perkins informed the claimant that it was the union's view that any manager appointed by the General Secretary to investigate a complaint would be professional and impartial and the claimant would have the opportunity to raise matters relating to the investigation and expand on the detriment that he believed he had suffered. Mr Perkins also explained that because Ms Mitchell and the claimant had raised closely related complaints which overlapped, it was appropriate that they were investigated by the same investigating manager.

221. On 29 January 2016 Yvonne Scarrott, emailed the claimant. That email disputed the claimant's assertion that Ms Mitchell was the same grade as Mr Carey, Mr Carey was the same grade as Mr Croy (we accept that this was the case). The email also clarified that it was not correct to say that the employee who had raised the grievance for whom the claimant was acting as a workplace companion did not raise allegations of bullying against Mr Carey, but rather the grievance had been about the interpretation and implementation of a policy, and it was disputed that

the claimant had suffered any detriment in the way that the complaints were being handled.

222. On 29 January 2016 the claimant emailed Ms Scarrott (a member of the HR team) to say that he had emailed Mr Perkins, to complain about the way his allegations had been handled by the union the day before. Separately, the claimant emailed again to dispute that Mr Carey was an appropriate investigator, to assert that for him so do so would be a detriment and to complain that Ms Mitchell had raised malicious falsehoods against him because he had raised a complaint against her. He asserted that Ms Mitchell should be suspended. He again requested a meeting with Mr Cash as the general secretary.

223. On the same day the claimant emailed Mr Perkins about the effect the process was having on his health and enclosing an undated letter from his doctor which said that the claimant's diagnosis had progressed to anxiety and depression, that he was suicidal thoughts and that "From my clinical assessment it is clear that the events in work have caused significant, emotional and had an impact on the claimant such that his mental state is impaired and he is now unable to carry out his duties." The claimant asserts in his evidence that this should be triggered a referral to occupational health and that the procedure should have been stopped at that stage.

224. On or about 2 February 2016 Ms Scarrott emailed the claimant about his request to meet with the General Secretary, stating that the claimant was confusing his status as an employee and status as member, that his complaints were being dealt with under the staff handbook and that as an RMT member he did not have an automatic right to a meeting with the General Secretary. The claimant has not shown any provision which suggests there is such a right.

The Carey Investigation

225. In February 2016 Mr Carey met with Karen Mitchell and he also interviewed Liam Welch-May and Sarah Henderson. He interviewed the claimant on 22 February 2016.

226. Mr Carey interviewed Ms Mitchell before he interviewed the claimant. In Ms Mitchell's interview Mr Carey allowed Ms Mitchell to read a prepared statement. The claimant objects to that and told us that if this was allowed he should have been invited to prepare his own statement. The notes of the meeting show that Mr Carey went through the claimant's allegations in some detail. In the course of the meeting Ms Mitchell was critical of the claimant in various respects and the claimant took issue with that in his evidence, but it is perhaps unsurprising in the circumstances given the nature of the allegations made by the claimant. Ms Mitchell had raised her complaints about the claimant, and she was explaining her case and she was seeking to defend herself against the claimant's charges. The claimant also asserts that Mr Carey asked Ms Mitchell leading questions relating to whether the claimant had a professional conflict of interests as a solicitor and

says that other questions asked showed that Mr Carey was not impartial in his approach.

227. In advance of his meeting with Mr Carey, the claimant prepared a bundle of documents that he wanted to be considered which included documents such as the photographs and the emails the claimant had sent to himself. The claimant told Mr Carey that he had more than the five grievances referred to in the letter setting out the scope of Mr Carey's investigation and restated his objection to Mr Carey acting as the investigatory officer. Mr Carey however declined to consider any of those additional matters and also declined to consider the claimant's objections to the procedure.

228. In the course of the meeting the claimant referred to the RW matter for the first time. He alleged that Ms Mitchell had attempted to pervert the course of justice in a fit of temper by instructing Ms Henderson to change to notes of the meeting with Mr Usher, if those notes contained a promise that that she would receive the notes by a particular date. The claimant said he had objected to that and that he did not think Ms Mitchell was racist but that he did consider this to be act of race victimisation.

229. The claimant says that when he raised that Mr Carey should have recognised that this was a protected disclosure and a protected act in terms of Equality Act victimisation so he should have taken appropriate action to investigate that and identify as a separate matter of grievance. Mr Carey told us that it was something which seemed to be raised simply to support the claimant's allegation that Ms Mitchell had a tendency to lose her temper in support of his bullying allegations. We accept that in the context of meeting, the meeting minutes support Mr Carey's evidence about that, and it is not apparent that the issue is raised as a concern in itself.

230. The claimant suggested that we should draw inferences from how Mr Carey conducted the meetings and the fact that he allowed Ms Mitchell to read out a statement. We did not accept that. The notes suggest that the tone of the two meetings was different, but the panel accept that this was as a result of the claimant's attitude, for example because of the hostility he showed towards Mr Carey looking at his concerns.

231. After the meeting the claimant emailed Mr Perkins to raise a complaint about the investigation hearing and identified a number of grounds in which he said it had been unfair and requested a copy of the audio recording of the hearing.

232. On 23 February 2016 the claimant reported his allegations that he had been assaulted by Ms Mitchell to the Metropolitan Police. The claimant was warned that there was a six-month time limit in relation to the crime of battery but that this would be investigated further. Ms Mitchell was subsequently interviewed under caution in early April, but no further action was taken by the police.

233. On 25 February 2016 the claimant's branch of the RMT passed a resolution that he was being subjected to unfair treatment. This led to various email exchanges between the branch and Mr Cash. Mr Cash told the branch that it would not be appropriate to discuss internal staffing matters with them because of confidentiality and assured the branch that the matter was being dealt in accordance with the relevant procedures and that "I can advise that there are provisions within the Union's staff procedures for internal staffing matters to be placed before the National Executive Committee, if a matter reaches this stage".

234. The claimant disputes that confidentiality was a justification for this response because in his words, his branch had "[his] authority and were looking after [his] interests" and he argued that it could not be said that staffing matters had been handled in accordance with relevant agreements because he did not consider that he had received a fair or impartial hearing. However, we accept the issues of confidentiality did not only relate to the claimant. The allegations in the case involved other individuals. Serious allegations had been made which, if not upheld, could still lead to damage to the reputations and we did not consider Mr Cash's conclusions about this to be unreasonable or surprising.

235. Mr Perkins told us that he and Mr Cash were of the view that this was not a matter which the claimant's branch had any interest in. The RMT is not the recognised trade union internally, there is a staff association, and in their view this was simply an internal staffing matter.

The First Tribunal Claim is lodged

236. On 22 March 2016 the claimant lodged his first tribunal claim. That claim alleged that he suffered a detriment because he had been a workplace companion and on health and safety grounds in relation to the incident on 10 November 2015, the appointment of Mr Carey and the procedure adopted in relation to the handling of the grievance by him, and the refusal of Mr Cash to meet with him and to investigate the complaint that the investigation hearing was unfair. It was also pleaded that Mr Cash's refusal to meet with the claimant was unjustified discipline by the trade union although that latter complaint was withdrawn in November 2016. There was no mention of the RW allegations about perverting the course of justice in that claim.

237. Mr Carey prepared a report for Mr Cash. He made clear in that that he had been appointed to investigate 5 grievances but that the claimant had raised a further 11 grievances at the hearing, along with a file of papers running to 180 pages. In the report Mr Carey explained that he viewed the grievances as overlapping and that he had not felt it was appropriate to go through the documents page by page and despite this his interview with the claimant had taken nearly 3 hours.

238. The reports notes that at the end of the interview Mr Carey gave the claimant the opportunity to state if he felt the issues had been dealt and records that the

claimant had said that they had covered "a lot" and had not asked for any of the 16 grievances (in total) to be readdressed and he had asked to make a statement which had been allowed. Mr Carey also recorded that the claimant had raised objections to his acting as the hearing officer but made clear that he believed that this was done when the claimant did not want to answer a question. On the issue of bias Mr Carey accepted before us that he worked closely with Ms Mitchell but makes the point he had also worked closely with the claimant and had socialised in a work setting with both of them.

239. Mr Carey explained in his report why he did not conclude that the alleged assault on 27 August 2015 had happened and gives various reasons why. In essence, he did not believe that the claimant's evidence was credible. In relation to the incident on 10 November 2015 Mr Carey explained why he believed that the claimant had a conflict of interests as the union's solicitor and pointed out that the claimant himself had appeared to acknowledge that when he declined to advise Mr Perkins. He did not accept that the claimant had obtained Ms Mitchell's permission to act as a companion and in the end had not done so in any event because the claimant went off sick and KH withdrew his grievances.

240. The grievance that the claimant had been threatened with disciplinary action when he left the office because the claimant believed that he was in imminent and serious danger was also rejected. Mr Carey did not believe that the claimant could have reasonably believed he was at risk of being attacked and the disciplinary action had been threatened when the claimant had said he was going to leave the office without permission, without Ms Mitchell being aware that the claimant had felt he was in danger.

241. Finally, the grievance that the claimant had been treated differently by Ms Mitchell because it had been Bob Crow who had wanted to appoint him and not Ms Mitchell unlike the other team members was also rejected. On the issue of the probation period Mr Carey had checked the personnel file which had shown that the claimant's appointment had been confirmed at the end of the usual six-month period.

242. Mr Carey also considered Ms Mitchell's grievances against the claimant – that he had acted aggressively and in a threatening way towards her on 10 November and had acted aggressively at a team meeting on 16 July and that he acted inappropriately in refusing to act for the union in relation to KH's request and had not followed her instructions in that regard, had publicly criticised the union and the general secretary and have left the department unsecured on 23 October. He concluded that there was insufficient corroborating evidence in relation to the first grievance and that the rest were matters of performance or conduct which should have been raised at the relevant time by Ms Mitchell.

243. The panel accepted that Mr Carey's conclusions were not consistent with someone taking a biased and one-sided approach. On balance we considered that

his report suggests a manager trying to reach fair conclusions to resolve a difficult workplace dispute.

244. On 5 April 2016 Mr Cash wrote to the claimant to apologise for the delay in sending out the final version of the report. That did not satisfy the claimant who replied via Mr Perkins the next day both to object to the delay and more generally to complain about Mr Carey's appointment and his lack of impartiality, the failure to consider that the failure to provide him with a recording, and also the fact that he had requested a referral to occupational health in January and no action had been taken in relation to that.

The branch complaint

245. In the meantime, the claimant had raised concerns with his own RMT branch about what happened. A resolution appears to have been passed by the branch on 25 February supporting the claimant and this was sent to Mr Cash. On 8 March Mr Cash wrote to Mr McDonnell as the branch secretary of the Wimbledon branch to say that this was an internal staffing mater but there would be scope for it to come to the National Executive Committee if it was not resolved.

246. In April the branch raised the matter again and Mr McDonell wrote to Mr Cash to express dissatisfaction with the previous response and to reiterate the branch's expectation that this would be referred to the NEC.

The response to the Carey report

247. On 15 April 2016 Mr Cash wrote to the claimant to explain that he had accepted Mr Carey's report and enclosing a copy. Mr Cash observed that difficulties had been identified in the working relationship between the claimant and Ms Mitchell and that a recommendation had been made for support to be provided to improve that relationship, including by mediation, which Mr Cash supported. He noted that that there was no suggestion that any disciplinary or performance action would be taken on this occasion in- line with Mr Carey's recommendations, but he did express a concern that the legal department may have found itself in a conflicted legal position on in internal staffing matter and noted that advice had been sought to create a procedure moving forwards which the legal team would be expected to adhere to. Mr Cash advised the claimant that if he was dissatisfied with the outcome or how the complaint had been handed then he could make a written request for a reconsideration. That was the next step under the bullying procedure.

248. Mr Perkins told us that while the investigatory process was underway he did not deem it to be appropriate to arrange a medical referral in-line with the union's procedure, but once the investigation had been concluded by Mr Carey, in mid-April he began steps to refer the claimant to a specialist in Liverpool. However, at the time the union did not have a dedicated occupational health provider. We were told that contact was made with an existing London based psychiatrist although we did not have evidence of that. That enquiry proved fruitless, but Mr Perkins eventually

found a company called Clinical Partners online through whom Mr Perkins was eventually able to arrange an assessment by Dr Elanjithara in August.

249. On 22 April 2016 the claimant submitted what he called his "appeal against Mr Carey's findings". That is a five-page document. It raised four preliminary points which included allegations of discrimination and then set out five grounds of appeal in relation to Mr Carey's findings including that he had raised 11 grievances which had not been dealt with and challenging Mr Carey's findings because it was asserted that Mr Carey had not been impartial, had reached conclusions without hearing all of the evidence and which he could not reasonably reach.

250. For the first time the claimant appeared to link what he said had happened to him and his allegations about the RW incident, although it is rather confusingly expressed. The claimant said that on the night she assaulted him, Ms Mitchell had called him untrustworthy and that he *"thought this was because [he] had said no to perverting the course of justice and an act of victimisation in the [RW] case but I have not made this assertion (although it could be part of the reason why she stated she did not trust me) because Ms Mitchell demonstrated she did not trust me in a previous incident over the L2 [which we understand to be a union form]*". He also referred to having told Mr Carey about there being other examples of when he had been subjected to harassment by Ms Mitchell and that *"there were witness such as Mr Todd and Mr McGowan but they have not been interviewed".* The claimant also referred to having found out that Ms Mitchell had told Mr Cash about the assault allegation after from the notes of Ms Mitchell's meeting.

251. On 25 April 2016 Ms Mitchell wrote to Mr Cash to complain that she had discovered that the claimant had alleged she had Ms Henderson to change the notes of the meeting to get rid of a date when she read the notes of the claimant's interview (that is the RW matter) and she considered this to be malicious and requested that this be investigated through the disciplinary procedure.

The Croy Investigation and Reconsideration

252. On 11 May 2016 the claimant was informed that Mr James Croy who was the National Policy Manager, was appointed to prepare a report on the points raised in his appeal letter for the purpose of a reconsideration of the bullying complaint outcome. That was in accordance with the second stage of the bullying procedure. The letter about Mr Croy's appointment also says that the RW allegation raised as a grievance by the claimant would be investigated by Mr Croy as "part of the appeal investigation" and under the disciplinary procedure.

253. The claimant objected to that approach because he said it victimised him for raising his RW concerns. Mr Perkins, Mr Croy and Ms Mitchell were clear in their evidence that if the investigation into the RW allegations had found that what the claimant said was true, Ms Mitchell would have faced disciplinary action and disputed that the claimant had been subject to any detriment through this approach. We accepted that and we were satisfied by Mr Croy in particular, that if he

concluded that Ms Mitchell had acted in the way suggested he would have regarded that as a very serious disciplinary matter. The claimant alleged that his allegations against Ms Mitchell were not dealt with fairly, but we accepted that Mr Croy approached his investigations on the basis that he was seeking to establish the truth of what had been said to whom before making appropriate recommendations.

254. Mr Perkins also wrote to the claimant to tell him that he was not entitled to a recording of the meeting with Mr Carey, but that he could attend the union's head office to listen to the recording. He also told the claimant he would not send him a word version of the transcript document which had been prepared. The claimant was not happy about that.

255. On 12 May the claimant wrote to Mr Perkins and Mr Cash to object to the process that was being adopted. He alleged that Mr Croy had given incorrect or false evidence about the probation process during the investigation process and therefore it would be a breach of natural justice for him to be involved in the appeal and asserted that Ms Mitchell had subjected him to victimisation under the Equality Act by accusing him of making derogatory and false accusations. The claimant requested that "someone truly independent" be appointed to relook at his grievances.

256. Mr Croy told us that he did not consider that he was biased because he answered questions about the probationary process and had told Mr Carey that the claimant's probation had not been extended. As we have found above, he was correct about that in the sense that the claimant's probation period had ended at the time specified in his contract of employment. Mr Croy regarded the probationary issue as a trivial matter. We accepted that and did not regard that as a reason which meant Mr Croy could reasonably be regarded as being biased or conflicted.

257. We also accepted that when Ms Mitchell said that she regarded the RW issues to be derogatory and false, the respondent had to investigate that to determine what had happened, as far as it was able to. If there had been two investigations looking at the claimant's allegations and Ms Mitchell's separately, there would be a risk that different investigators would reach different conclusions about what had been said to Ms Henderson. That must inevitably be a risk when allegations are made where there is little or contested corroborating evidence about a significant dispute of fact. We accepted that it would be a reasonable approach for an employer to conduct one investigation.

258. We accepted that what the union needed to do was to investigate the RW matter. If Ms Mitchell had told Ms Henderson to change notes for a meeting in order to victimise a black member of staff who had raised a grievance against the union, that would justify disciplinary action against Ms Mitchell. On the other hand, if the claimant had falsified his allegations, disciplinary action against Ms Mitchell was not warranted but could be called for against the claimant on the grounds that they could have been made in bad faith.

259. It was not clear to us if the claimant was suggesting to us that because he had raised his allegations about Ms Mitchell's conduct under the guise of a victimisation complaint, that the union should simply accept what he said at face value and not investigate the truth of his allegations. At times that did appear to be case from his criticism of the respondent, but we thought that was that would a surprising belief for an experienced employment lawyer to hold. All employees must be treated fairly – including employees who face disputed allegations of victimisation. Unless facts are clear cut that means some sort of investigation.

260. On 13 May 2016, Mr Croy met with Ms Mitchell to begin the investigation process. When he asked Ms Mitchell if she could think of possible motivation for the claimant raising false allegations, Ms Mitchell suggested that the claimant might have had a monetary motivation. The claimant is offended by that suggestion. However, the claimant also told us that he had been assaulted in a past employment by a colleague and that had resulted in a significant settlement. Ms Mitchell told us that the claimant had talked to her about wanted to return to Liverpool to be closer to family and that she thought he was looking for a means to achieve a negotiated exit.

261. In the meantime, correspondence between the claimant and Mr Perkins and Mr Cash continued. Replies to the claimant 's objections to Mr Croy were addressed in a long letter on 17 June 2016 and he was asked to provide further information about new allegations.

262. On 7 July 2016 the claimant wrote to Mr Perkins and Mr Cash to raise a formal grievance. His letters complains that he been subject to detriment and victimisation and that by failing to take appropriate action against Ms Mitchell the union had breached its own procedures. The letter "particularises" the allegations of race discrimination and makes allegations of bias on Mr Cash's part because he had been told about the alleged assault in August 2015.

263. On 18 July 2016 Mr Cash wrote to the claimant to clarify the procedural issues to respond to the claimant's complaints. The claimant asserts in his claim as recorded in the list of issues, that Mr Cash denied that he had raised an allegation of race discrimination. In his witness statement the claimant expresses it slightly differently by saying *"Mr Mick Cash refuted that my allegations regarding the RW matter were not taken seriously and when I raised the protected concerns during the 22nd of February 2016 during my grievance hearing and states they were not part of my grievance. I had raised a serious accusation of discrimination contrary to the RMT Staff Handbook and RMT Rule Book, the allegations concerned unlawful and illegal actions by Ms Mitchell, the RMT were advised by Thompsons Solicitors throughout this process but failed to investigate such serious complaints and this was a detriment".*

264. In the letter Mr Cash says this

> 4) It is not correct to say that we have not taken your allegations against Karen Mitchell seriously. I have appointed James Croy to investigate the very serious issues you have raised as I considered that Kevin Carey's report did not deal with the allegations because they did not form part of your formal grievances and were made during your interview with Kevin. You will also appreciate that Karen Mitchell has in turn raised serious allegations that

265. The panel accepted that the ordinary meaning of the phrase in Mr Cash's letter is simply that the claimant had not raised the race victimisation complaint in his original grievance, not an assertion that the allegation had not been made at all nor is there any suggestion that it will not be investigated. It appeared to us that the claimant had either mis-read the letter or has chosen to misrepresent it.

266. Mr Croy tried to meet the claimant in late July. A meeting was arranged on 16 August 2016 with the claimant's trade union representative. On the same day the claimant had been due to be assessed by Dr Elanjithara, on occupational health specialist, but the claimant said he could not attend that assessment.

267. In the meantime, the claimant sent a further response to Mr Cash's letter of 18 July 2016 raising various matters about the proposed investigation and making a number of assertions about alleged flaws in the process. In particular he asserted that Mr Croy was not impartial and should not conduct the next stage of the process.

268. That was replied to by Mr Cash on 4 August 2016. Mr Cash said this *"I do not accept that you raised a complaint of victimisation at your investigation hearing with Kevin Carey. You referred to the [RW] matter and alleged Karen Mitchell instructed Sarah Henderson to remove a date from a document. You referred to this as an example of Karen's character and temper. You did not allege victimisation as a result of raising the [RW] matter until your letter dated 12th May 2016".*

269. The panel accepted that this was a fair representation of how the claimant had raised matters at the meeting. At that point the claimant was also sent an audio recording of his meeting with Mr Carey.

270. On 5 August 2016 the Wimbledon branch raised the issues raised in April 2016 again and asked for this to be raised with the NEC.

271. The claimant wrote on 11 August essentially reiterating his dissatisfaction with the letter from Mr Cash. The panel accepted the evidence of Mr Perkins that by this time the correspondence was becoming hard to manage. Mr Cash's letters had reiterated that the issues would be considered in accordance with the procedures. The claimant would not accept that. In essence the correspondence is doing no more than covering the same ground and it was clear to the panel that by this stage the claimant's conduct was causing Mr Pekins and others considerable frustration.

272. On 11 August 2016 Mr Cash replied to Mr McDonnell at the Wimbledon branch. That letter again stated that this is regarded as an internal staffing matter being dealt with under the union's own employment procedures and that in light of that it was not appropriate for this matters to be placed before the NEC.

273. The respondent had arranged an occupational health appointment for the claimant on 24th August in Liverpool, but the claimant informed Mr Perkins he could not attend that because he would be in London. He also told Mr Perkins that he was due to start cognitive therapy at the end of the month and would not wish a home welfare visit to take place until after then.

274. On 16 August 2016 the claimant attended an investigation interview Mr Croy in London. The panel were shown a transcript of the hearing which lasted some almost 2 hours.

275. The claimant told us that Mr Croy was not impartial and referred to photographs sent to Mr Cash that showed Mr Croy dancing and socialising with Ms Mitchell, Mr Perkins, Mr Carey and others at a union social event. Mr Croy rejected that allegation. He pointed out that the event in question was a works event attended by most, if not all, of the senior managers. The panel accepted that colleagues in any organisation will socialise at internal events. Such socialising is commonplace within most large employers. The fact that employees have socialised with each other does not mean that they cannot make impartial decisions under employment procedures. We did not find any suggestion in the evidence that we heard from Mr Croy to suggest that he was biased or had in any way failed to take a serious and measured approach.

276. The claimant also criticised Mr Croy's conduct of the investigation because he did not interview Mr Cash. Mr Croy told us that he did consider that this was necessary because Mr Cash had not been directly involved in the issues he was looking at. We did not consider that this suggested bias. We accepted that a reasonable manager could decide simply to look at first hand evidence. In relation to the claimant's other criticism about his impartiality, Mr Croy told us that he did not feel the need to listen to the recording of the original investigation because he had a transcript of the hearing and that he did not need to interview Mr Carey because he was reconsidering the decision taken. We accepted that Mr Croy was a busy manager trying to manage his time and that listening a meeting recording of a long meeting when he could read the notes might not seem a sensible use of time.

277. The claimant also criticised Mr Croy because he had interviewed Ms Mitchell first which the claimant perceived as evidence of bias. Mr Croy explained that he had to interview one or other first but pointed out that in any event the claimant had objected to his appointment and the to-ing and fro-ing about that had delayed their meeting. Mr Croy had been asked to undertake his reconsideration in April and had decided to get on with things in the meantime. We accepted that and found that it was not evidence of any ulterior motive.

278. In terms of the investigation meeting itself, the panel found no evidence of anything improper in how Mr Croy conducted the hearing. In the view of the panel the transcript suggests someone taking a reasonable and thorough approach to the investigation.

279. During the hearing Mr Croy explained to the claimant that he would not be able to complete the process until October 2016. It was of course mid-August when they met. Mr Croy explained that he had holiday booked over the coming weeks and would need to time to prepare for and attending the Trade Union Congress and the Labour Party Conference during September. Mr Croy explained to us that in light of his role as Head of National Policy, these conferences were particularly important and very busy times for him. We accepted his evidence about that. It was unfortunate these matters led to delay, but we can see that Mr Croy would have not anticipated that it would take to the late summer to meet the claimant given that he had first tried to meet him in April. The summer had largely been lost due to the claimant's objections to Mr Croy and by the time the claimant agreed to meet him, Mr Croy had little time to prepare the report.

280. In due course Mr Croy prepared two separate reports submitted to Mr Cash on 23rd October 2016. The first was a reconsideration of Kevin Carey's findings in relation to the claimant's complaint against Karen Mitchell and the second was his report into the RW allegations. Those are referred to below.

The occupational health appointment of 7 September 2016 and the second tribunal claim is lodged

281. Eventually the claimant attended an occupational health appointment with Dr Elanjithara, a psychiatrist, in Liverpool on 7 September 2016. On the same date the claimant lodged his second claim in the employment tribunal.

282. In his evidence to the tribunal, Mr Croy was critical of how matters had progressed with the claimant in terms of his sickness absence. That is consistent with evidence in the bundle which shows that after meeting the claimant he raised concerns that the claimant had not been seen by occupational health. There are emails in the bundle of documents between Mr Croy and Mr Perkins showing that Mr Croy asked for further information to understand the delays and indeed did not accept short reassurance from Mr Perkins at face value. We found that was evidence of robust and even-handed approach.

283. We accept that in the background Mr Perkins had been trying to progress the occupational health referral. He and the claimant had continued to exchange correspondence over the summer. The claimant felt it was unreasonable of Mr Perkin not to be aware of when he was in London We thought that was a somewhat unrealistic expectation. The claimant was not in the office and Mr Perkins was not only dealing with the claimant, he had other responsibilities

284. On 14 October 2016 Mr Perkins wrote the claimant to seek to arrange a further meeting on 21st October 2016. Mr Perkins described this as a welfare meeting although this panel found there is nothing in the letter to suggest that Mr Perkins was seeking to meet with the claimant informally, which is what is usually meant by a welfare meeting. The purpose of meeting was intended to be to discuss the claimant's absence and the fact that the claimant had received 49 weeks full sick pay which Mr Perkin's described as being some 25 weeks more than the minimum in the respondent's policy. In short the letter looked like the sort of letter that might initiate a formal absence or capability process.

RMT Sick Pay Policy

285. It is appropriate to record here what the trade union's policy was about sick pay

"Sick Pay is paid for the following periods of absence: -

6 months but less than 1 year's employment – full basic pay 6 weeks, half basic pay 6 weeks

1year but less than 5 years employment - full basic pay 16 weeks, half basic pay 16 weeks

5 years and over - full basic pay 26 weeks, half basic pay 26 weeks"

286. That is consistent with Mr Perkins' description of the entitlement. However, the policy continues *"The above represents a minimum guideline only. Cases of genuine serious illness of a prolonged or terminal nature will always be considered sympathetically and provision made for indefinite payment of full salary during sickness. All parties recognise there is precedent for this."*

287. Mr Perkins told us that he regarded this as no more than a discretion to extend sick pay. The claimant argued that this is incorrect and that in fact he had a contractual entitlement to indefinite sick pay as long as he was suffering from a "genuine serious illness".

288. We note here that the use of the words "will always" seems to be consistent with the claimant's understanding of the sickness policy. However, after the statement about genuine serious illness, the policy says, *"no member of staff will be paid reduced sick pay without their case first being fully discussed with a staff representative"*. The claimant told us that this would apply only to ill staff whose condition was not genuine and serious, but that does not seem to make sense. If sickness absence was not genuine, the staff member would not be entitled to sick pay at all. If the condition was not serious, presumably this suggests the staff member should not be absent from the workplace on a long-term basis. Unfortunately, the policy seems to have drafted in an unhelpfully ambiguous way.

289. On 19 October 2016 the claimant complained about the delay in receiving an outcome from Mr Croy and said that this was exacerbating his mental health problems. As we have found above however, much of that delay had been caused by the claimant's unwillingness or inability to meet Mr Croy in the summer.

290. On 21 October 2016 there was a meeting between Mr Perkins and the claimant to discuss pay and welfare issues. During that meeting the claimant told Mr Perkins that Mr Elanjithara had told him that he needed to see a psychiatrist rather than a therapist and that the claimant had found the meeting to be very difficult because it had explored events in the past which he found to be traumatic

Conclusions of the Croy Report

291. On 23 October 2016 Mr Cory provided his reports to Mr Cash. His decisions can be summarised as follows. In terms of the reconsideration of the grievance, he did not find any unfairness or evidence of impartiality in Mr Carey's report and accepted that it had not been prejudged. He did not accept that there had been a failure to follow RMT procedures or that the timing of the reports was related to when Ms Mitchell had been interviewed by the police or when tribunal proceedings had been issued. Mr Croy told us that RMT is a small organisation, and all its managers oversee extremely busy departments and that he had no reason to doubt that juggling those obligations with finding time for an investigation could lead to some delay and we accepted his evidence about that.

292. In terms of the investigation into the RW allegations, Mr Croy did not believe what the claimant had said about that matter. He concluded that there was no evidence to support this allegation and he concluded that there were inconsistencies in the claimant's account. He did not believe that there could have been misunderstanding and concluded that the allegation had been made maliciously. In consequence he recommended that the claimant's allegations be considered under the disciplinary procedure because the claimant may have been guilty of gross misconduct. We accept that was perhaps an inevitable consequence of the conclusion Mr Croy had reached that the claimant had made an extremely serious false allegation against the head of the legal department and a trainee solicitor.

293. Mr Croy was very clear in his evidence before us that if he had believed the claimant and had believed that Ms Mitchell had instructed Ms Henderson to change the minutes, that he would have recommended disciplinary action against Ms Mitchell. We accepted his evidence about that.

Initiation of disciplinary procedure

294. The claimant was told what Mr Croy's conclusions were on 28 October 2016. Mr Cash told him that he had accepted Mr Carey's findings about the reconsideration of the grievance and that disciplinary action was to be taken

against him in relation to the RW allegations that and that this would be dealt with by Mr Stephen Todd.

295. On the same date, Ms Mitchell was informed by Mr Cash that the complaints raised by the claimant had been rejected and that her complaint had been upheld and that disciplinary action against the claimant had been recommended.

296. On 31 October 2016 the claimant complained that he had been told by a solicitor from Thompsons in the course of the litigation process that his sick pay might be reduced. That was clearly unfortunate at best. He also asserted that the Croy outcomes were unfair, that there was a lack of impartiality and the threatened disciplinary action was also unfair.

297. On 4 November 2016 the claimant submitted a seven-page appeal and grievance about Mr Croy's decisions making various allegations of unlawful treatment and discrimination. That letter crossed with a letter of the same date to the claimant from Mr Perkins explaining what witness statements had been provided to him and to Ms Mitchell with the Croy outcomes and informing him that the consent of Ms Mitchell, Mr Welch-May and Ms Henderson would be sought for disclosure of their statements to him. As this would be relevant evidence in the disciplinary process which the claimant was entitled to see, the panel found this letter to be misjudged. The claimant wrote to Mr Perkins and Mr Cash to complain that was breach of the disciplinary procedure.

298. The panel concluded that at this point both Mr Perkins and Mr Cash had somewhat lost sight of the process. This is demonstrated by the letter of 18 November in which Mr Cash *says "you [the claimant] say that that you have you have noted that you are to be disciplined. This is not an accurate description of the position. I have appointed Steve Todd as the hearing officer of the disciplinary charges. The disciplinary hearing has not yet taken place. Therefore not decision has yet been taken as to whether you will be disciplined or not*".

299. This was criticised by the claimant. He pointed out that a decision had been taken that he was to be disciplined – what Mr Todd was to determine was the punishment, and that someone who is to be disciplined is entitled to the evidence before the disciplinary hearing so that they can defend themselves. The panel had some sympathy with the claimant about this, but we do not accept that was any evidence of bias or discrimination. Usually, the evidence to be considered at the disciplinary hearing is sent to the individual with the invitation to the disciplinary hearing and that that stage had not been reached. We felt the letter could perhaps have been better worded but that there was no more to matters than that.

300. On 18 November 2016 Mr Cash and Mr Perkins wrote the claimant to dispute the allegation that the procedure had been unfair and to dispute that he was entitled to an appeal against the outcome of the Croy decision. The claimant was unhappy with that correspondence and that resulted in further allegations of detriments and victimisation in a letter of 21 November 2016. The claimant disputed that he should

not be allowed to appeal and asked for contact details for Ms RW and her representative. He sought to raise a grievance about the decision to refuse his request for an appeal. It was correct for the respondent to say that there was no further appeal stage under the bullying procedure.

301. On 14 December 2016 Mr Perkins emailed Mr Todd to formally instruct him to act as disciplinary officer in relation to the disciplinary action to be taken against the claimant .

The Elanjithara report

302. On 4 January 2017 Dr Elanjithara sent the medical report about the claimant to Mr Perkins. Mr Perkins told us that he was dissatisfied with the length of time it had taken the report to be prepared. The claimant had been seen on 7 September 2016, almost 4 months previously. The claimant says that the reason for the delay was because Dr Elanjithara had sought information from the claimant's GP which is consistent with an email in the bundle. Although that was given as the reason for delay, it is also curious how little reference to the claimant's medical history there is. In light of the reference to past trauma it seemed surprising to us that there is no mention to the past workplace assault for example. Mr Perkins was right to say this occupational health report does seem to have taken an unusually long period to be sent to the employer.

303. The report itself is described as a confidential psychiatric report. Dr Elanjithara recounts the claimant's version of events relating to his employment history. He said this about the claimant's diagnosis:

Diagnosis

Mr Edwards suffers with complex form of Post-traumatic stress disorder (PTSD) with prominent features of depression. He suffers with intrusive thoughts, emotions, nightmares, feeling of numbness and detachment, and some avoidance behaviours.

There is history of early childhood trauma he suffered due to his father's behaviours towards him and family. Mr Edwards was able to move on and grew in his faith and his desire to help workers with their issues through his field of work kept him going. One of his main coping mechanisms to deal with difficult times in his own life was to submerge himself in work. Unfortunately, Mr Edwards in the present job came across circumstances, and people that evoked an outpouring of his deep seated emotional trauma, having added further psychological trauma to him. This resulted in expression of PTSD symptoms as well as significant depressive symptoms. At some point during this emotional state, Mr Edwards resorted to excess drinking and expression of anger, something that he had witnessed as a child at his home. This may have further exacerbated his psychological suffering and possibly linked to him feeling dirty.

304. Dr Elanjithara also says this:

I am also concerned about the risk of suicide as he is currently in a fragile mental state. There is significant impact in his day-to-day functioning and quality of life due to his psychological health.

305. Dr Elanjithara diagnosed PTSD, made recommendations for therapy treatment and states that the claimant is not likely to return to work for 6 to 12 months and that this will depend on the right form of treatment having been started.

306. The claimant suggested that Dr Elanjithara's report is evidence that he is telling the truth about what happened. However, we could not accept that. The doctor had no alternative versions of events available to him nor any evidence other than the claimant's account. We do not consider that Dr Elanjithara purports to make any such finding in his report nor was he in position to make any such finding.

307. On 19 January 2017 the claimant wrote to Mr Perkins with a further doctor's certificate and referred to his deteriorating mental health

The Third Tribunal Claim is lodged

308. On 27 January 2017 the claimant lodged his third claim with the employment tribunal.

309. Mr Perkins had sought to meet the claimant for a welfare meeting on 27 January 2017 Mr Perkins sought to arrange a further sickness welfare with him and someone from the HR team, Mr Barnor. The claimant told Mr Perkins that he would need adjustments for that meeting and objected to Mr Barnor being there. This led to extended correspondence between the claimant and Mr Perkins and the meeting on 27 January was cancelled. Mr Perkins wanted Mr Barnor to attend to take notes and the claimant objected because he felt he would be embarrassed speaking about his illness in the presence of someone he did not know. Eventually it was agreed there would be a meeting in Liverpool in the presence of Ms Scarrott.

Arrangements for the disciplinary hearing

310. On 1 February 2017 Mr Perkins prepared a letter for Mr Todd to send the claimant about the disciplinary process and sought the claimant's consent for a further occupational health report to assess the claimant's fitness to participate in the disciplinary process. The claimant argued that this was unreasonable and unnecessary given the respondent had received the medical report from Dr Elanjithara on 4 January 2017. Mr Perkins told us that the reason for seeking a further report was that by this stage it was nearly 5 months since the claimant had been assessed and although the report talked about fitness for work, it did not address the claimant's fitness to attend a disciplinary hearing.

311. On 3 February Mr Todd wrote to the claimant to seek to agree a disciplinary hearing date in February and informed him that that in addition to the specific allegations of misconduct in relation to the allegations against Ms Mitchell and Ms Henderson, it was Mr Todd's' view that the termination of the claimant' employment

also needed to be considered on the further grounds of a breakdown of trust and confidence between the claimant and the senior management team including by reference to additional allegation that a false accusation of a physical assault had been made. His letter explained what in the correspondence had led him to that conclusion.

312. On 7 February 2017 the claimant requested that the disciplinary hearing be postponed because he was due to have a mental health assessment on 14 February 2017 and on the following day he sent a copy of the invitation letter as evidence.

313. On 8 February 2017 the claimant wrote to Mr Cash. His letter argues that in light of Dr Elanjithara's report which had referred to a suicide risk, and the hospital mental health assessment, the disciplinary action should not be allowed to continue and that the forthcoming hearing should be postponed so until after treatment.

314. On 22 February 2017 Mr Cash wrote to the claimant to postpone the disciplinary hearing but subject to the evidence being produced by 28 February confirming that he was not fit to attend a disciplinary hearing, noting that the evidence from both Dr Elanjithara and the GP notes talked about fitness for work but not to attend hearings.

315. On 24 February 2017 Mr Cash received a letter for a Dr Moore whose details describe them as a GP trainee in psychiatry, stating that the claimant was receiving intensive support from the psychiatric team and that it was not fit to attend a disciplinary hearing.

316. Although a letter had been provided within the timescale of the letter of 22 February, on 27 February 2017 the claimant wrote to Mr Cash to object to the short notice he had been given to provide the medical evidence and asserting that this had made him more unwell and alleging that it was motivated by the protected concerns that had been raised and suggesting an intention to write further about this.

317. That further correspondence was sent to 7 March 2017. That letter is 4 pages long. It asserts that Mr Cash should have understood from the Elanjithara report that the claimant was not fit to attend the disciplinary hearing, raises various concerns about the disciplinary process and makes new allegations of harassment arising out of documents contained in the disciplinary bundle, to some extent rehearsing or reframing allegations raise previously. It repeats the allegations about the RW matter can continues to assert the claimant' version of events.

The capability process

318. In March the "sickness welfare meeting" was conducted in writing, that is by Mr Perkins writing to the claimant on 14 March identifying issues and concerns of the management team arising out of the continued absence and asking a series of

questions about his health, progress, treatment, possible arrangements for a return to work, issues that he wishes to raise and so on. Mr Perkins had previously sent the claimant a consent form to refer him to BUPA as the employer's occupational health providers but when the claimant returned the form he had crossed out BUPA and given only consent to be seen by Dr Elanjithara.. There was also an exchange of notes of the meeting of 21 October between Mr Perkins and the claimant.

319. On 16 March 2017 the claimant wrote again to Mr Cash requesting more time to reply to reply to Mr Perkins letter and raising many of the issues previously raised whilst chasing a reply to this letters of 21 November 2016 and 7 March 2017. He accused Mr Welch-May, Miss Henderson, and Ms Mitchell of providing false evidence and seeking to pervert the course of justice. He alleged that the disciplinary action was being taken because he had raised protected concerns and that this amounted to victimisation.

320. Mr Cash replied to that letter on 17 March 2017. He told claimant that the issues which he had raised in his letter would be matters for Mr Todd as part of the disciplinary process.

321. On 29 March 2017 the claimant sent a further long letter to Mr Cash. This letter is over 9 pages with a number of attachments and annexes. In it the claimant quotes at length from the Elanjithara report and his meeting with Mr Perkins. He repeats his assertions that the disciplinary procedure should be postponed. He repeats the points raised in the letter of 16 March. The attachments include answers to Mr Perkins' welfare questions and a form of authority for an occupational health referral but again amended so it is only in provides authority in respect of Dr Elanjithara.

322. The substantive reply to that letter on 13 April 2017 directed the claimant to address information about health issues to Mr Perkins, rather than Mr Cash, and said that the issues relating to disciplinary charges should be raised with Mr Todd.

323. That short letter of 13 April prompted a further detailed letter from the claimant on 8 May 2017 largely covering the same ground as before and demanding a substantive response to issues previously raised in March and November. The claimant continued to object to Mr Todd considering the disciplinary action against him on the basis that Mr Todd was friends with Ms Mitchell and repeating his allegations of unlawful detriment and about criminal conspiracy.

324. On 9 May Mr Perkins wrote to the claimant to acknowledge the information provided to Mr Cash. His letter made clear that whilst the trade union was sympathetic to the seriousness of the claimant's medical situation and the fact he appeared to be too unwell to participate in the disciplinary process or give any indication of when he would be well enough to fit to work, a referral would still be made to BUPA. The claimant was warned that if he would not consent to that, a referral would be made to BUPA for advice on the basis of information in the trade unions' possession, although Mr Perkins is not explicit about what decision would

relate to. Mr Perkins confirmed that the trade union was prepared to make adjustments on a return to work but would not pay for private treatment as requested. Finally, he informed the claimant that his sick pay was to be reviewed.

325. The documents enclosed with that letter include the sickness absence and ill-health capability procedure including the procedure for termination of employment in case is long-term ill health and an occupational health referral seeking advice on the claimant' ill health and fitness for work including his fitness for the role of solicitor or another role, whether he was permanently unfit for his role or any other work and whether he would meet the criteria for an ill-health retirement or transfer. Advice was also sought for adjustments required for the disciplinary and a sickness capability procedure. The claimant was invited to a further sickness welfare meeting on 24 May 2017.

Mr Gilchrist's appointment

326. In the meantime, Mr Andy Gilchrist had been asked to chair a sickness absence and ill-health ability procedure. Mr Gilchrist was at the time the national education officer of the RMT and is a former general secretary of the Fire Brigades Union. He is a prominent trade unionist and in his evidence made clear to us that he considers is personal reputation to be an important matter to him and this would prove to be significant at the meeting with the claimant.

327. On 22 May 2017 the claimant wrote to the president of the RMT, Mr Hoyle, and the two assistant general secretaries, Mr Hedley, and Mr Lynch, to complain that the refusal to investigate his concerns as a member of the union amounted to a detriment and victimisation. This letter is 25 pages long with 106 pages of attachments and repeats the claimant allegations about matters to date in great detail. The letter was addressed to "Mr Paul McDonald", but we accept the recipient was Mr McDonnell in his role as chairman of the Wimbledon branch. The letter sought support for a complaint against Mr Cash.

328. On 22 May the claimant also wrote Mr Cash again to allege that he had been subjected to further discrimination through the letter of 12 May. The claimant repeated a number of allegations and concerns previously raised. The claimant alleged that the proposed welfare meeting on 24 May would be detrimental to his health and placed him at risk of further harm and he would not attend.

The attempts to organise an occupational health assessment

329. On 26 May 2017 Mr Perkins provided a response to the claimant's letter of 22 May dealing with assertions about the sickness absence process and the referrals to occupational health. Mr Perkins agreed that, as before, the welfare "meeting" was to be conducted in writing. Mr Perkins told the claimant that an occupational health referral had been arranged for him on 12 June 2017 in Manchester.

330. The claimant responded the same day. He refused to attend the occupational health meeting. He asserted that a doctor from Kirby Community Health Team would contact Mr Perkins to say that the claimant's health would be endangered by seeing a different doctor and asked for confirmation that Mr Perkins would not be contact him again until Mr Hoyle (on behalf of the NEC) had investigated his complaints. The claimant also told Mr Perkins that he did not have permission to obtain the claimant's medical records.

331. Mr Perkins sent a list of questions for the claimant to answer by way of welfare "meeting" on 26 May 2017.

332. On 26 May 2017 Mr Cash wrote to the Mr Hoyle, Mr Hedley, and Mr Lynch, copied to Mr Perkins, in relation to the emails and complaint from the claimant to ask them not to respond in light of ongoing legal issues and staffing matters.

333. The claimant's complaint to the RMT President was acknowledged by Mr Perkins in his guise as the union's constitutional manager, although the claimant objected to that on the basis that many of the complaints related to actions taken by Mr Perkins acting as the human resources manager .

334. On 19 June 2017 the claimant answered the welfare questions. He also sent a letter from Dr Regan from Kirkby Community Health Trust requesting that the claimant be seen by the Dr Elanjithara as the prospect of another initial assessment/history taking with a new psychiatrist was increasing the claimant's anxiety levels.

The Fourth Tribunal Claim is lodged

335. On 28 June 2017 the claimant lodged his fourth employment tribunal claim.

336. In the meantime, steps were taken to explore Dr Elanjithara's availability. The company who had provided his services told the trade union that the Dr Elanjithara was not taking on any further new work and it would not be possible to be seen by him. Advice was sought from BUPA and they confirmed that they could assess the claimant if they were provided with a copy of the Elanjithara report to avoid the need for the claimant to go through his previous history which seemed to Mr Perkins to address the concern raised by Dr Regan and this alternative was suggested to the claimant.

337. On 6 July 2017 there was a preliminary hearing before Employment Judge Sage in London to consider case management of the claimant's employment tribunal claims. The claimant made an application to postpone the final hearing which, at this stage of the proceedings, had been listed for 18 September 2017. Before us it has been alleged that because the respondents knew that the claimant would have difficulty with complying with case management orders because of his mental health while internal procedures were also continuing, the respondent was acting vexatiously. However, the claimant was represented at that hearing by

counsel and that no concerns were raised with the employment judge at the time the orders were made or after the hearing when counsel would have had the opportunity to discuss the orders of the claimant. This tribunal panel concluded that if there had been grounds to believe that the respondent was acting vexatiously that would have been raised by the claimant or his barrister at the time. Not only was the claimant represented by counsel he is, of course, also an experienced employment solicitor.

338. On 7 July 2017 the claimant wrote again to the RMT President and Assistant General Secretaries seeking a reply to his earlier letter and complaining about HR seeking to continue contact. He also referred to the tribunal case management hearing the previous day and alleged that the HR correspondence about Dr Elanjithara's availability amounted to victimisation. .

339. On 10 July 2017 Mr Perkins wrote to the claimant with the outcome of the sickness "welfare meeting" which had been undertaken as a paper exercise on 5 June. In the letter Mr Perkins related the suggestion for a way for the claimant to be assessed and referred to possible ill-health redeployment or retirement on health grounds. He also advised the claimant that if the trade union did not receive updated medical advice, he would have a decision on the evidence in his possession which might include referring the claimant to a sickness capability meeting "or some other action". The claimant was told that another BUPA referral meeting had been set for 24 July 2017.

340. The claimant replied on 11 July to say that he would not attend that appointment. He had contacted Dr Elanjithara himself and informed Mr Perkins that the doctor was concentrating on court work and that the claimant considered it a reasonable adjustment for the appointment to wait until Dr Elanjithara had completed his court duties and other work.

341. On 12 July Mr McDonnell wrote to Mr Cash and then on 19 July to Mr Cash and Mr Hoyle about the concerns raised by the Wimbledon branch relating to the claimant and objecting to the failure to refer matters to the NEC.

342. In the meantime, Mr Perkins had been in contact with Clinical Partners again in light of what he had been told by the claimant had been able to arrange for the claimant to see Dr Elanjithara. In due course the claimant was offered appointments on 2 or 5 August 2017.

343. On 19 July 2017 Mr Cash wrote to Mr McDonnell about the correspondence from Wimbledon branch. In that letter Mr Cash referred to the correspondence from the previous year and pointed out that in July and August 2016 he had told the branch that this was being dealt as an internal staffing matter and that no appeal had been lodged against that decision.

344. On 28 July the claimant wrote to Mr Hoyle, Mr Hedley, and Mr Lynch again. He referred to have made complaints under the rule book and the staff handbook,

raised concerns that these were not being investigated and called for Mr Cash and Ms Mitchell to be suspended and for Mr Hoyle to summon a special meeting of the NEC to consider his complaints.

345. Dr Elanjithara was instructed to provide a further medical report on the claimant on 26 July 2017. This report was to deal with various matters including his capability to undertake his current role as solicitor including alongside his colleagues, to assess if the claimant was permanently unfit for that role, to assess his fitness for a possible alternative roles, his fitness to attend a disciplinary hearing and participate in that procedure and his fitness to attend sickness capability procedure and to attend meetings about his sickness including a sickness and ill-health capability hearing.

346. On 26 July 2017 the claimant wrote again to Mr Perkins. He stated that he was willing to meet with Dr Elanjithara in Liverpool but that he was receiving "stepped up care" from a mental health nurse, that his medication had been increased and that it would not be appropriate for any referral to be made during a period of crisis because the doctor would not be able to get a fair assessment of a future capabilities. He suggested that the referral process should be paused until his grievances under the staff handbook and rule book against Mr Cash had been investigated.

347. On 27 July 2017 the claimant was informed that the sickness absence procedures would not be suspended while his complaint to the President and the Assistant General Secretaries was considered as the processes would run concurrently. An appointment in Liverpool with Dr Elanjithara would go ahead on 2 August and the claimant was advised to raise matters in relation to his crisis in that setting.

348. On 28 July 2017 Mr Cash wrote to the claimant in relation to his letter of 22 May 17 to the president and assistant general secretaries. The letter informed the claimant that his complaints would not be considered under the Rule Book because they related to *"events and circumstances in the course of your employment as member of staff of the union rather than as a member of the union"*. He was told that individual staffing issues are not matters for the President or the NEC. The claimant was told that if he was dissatisfied with that he had the right to submit an appeal to the NEC via his branch.

349. On 28 July the claimant also wrote to Mr Perkins again. He again referred to being on "stepped up care" and said that he was an "suicide watch" and that he would not be well enough to attend the occupational health appointment on 2 August. The claimant gave Mr Perkins permission to contact Kirkby Community Mental Health team and then went on to raise concerns that he was only being required to attend occupational health and being subjected to capability and disciplinary procedures because he had raised protected concerns and issued tribunal proceedings. He then outlined some measures which he thought would be

reasonable adjustments and raised further concerns about his complaints as a trade union member were being handled.

350. On 28 July 2017 the claimant wrote to Mr Perkins stating that he considered his health would only improve if the disciplinary action was over and that he wished to attend a hearing in London over 2 days in October.

351. The claimant had also contacted the President and the assistant general secretaries seeking their assurance that the letter from Mr Cash had been sent with their agreement. Mr Cash wrote to the claimant to reassure him about on 31 July 2017.

352. On 2 August Mr Perkins wrote to the claimant to reply to the correspondence about the disciplinary procedure. Mr Perkins noted that the claimant wanted to go ahead with the disciplinary hearing but stated that a disciplinary hearing could not go ahead after such a long period of absence, especially in light of the information provided about the claimant's crisis. Mr Perkins stated that the capability procedure would proceed and warned the claimant that the union would make decisions in absence of up-to-date medical information if necessary.

353. That letter was not well received by the claimant. It prompted a response on 3 August repeating many of the same allegations as before, making clear that the claimant thought to the approach was unreasonable and again repeating his assertion that the disciplinary hearing should go ahead.

354. On 3 August 2017 the claimant also wrote a further long letter to Mr Cash expressing his dissatisfaction with Mr Cash's letters of 28 and 31 July and submitted a letter to the RMT's Council of Executives setting out an appeal to the NEC in relation to how his complaint under the union rule book had been handled. The appeal was also sent to the Wimbledon branch

355. On behalf of the Wimbledon branch, Mr McDonnell wrote to Mr Cash submitting to him their complaint with reference to the complaint made on 22 July 2017 and requiring that this be placed before the NEC.

356. On 10 August 2017 Mr Perkins wrote to the claimant to disagree with the various assertions made by the claimant in last letter and to inform of that a further appointment has been made to see Dr Elanjithara on 16 August in Liverpool. In response to that the claimant wrote to Mr Cash to ask him to instruct Mr Perkins to arrange an occasional health appointment after 27 September 2017 and raising a number of questions about the handling of the processes to date.

357. The various senior officials the claimant had sought to involve in the process all declined to become involved and, in Mr Hedley's words, directed the claimant to the "recognised processes".

358. Mr Perkins again replied to the claimant on 18 August. After explaining why the union had decided to proceed with the disciplinary process, Mr Perkins informed the claimant that

> Currently, the Union is not in possession of appropriate medical advice which indicates the prospect of you returning to work in the foreseeable future. It is therefore my view that I shall need to refer this matter to a formal meeting under rhe Union's Sickness Absence and Ill Health Capability Policy (a copy is enclosed for your reference). The relevant section of the policy in this instance is headed 'Termination of *employment -- procedure in cases of long term ill health"* The formal meeting would be chaired by a Senior Manager who would be responsible for any decision reached. Karen Mitchell, as your Manager; would be required to attend as will I due to my involvement with the management of your sickness absence.

359. This letter prompted the claimant to write to Mr Cash and Mr Perkins on 18 August 2017 to complain that was he was being subjected to an act of discrimination and detriment for raising protected concerns.

Attempts to organise a capability hearing

360. On 24 August 2017, the claimant was invited to attend a sickness capability meeting on 7 September 2019 to consider whether he was fit to perform the role of solicitor by reason of sickness and to consider various possible actions including the termination of his employment, ill health retirement or a transfer. He was informed that the matter would be considered by Mr Andy Gilchrist.

361. In reply the claimant asked for that hearing to delayed until after 27 September and that Ms Mitchell not attend the hearing. He also objected to Mr Gilchrist conducting the hearing because, as former general secretary of the Fire Brigade Union, he had had regular contact with Ms Mitchell, and they had socialised together.

362. On 31 August 2017 Mr Barnor wrote to the claimant to inform him that the objection to Mr Gilchrist was noted but that he would remain the hearing officer. The following day Mr Gilchrist wrote to refuse to postpone meeting on 7 September.

363. At the time a tribunal hearing was still listed to hear the claimant's complaints on 18 September 2017. In his witness statement the claimant said this about the capability hearing *"I had to read bundles, I had to prepare my own bundles, arrange witnesses and representation and prepare a statement and attend a hearing listed for the 7th of September 2017, eleven days before the substantive Employment Tribunal hearing. The Respondents and Thompsons solicitors actions they were deliberately placing me under pressure, causing a deterioration in health and gaining a litigation advantage, have no doubt they affected my health and this was their intention because of the approaching Employment Tribunal hearing. I could not prepare for two hearings due to my illness and the Respondents and their legal advisers Thompsons Solicitors were well aware of this due to the medical evidence they already had in their possession".*

364. The claimant raised this issue in the course of his cross examination of respondent witnesses. Mr Gilchrist denied that he had any knowledge of the employment tribunal hearing and told the tribunal that what he took into account is reflected in his correspondence. It seemed somewhat unlikely to the tribunal panel that this had not been raised by the personnel team or discussed in what we were told is a close-knit management team. However, there is no suggestion in any of the claimant's correspondence to the union at the time that the reason he could not prepare for the capability hearing was the forthcoming tribunal hearing.

365. The panel were concerned by Mr Gilchrist's response to the request for a postponement in his letter of 1 September. In terms of the claimant's unfitness for hearing he said that *"I note that you contend you are unfit to read the management document bundles, but I do not appear to have an up-to-date occupational health assessment, or other medical evidence that supports your contention. Consequently, I am unable to conclude that you are unfit to participate in the sickness capability meeting on 7th September 2017, but I am happy to revisit this issue if you provide additional medical evidence".*

366. We considered that Mr Gilchrist's approach to this showed a lack of both sympathy and empathy and little regard to good HR practice. Mr Gilchrist had various letters from the claimant's won medical care team explaining the severity of his mental health issues at this time and Dr Elanjithara's report, although somewhat out of date by this stage, referred to a suicide risk. However, Mr Gilchrist did agree "as reasonable adjustment" to delay the meeting until 13 September to give more preparation time.

367. In terms of Mr Gilchrist's comments about the claimant's fitness to attend the hearing, there does not appear to be any suggestion that the respondent did not believe that the claimant was unwell. That was why the trade union was considering termination of employment and one the reasons given by Mr Perkins for not resuming the disciplinary process was that the claimant was on stepped up care and suicide watch. We were troubled by Mr Gilchrist's somewhat hostile tone, both in his correspondence at the time and in his evidence before us.

368. The claimant sent a further letter to Mr Perkins on 5 September 2017. This largely repeats the concerns already raised but does also contain a letter from the claimant's GP – a letter dated 25 August 2017 from Dr Miray Marcos from Millbrook Medical Centre, requesting that the capability meeting be postponed until after 27 September because of the claimant's mental health.

369. The GP's letter was also sent to Mr Gilchrist with a letter alleging that Mr Gilchrist would be acting in breach of the rules of natural justice if he acted as the hearing officer in light of his friendship with Ms Mitchell and raising a number of other matters including repeating his objection to Ms Mitchell attending the meeting.

370. Mr Gilchrist replied to that letter on 7 September. He rejected the objections to him acting as the hearing officer and also rejected the suggestion that the claimant had shown that he was not fit to attend the capability hearing as *follows "I …note that it [the GP letter] does not state that you are unfit to attend the rescheduled hearing set for Wednesday, 13th September 2017. The only other medical information that I am aware of is in the management document bundle and so if you have additional medical evidence that you want me to consider, please send this to me by return of post."* He went to invite the claimant to attend a meeting with BUPA.

371. Whilst it is true that the GP had not said that the claimant was unfit to attend the capability hearing in terms, he had said this

"This is to confirm that Mr Edwards is currently on Stepped Up Care programme under the mental health team for deterioration in his mental health. His medications were increased recently and can take 6 weeks to be effective and show improvement in his mental health. He Is under regular and close review of the psychiatrist here at present.

I would be grateful if the Sickness Capability meeting is postponed until after the 27th of September"

372. On 11 September 2017 the claimant sent a further letter addressed to Mr Perkins, Mr Gilchrist and others which repeats the claimant's concerns and reminds the union of the medical evidence that have received to date about the claimant. This letter does refer to the employment tribunal hearing and in particular to evidence which had been submitted in support of an application for an adjournment to that hearing which had referred to the claimant as being "psychiatrically unstable" and also encloses evidence that the claimant was having a scan to investigate the possibility of brain scan on 13 September at Aintree hospital.

373. The claimant was only informed on the morning of 13 September that the hearing that afternoon would not be going ahead. However, in a letter sent on the same date Mr Gilchrist continued to insist that he would need medical evidence that the claimant was not fit to attend the sickness capability meeting. In relation to the attendance of Ms Mitchell, Mr Gilchrist told the claimant that it was up to management who they called as witnesses but if he presented medical evidence that he could not be present while she gave her evidence, arrangements could be made to accommodate that.

Meeting with the staff representatives about terminating the claimant's sick pay

374. On 14 September Mr Perkins attended a meeting with the union's staff representatives to discuss the sick pay arrangements for the claimant. In

preparation for that a report was prepared setting out the costs of absence. By this time the claimant had been absent for almost 2 years. The gross salary costs of his salary during that time has been £93,918.16 and the ongoing cost of locum cover amounted to around £52,000 per annum.

375. The position was noted by Mick Cash and two staff representatives who attended the meeting, and they signed the business case report to confirm that Mr Perkins had discussed the matter with them. Mr Perkins told us that the consideration of and decision to reduce the claimant's occupational sick pay was consistent with the unions usual processes and pointed to the fact the sick pay of another employee, with the same minimum guideline entitlement as the claimant, was ceased in May 2017 after approximately 18 months' absence.

376. On 18 September 2017 a further long letter was sent to the claimant responding to his concerns and in light of the request that the capability hearing been delayed until after 27 September 2022 offering him a number of dates in md-October.

377. On 18 September 2017, Mr Perkins also wrote to the claimant to inform him that his occupational sick pay would cease on 9 November 2017. Mr Perkins told the claimant that his minimum entitlement was to 120 days of full pay and that he had received 359 days, or 71.8 weeks, above that minimum entitlement. The claimant replied to say that he regarded that as another detriment and act of discrimination.

378. On 25 September 2017 the claimant confirmed to Mr Gilchrist that he could attend on any of the advised dates for a capability hearing. He continued to make clear his objections to the process more generally. He also repeated those concerns and allegations to Mr Perkins and referred to other concerns and complaints arising out of the various documents which he had raised previously.

379. On 25 September the claimant also wrote to the NEC again to reassert the grievances about Mr Cash and Ms Mitchell and to call for the current procedures to be halted until the NEC had considered his complaints. He also wrote to Mr Cash repeating his allegations and asserting that his complaints under the unions' Rule Book had not been addressed.

380. In early October it became necessary to rearrange the capability hearing because the claimant's trade union representative was unavailable. In the meantime, Mr Gilchrist and the claimant continued to exchange correspondence about the capability procedure. Something of an impasse was reached, with Mr Gilchrist insisting that the claimant should be seen by BUPA and the claimant refusing on the basis of his health and insisting that the union should contact Kirby Mental Health Team. The capability hearing was eventually rearranged for 13 October 2017, but the claimant also continued to insist that the disciplinary process should be completed.

The first capability hearing, held on 13 October 2017

381. The capability hearing went ahead on 13 October. The hearing was attended by the claimant and his representative, Mr Nixon, Mr Gilchrist accompanied by Mr Barnor to advise him, and a notetaker. Mr Perkins attended to present the management case. Mr Gilchrist told that in his view the claimant had two management questions to answer, and the subsequent structure of the meeting would depend on whether these were admitted or disputed by the claimant and whether it would be necassry for Mr Perkins to present the management case. The claimant and Mr Nixon objected to that process and argued it was consistent with the RMT capability procedure, particularly in relation to the medical evidence relied upon.

382. Mr Gilchrist tried to push forward with the hearing, but the claimant continued to raise points of order and issues about his sick pay having been stopped. Mr Gilchrist paused the meeting to take advice and then tried to deal with the procedural points raised. In relation to the absence of medical evidence he told the claimant that all reasonable steps to get that evidence had been exhausted and that his level of sickness was unacceptable. Mr Gilchrist told the claimant that in his view the issues were relatively straightforward. The claimant had been off work for almost two years and there was no up-to-date medical evidence showing that he would be able to return in the foreseeable future. The claimant and his representative continued to raised objections and the claimant pointed out how unwell he had been and said that he was willing to attend a meeting for an updated occupational health report, but he needed 6 weeks for the increased medication to take effect.

383. The claimant insisted that because he had outstanding grievances against Ms Mitchell and Mr Cash and in light of Mr Gilchrist's close friendship with Ms Mitchell, Mr Gilchrist could not be impartial.

384. The claimant did accept that his level of attendance was not acceptable, but in terms of his fitness to continue in the role of solicitor he insisted that an up-to- date occupational health report was required, Mr Perkins started to present the management case, but it was not possible to complete the hearing and it was adjourned.

385. The next hearing date was scheduled for 26 October but after the hearing the claimant told Mr Gilchrist by letter that the hearing had had a detrimental impact on his health and asked for the hearing not be reconvened until after 19 November. The claimant claimed that Mr Gilchrist's conduct during the hearing showed that he did not intend to be fair or impartial.

386. On 20 October the claimant emailed Mr Perkins to lodge a grievance against RMT procedures and identified a further 6 matters he said should be added to the list of grievances which should be placed before the NEC. He again referred to the disciplinary hearing going head. The claimant asserted that his pay should not be

stopped because there were outstanding procedures including a disciplinary procedure for gross misconduct. He also sent numerous emails to Mr Gilchrist reiterating his objections to the process and to Mr Gilchrist acting as the capability officer.

387. The capability procedure hearing was eventually rearranged again for 2 and 3 November 2022 although the claimant had pressed for it to be arranged after 19 November. On 1 November the claimant again emailed the RMT President, the Assistant General Secretaries, and the Council of Executives to raise concerns about Mr Cash and in particular the fact that Mr Cash would not attend the capability hearing as a witness. The concerns he raised were also supported in an email from Mr Nixon the trade union representative from Unite the union. Various emails continued to be exchanged between the claimant and Mr Perkins continued throughout 1 November.

The capability hearing on 2 November 2017

388. It is clear that capability hearing on 2 November was a difficult one. From the outset the claimant insisted that Mr Cash should attend the meeting as a witness. He told Mr Gilchrist that he had been very distressed by correspondence from Mr Perkins and that he had not slept. He told Mr Gilchrist that in light of the concerns he had raised with the senior officers the process should be referred to the NEC and Mr Gilchrist should halt the process.

389. Mr Gilchrist refused this, and Mr Perkins continued to present the management case. The claimant and Mr Nixon wanted to ask questions, but Mr Gilchrist refused that and said that questions would be allowed at the end. Ms Mitchell attended to give evidence about the impact that claimant's absence had on the legal department. The claimant and Mr Nixon insisted that they should be allowed to ask questions about the alleged assault because the claimant said that was the reason for his absence. The claimant suggested that Mr Gilchrist would not allow questions because he was concerned that Ms Mitchell would incriminate herself and that pointed to his lack of impartiality.

390. Mr Gilchrist refused to allow this. In his view these were matters which had been investigated by Mr Croy and were matters relevant to the disciplinary process not the capability considerations. Mr Gilchrist told us that he had tried to keep the focus of the hearing on these capability issues but that the claimant had continued to interrupt proceedings.

391. This led in particular to one allegation which we need to consider specifically. Mr Gilchrist told us that he tried to reassure the claimant that he was capable of being objective. When the claimant asserted that Mr Gilchrist was acting on the instructions of Mr Cash and said, "You might want to bury it because you've instructed by Mr Cash to this; I've got claims against him", Mr Gilchrist reacted by saying that was outrageous. The allegations went back and forth and ended with Mr Gilchrist saying, "I sincerely hope it's not repeated outside of these four walls".

392. The claimant said this was a threat and he later complained about this and raised it as issue supporting his assertion that Mr Gilchrist should stand down. In his evidence to us Mr Gilchrist denied being threatening but did tell us that he considered these comments to be defamatory and that in the past he had taken legal proceedings for defamation where he felt it was appropriate. Mr Gilchrist disputed that he acted inappropriately, but it clear that the proceedings at this stage had become very heated. It appeared to this panel that this comment was t motivated by Mr Gilchrist's desire to protect his own reputation and was not related to anything else. The transcript suggests to the panel that both Mr Gilchrist and the claimant were close to losing their tempers at this stage. Both say that about the other whist denying it of themselves. The panel found the "four walls" comments to be misjudged but also accept that the claimant was acting in somewhat provocative and difficult manner and was repeatedly making allegations against the union and its officials which, based on the evidence before us, he had no grounds to make.

393. During the questioning of Ms Mitchell some questions about the claimant's sickness absence and his sickness absence before the November 2015 incident. In his statement the claimant says, "that Ms Mitchell failed to say until pressed that I had no sickness absence, Ms Mitchell in being reluctant to admit this subjected me to a detriment for the protected concerns I had raised against the Third Respondent including the Employment Tribunal claims submitted." The notes suggest that Ms Mitchell showed some reticence, but the panel accepted that by this time, which was nearly 2 years after the claimant had been last in the office, she simply could do not recall what his sickness had been and had not expected to be asked about this. The panel accepted Ms Mitchell's evidence about that and found the significance attached to this exchange by the claimant somewhat difficult to follow.

394. There was a further disagreement between Ms Mitchell and the claimant about whether he had asked to be able to work in Liverpool as an adjustment and then things became even more heated the claimant sought to raise matters related to his allegations about Ms Mitchell. She objected to answering those and Mr Gilchrist intervened to ask for that line of questioning to stop. Ms Mitchell said she found the claimant to be intimidating and something of a standoff developed between the claimant and Mr Gilchrist and Mr Barnor.

395. The hearing was eventually adjourned, and Mr Gilchrist told the claimant that he was not entitled to badger witnesses. The claimant protested vociferously about that and this turned into something of an argument. Mr Gilchrist said that he would chair the meeting in the way that he felt was appropriate and the claimant and Mr Nixon objected. Eventually Mr Gilchrist told the claimant and Mr Nixon that all future questions would have to be submitted in writing because he felt the cross-examination of Ms Mitchell had not been acceptable and on that the basis the hearing the next day would be postponed for the claimant to submit questions in writing.

After the 2 November meeting

Final correspondence about the branch complaint

396. On 6 November Mr Cash wrote to Mr McDonnell about the outstanding appeal about his decision not to place the branch resolution before the NEC. He pointed out that Mr McDonnell had acknowledged that he could not be sure that appeal email had ever been sent but also highlights that in any event a union resolution of 2015 imposes a number of requirements

"Format of Resolutions

Resolutions must be presented in the appropriate format. Before a resolution appears on the agenda for consideration, it must be sent with the signatures of the Branch Secretary and Chair, the branch stamp and the date of the meeting at which the resolution was adopted and recorded. Resolutions may still be sent electronically – i.e. scanned, or by post but they must contain these details as authentication."

Further in September 2017 the NEC had determined that "the submission of resolutions to the NEC will only be accepted if they contain the signature of the Chair and Secretary. Emails alone are not acceptable."

397. Mr Cash informed Mr McDonnell that if the branch did wish to appeal his decision the resolution would have to be supplied under the rules and "using established practice". Mr McDonnell confirmed in his evidence that this was never done. He argued that he had submitted resolutions before without following these requirements but significantly he also accepted that a resolution meeting the requirements set out above had never been submitted in the claimant's case.

398. On 7 November 2017 the claimant wrote Mr Perkins, Mr Hoyle, Mr Hedley, Mr Lynch, and the executive council again. This letter appears to cover much of the same ground as previously and alleged that the claimant was still being subject to detriments.

Mr Edwards tells Mr Perkins he will need to hand back flat keys

399. At round this time, the claimant also entered into correspondence with Mr Perkins about the flat he still rented from them at a subsided rent. He told Mr Perkins if his sick pay was ceasing he would have to hand back the keys to the flat. In reply Mr Perkins pointed out that the claimant had enjoyed a substantially subsided rent, not least because the claimant had not agreed to a rent increase since 2014 and that had not been pursued by the union. Mr Perkins stressed that the claimant was free to stay until the end of his tenancy if he chose not to renew and that he was not being forced to leave. Mr Perkins also agreed with the claimant that after the end of his sick pay, if the tenancy agreement was ended that

the union would pay for accommodation and meet travel costs for him and his mother for any London meetings.

400. The claimant continued to express his disagreement with his sick pay being terminated, in his words "without consultation" and while there were outstanding capability and disciplinary procedures. He expressed in strong terms his view that the pay cut was a detriment and connected to his grievances and the tribunal proceedings. He continued to press his case that the disciplinary hearing should be heard and said that both to Mr Perkins and to the President and other members of the executive. He also argued that the removal of pay and, in his words, "forcing the claimant to leave the flat" amounted to a failure to make reasonable adjustments.

401. The outstanding elements of capability hearing were eventually re-arranged for 20 and 21 November 2017. As that hearing approached the claimant entered into correspondence with Mr Barnor, the HR consultant assigned to assist Mr Gilchrist with the capability process, about the questioning process for Ms Mitchell and his assertion that he had been threatened by Mr Gilchrist. In light of what had happened at the last meeting the claimant was told that he must agree that his questions would be put by his representative Mr Nixon. When the claimant and Mr Nixon did not agree to that, they were told that future questioning of witness would be undertaken though written questions. The claimant responded by reiterating his allegation that Mr Gilchrist had threatened him and should recuse himself.

The final capability hearing on 20 November 2022

402. When the capability hearing was reconvened on 20 November 2017, the claimant reiterated his insistence that he should have the opportunity to have the outstanding matters addressed and particularly that he should be able to challenge Ms Mitchell about what he said were the reasons for his absence and his inability to return. The claimant tried to hand Mr Gilchrist a letter of complaint which he refused to accept. He repeated his allegation that Mr Gilchrist had threatened him. Disagreement about the process continued but eventually the hearing did get underway. The claimant was allowed to ask Mr Perkins questions. The claimant began asking questions about the process for obtaining permission to contact occupational health but as things become fraught once more and as the meeting had been going on for some-time, it was adjourned until the next day.

403. The following day the claimant raised the issue of his letter of complaint about Mr Gilchrist again. Reference was made to a letter of complaint which had been sent the night before by the claimant. In his statement Mr Gilchrist was candid that he was uneasy about how to proceed as concerns had been raised about him and Mr Barnor, which the claimant and Mr Nixon were pressing to be responded to. The claimant became very upset and distressed, and Mr Nixon said that the meetings were adversely affecting the claimant's mental health. The claimant told Mr Gilchrist that he has not slept for two days and he could not take any more. At this point Mr Gilchrist decided to adjourn the hearing

404. In a letter the following day addressed to Mr Nixon rather than the claimant, Mr Gilchrist explained that he decided that that the claimant should be assessed by BUPA to assess his fitness to attend the capability hearings or that Mr Nixon should attend alone to present the claimant's case.

405. We accept that by this point Mr Gilchrist was very concerned about the claimant's mental health. The claimant objects to what Mr Gilchrist said and relies upon that and what had happened at the last capability hearing as the "last straw". We accept however that in light of his concerns at this final point, Mr Gilchrist made sensible and appropriate suggestions. The capability hearing process had already been very extended. A decision needed to be taken but we accept that it had become clear that participating in a hearing was not in the interests of the claimant's health.

The claimant's resignation

406. On 24 November the claimant wrote to Mr Hoyle, Mr Hedley, Mr Lynch, the executive council, and Mr Perkins to tell them that he was resigning with immediate effect because there was breakdown in mutual trust and confidence. He cited Mr Gilchrist seeking to refer him to BUPA rather than seeking advice from Kirby Mental Health Community Centre, his refusal to stand down as the hearing officer the failure of anyone at RMT to intervene on his behalf as the last straw. His letter of resignation also listed his various allegations that he had been assault, of attempts to pervert the course of justice, of discrimination, victimisation and being subject to detriments by Mr Cash, Ms Mitchell, Mr Gilchrist, and others.

407. In the letter the claimant also asserted that "*Mr Cash and the RMT…… refused to allow me to retain my RMT flat until the internal procedures are completed….*" Although this is minor point, for the tribunal panel felt this is significant in terms of how we assessed the claimant's evidence. The claimant had approached Mr Perkins to ask that he be allowed to hand back his keys and terminate the tenancy on the flat early (that would of course require the consent of the trade union). Mr Perkins had been at pains to say that the union would agree to that if the claimant wished but it was a matter for him. As a panel we think it is possible that by this stage the claimant had convinced himself that the union had *"refused to allow him to retain*" the flat but the assertion was demonstrably untrue.

The Fifth Tribunal Claim

408. The fifth Tribunal claim was lodged on 19 December 2017.

DISCUSSION AND CONCLUSIONS

Preliminary matters

409. There is an initial point it is sensible for us to address. We did not hear evidence from Mr Cash, Mr Lynch, Mr Hoyle, or Mr Hedley. We understand that the claimant

to be critical of that and that he suggests that is something we should draw an adverse inference from to show that he has been subject to discrimination and detriments.

410. We do not consider that this is something we should draw an adverse inference about alone in determining these claims. It is for the claimant to present his case and to show facts from which we could draw an inference that he has been subject to discrimination or an unlawful detriment. We have taken into account the lack of direct evidence from the respondents where relevant in determining what we found had happened.

411. In their oral submissions to us, both the claimant and Mr Panesar agreed that this was not a case which turns on fine points of the law but rather it is case which turns on whose account we prefer. Both presented their respective cases in their oral submissions in stark terms asserting that the other side was lying.

412. As our findings of facts explain, we concluded that the claimant was not always reliable in his evidence. There is an example highlighted at the end of our factual findings about whether the claimant had been told by the union that he could not retain his flat, something the claimant said in his resignation letter. That was not true. It had been the claimant who had wanted to give up his flat and relinquish his tenancy early because he could no longer afford it. It is a relatively trivial matter when considered against the main allegations at the heart of this case, but it is an example of something where the panel could be sure that what the claimant said about something was simply not true. Significantly this was not a question of fading memory which may lead to inconsistencies in accounts over time. The claimant had presented an untruthful account of a relatively straightforward matter and after he had said it once, that untruthful account was repeated several times and had been repeated to his trade union representative who also asserted this had happened. The impression we gained overall of the claimant was of someone who is capable of convincing himself that something has happened even if that it is not true.

413. We have taken some time to explain our findings of fact in this case in the previous section setting out our findings of fact because it is case where so many of the facts are in dispute and because so many factual disputes are of such significant. Those conclusions are what underpin our conclusions.

The significance of our findings of fact about the alleged assaults and the RW matter

414. As already observed, this was a case which essentially came down to the claimant' word against that of Ms Mitchell and Ms Henderson in terms of events for which there is little, or only disputed, corroboration. For the reasons explained in our factual findings we found, on the balance of probabilities, the claimant had not been assaulted by Ms Mitchell nor had he overheard her give instructions to Ms Henderson to pervert the course of justice.

415. It is not in dispute that the event which led directly to this claim was the confrontation between the claimant and Ms Mitchell on 10 November 2015. Ms Mitchell had raised matters of potential professional misconduct. That much is not in dispute. This led to an argument and the claimant left the office and subsequently became unwell following that confrontation between them about whether he had overstepped the mark in acting as a workplace companion and that, in turn, led the claimant to take extended time off work for stress.

416. We rejected the suggestion by the claimant that the fact that he went off ill suffering with stress is evidence that his account must be truthful. We have no doubt that this situation would be highly stressful for the claimant, whether he was culpable or not. The claimant is a solicitor and he had been accused of professional misconduct by Ms Mitchell. That in itself would be stressful. The claimant was also offended that he had been accused of such misconduct in acting as KH's representative when, based on his past experience in private practice, he believed that he had a right to represent colleagues in workplace disputes just as he had when he had been a shop steward. We accepted Mr Panesar's submissions and concluded that the timing of the allegations of assault and in relation to the RW matter were attempts by the claimant, in essence, to distract from the criticism of him about his professional conduct.

417. Turning then to the claims as set out in the list of issues, we made the following preliminary findings which are crucial to the matters set out in the list of issues:

Had the claimant made a protected disclosure under s43A of the Employment Rights Act?

418. The claimant accepted before us that if we concluded as matter of fact that he had not been assaulted, his disclosure about that would not fall within s43A of the Employment Rights Act because he could not have a reasonable belief that his disclosures about that tended to show a breach of the relevant legal obligations. We agree that must be correct.

419. Based on our findings of fact, we find that the claimant had not made a protected disclosure.

Had the claimant shown that he was in serious and imminent danger? S44 Employment Rights Act?

420. The claimant also accepted in cross-examination that if he had been not been assaulted by Ms Mitchell when he left the office on 10 November 2015 he cannot have done so because he believed himself to be in serious and imminent danger.

421. On the basis of the evidence available to us, we concluded that the claimant had not been assaulted. In consequence we find that the claims under s44 of the Employment Rights Act must also fail. We concluded that the claimant left the office on 10 November because he was angry. It was a sensible thing for him to

have done in the circumstances, but it was not because he believed that he was in any danger. It follows that all of his claims under s44 must also fail.

Had the claimant shown that he had done a protected act for the purposes of the Equality Act in relation to RW?

422. The claimant also accepted that if we concluded as a matter of fact that he had not overheard Ms Mitchell instruct Ms Henderson to pervert the course of justice in relation to RW, he cannot have done a protected act when he later raised concerns, grievances, and tribunal proceedings about that.

423. He also conceded that if this incident had not happened, if he said that it had, that would have been an act of bad faith (accepting of course that he insisted that it had happened).

424. On the basis of the evidence available to us, we concluded that that the claimant had not overheard Ms Mitchell instruct Ms Henderson to pervert the course of justice and we find that he had acted in bad faith when he said that he had. Accordingly, we accept the submissions of Mr Panesar that the claimant does not fall within the scope of s27 of the Equality Act. In consequence of the claimant's race victimisation claims must fail.

Implications for the list of issues

425. These conclusions mean that a substantial number of the claims in the list of issues cannot succeed. However, this still leaves a number of claims – the claims that the claimant was subject to a detriment under s12 of the Employment Relations Act 1999, his disability discrimination claims, and his claim that he was constructively dismissed and that that dismissal was both unfair under s94 of the Employment Rights Act and discriminatory under the Equality Act.

Workplace Companion Claims: s12 Employment Relations Act 1999 ("ERelA")

426. In relation to the claimant's claims about being subjected to a detriment because he was a workplace companion, Mr Panesar submitted that the claimant could not claim the protection of the relevant statutory provisions because he never was a workplace companion because the grievance hearing for KH never went ahead. Mr Panesar argues that that any detriment the claimant was subject to was because he had acted as a representative for KH, including in seeking to negotiate an outcome in correspondence with Mr Perkins which the respondent regarded as him acting in conflict with his role as an in-house solicitor.

427. The claimant denies that he acted as anything other than a workplace companion. He told us that he had not engaged KH as a client, had not provided him with terms of engagement and had not provided KH with any advice about time limits. In those circumstances he denied that he gave legal advice and that any

conflict of interest as a solicitor had arisen and he argued that s10 gives him an unfettered right to act as a companion.

428. We have been referred to the decision in *Toal and anor v GB Oils Ltd* 2013 IRLR 696, EAT. This is a case which resulted in the relevant ACAS Code being updated in March 2015. It is a case brought by an employee denied their chosen companion, but it contains a careful consideration of the extent of the law which applies equally to companions. The Honourable Mr Justice Mitting made the following observations about section 10 in his judgment…

"(para 11) …To trigger the right, there must first of all be an invitation by the employer to attend a disciplinary or grievance hearing. The mere raising of grievance by an employee does not suffice to trigger the right. What is required is either a requirement or an invitation to attend a hearing."

429. Pausing there, at the relevant time KH had been invited to a grievance hearing and so we accept that the right at s10 had been engaged in relation to the claimant.

430. Mr Justice Mitting continues

"12. The employee must request to be accompanied at the hearing… The request must, however, be reasonable. Precisely why Parliament put in a qualification requiring that the request be reasonable is not entirely clear to us….

13. Section 10(2)(a) requires the employer to permit the worker to be accompanied at the hearing by a companion, hence the word 'must' in the subsection. This requirement is subject to only one express exception, which is contained in section 15 of the 1999 Act for persons employed by the Security Service, the SIS or GCHQ.

14. The companion is to be chosen by the worker, not by the employer, but the companion must come from within one of the three categories of individuals identified in subsection 3."

…

16. We will first take Mr Gloag's first point that the word 'reasonably' in section 10(1)(b) applies both to the choice of representative and to the requirement to be accompanied. Like the Tribunal, we reject this submission. We agree with the Tribunal that Parliament could easily have provided by express words for requiring the choice of companion to be reasonable, as well as the requirement to be accompanied. The fact that it did not do so, and then in the next subsection obliged an employer to permit the worker to be accompanied by a companion chosen by the worker, is a strong counter indicator to Mr Gloag's contention. It is easy to understand why Parliament would have legislated as it did. This is a right conferred upon the worker. It is possible to conceive of circumstances in which an employer might wish to interfere with the exercise of that right without proper reason in a manner that would put the worker at a disadvantage. Consequently, Parliament

has, in our view, legislated for the choice to be that of the worker, subject only to the safeguards set out in subsection 3 as to the identity or the class of person who might be available to be a companion."

431. We accept that s10 ERelA, as confirmed by *Toal*, gave employees of the RMT the right to choose the claimant to act as a workplace companion. Parliament could have chosen to exclude employees who would have a professional conflict of interest from acting as a companion but has chosen not to. We therefore accept the claimant's submissions in that regard.

432. We reject Mr Panesar's argument that the claimant does not fall within scope of the protection of s12 because the grievance hearing did not go ahead. An invitation to a grievance hearing had been issued. S10 applies if a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he has exercised or sought to exercise the right under section 10(2) or (4), or accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

433. We find that this means that the companion does not need to have actually attended a hearing, it is enough that someone has sought to have them as their companion. That is the position which applied when Mr Perkins and the claimant exchanged emails about KH. Accordingly, we accepted that the claimant fell within the potential scope of the legislation protecting workplace companions.

434. The first 9 pages of the claimant's submissions, pages 23 to 27, and page 49 of his submissions relate to these claims, although in terms of the legal issues the claimant's legal arguments are not always entirely clear. In the first few pages there is a certain conflation of the allegations about the alleged assaults and the workplace companion and in the main the submissions tend to concentrate on what the claimant says the detriments were, rather than why he says they were more than trivially influenced by the companion issue. Given there are overlapping claims, for example some of these alleged detriments are also alleged to be detriments on other grounds, these are not easy issues to unravel but the panel did its best.

435. The claimant does say this to address the fact that the respondent argued that the basis for the respondent's concerns was that he was in breach of his professional obligations:

The Respondents overarching issue assertion that the Claimant was not subjected to any alleged detriment for being a WPC and that the Respondents considered there was a conflict

The RMT's case is that they did not subject the Claimant to a detriment for being a workplace companion but tried to stop him being a workplace companion because he allowed himself to be in a position of conflict being a RMT solicitor – the legal

question is can one be properly separable from the other: for example a racist conduct which is also whistleblowing, the racist conduct is treated as properly factually separable from the disclosure

Case law Panayiotou v Hampshire Police 2014 IRLR 500

Shinwari v Vue Entertainment ltd (EAT unreported 12th March 2015)

In this case the Respondents objecting to the Claimant to being a workplace companion and the Respondent's case that the Claimant was putting him in a place of conflict is not an objection to distinct and separate conduct: the reason for the Respondent's objection is the Claimant being a workplace companion in the first place.

To allow the Respondents defence would be tantamount to permitting a defence to S12 Employment Relations Act 1999 in the grounds of justification. S12 of the Employment Relations Act 1999 is expressed in absolute terms and does not allow for such a defence".

436. The case of *Panayiotou v Kernaghan & Anor* UKEAT/0436/13/RN is an appeal against a ruling that the claimant had been dismissed because of his long- term absence, together with the manner in which he had pursued his complaints, and not because he had made protected disclosures. The claimant was a policeman. During the course of his employment, Mr P made a number of protected disclosures as defined in section 43B of the ERA 1996. He was subjected to a series of detriments and was ultimately dismissed by his employer. He argued that his protected disclosures influenced the employer in acting as it did and were the reason, or the principal reason, for his dismissal. However, the employment tribunal found that the employer acted as it did because of the claimant's long-term absence on sickness grounds and the manner in which he had pursued his complaints which had resulted on the employer having to devote large amounts of management time to the claimant's correspondence and the processes related to his complaints. The EAT accepted that the tribunal was entitled to reach that conclusion on the facts before it.

437. *Shinwari v Vue Entertainment Ltd* UKEAT/0394/14/BA was an appeal against the rejection of the claimant's claims for automatic unfair dismissal and detriment on grounds of making a protected disclosure. The claimant in the case had resigned after allegedly suffering detrimental treatment, because, having promised to keep his identity confidential, the respondent disclosed a witness statement from him revealing his identity in the disciplinary process. The tribunal dismissed his claims. It accepted that none of the Respondent's treatment of him was on the grounds of or by reason of the disclosure and was for properly separable and genuinely different reasons.

438. The EAT dismissed the claimant's appeal and found that tribunal was entitled to treat those particular factors as separable from the fact that the claimant had

made protected disclosures and to decide that those factors were the reason why the employer acted as it did.

439. Overall the employment judge in the case had been satisfied that the claimant did not suffer a detriment by the respondent's actions. He found that the claimant had made a protected disclosure in good faith but that the respondent had acted reasonably throughout and that any disadvantage the claimant felt he had experienced was not in any way done on the ground that he had brought circumstances concerning health and safety to his employer's attention. The claimant appealed.

440. In her judgment dismissing the appeal, the Honourable Mrs Justice Simler reviewed relevant authorities on the question of severability. She identified that both the cases of *Martin v Devonshire Solicitors* and *Woodhouse v West North West Homes Leeds Ltd* [2013] IRLR 773 support the conclusion that it is permissible in appropriate circumstances for a Tribunal to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself, provided the Tribunal is astute to ensure that the factors relied on are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did.

441. She also said this *"In addressing the question as to whether the reasons are properly and genuinely separable in a particular case, rather than any exceptionality test, a Tribunal must bear in mind the importance of ensuring that the factors relied on are genuinely separable, and it is helpful to repeat the observations made at paragraph 22 in Martin v Devonshire Solicitors:*

"We prefer to approach the question first as one of principle, and without reference to the complex case law which has developed in this area. The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the managing director at home at 3 am. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected

complaint. (What is essentially this distinction has been recognised in principle – though rejected on the facts – in two appeals involving the parallel case of claims by employees disciplined for taking part in trade union activities: see Lyon v St James Press Ltd [1976] ICR 413 ("wholly unreasonable, extraneous or malicious acts": see per Phillips J at p 419C-D) and Bass Taverns Ltd v Burgess [1995] IRLR 596.) Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle."

442. We have taken into account that guidance and have explained below how we have applied to the claims brought as set out in the list of issues.

Determination of claims as set out in the list of issues

THE FIRST TRIBUNAL CLAIM

443. In terms of the various things which the claimant said were detriments we made the following findings:

Issues 1 to 4 The incident on 10 November 2015

444. The alleged detriments are

a. Ms Mitchell acting in a threatening manner? (issue 1)

b. Ms Mitchell requiring the claimant to cease acting as a workplace companion for his colleague KH? (issue 1)

c. 10.11.15

Did Karen Mitchell subject C to a detriment on 10.11.15 on the grounds that he was seeking to accompany his colleague KH to a grievance hearing by:

• Threatening C with disciplinary action/ making the claimant feel he was in danger when he tried to leave the office? (issue 4)

445. The list of issues records that the claimant further clarifies these claims by saying that the issues are that *"Did Karen Mitchell subject C to a detriment by making false allegations on the grounds he was seeking to accompany his colleague KH to a grievance hearing*" and "*Did Karen Mitchell subject C to a*

detriment by making derogatory comments on the grounds he was seeking to accompany his colleague KH to a grievance hearing." At no stage did the claimant explain what he meant by this, but we understand this to refer to what said during the confrontation and in the email sent by Ms Mitchell immediately following it.

446. Ms Mitchell and the claimant were angry with each other and their conduct towards each other reflected that, but the only aspect of Ms Mitchell behaviour which we found could reasonably be regarded as a threat was her suggestion that the claimant would be subject to a disciplinary action if he left the office. There was no disciplinary action taken of course, but it was not disputed that the reference was made to that being the consequence if the claimant left the office and we accept that he could reasonably perceive that as a detriment.

447. It was not disputed that Ms Mitchell told the claimant that he could not act as workplace companion. We accept that the claimant, who took pride in the fact that he had been a stop steward in the past, and who was aware his fellow employees had a statutory right to request that he accompany them to a disciplinary or grievance hearing, regarded this as an important role and so thought this was a detriment.

448. We asked ourselves if the burden of proof shifted to the respondent to show that the reason for these detriments was not that the claimant was acting as a statutory companion?

449. In this case we accept that the burden did shift. It is clear from the correspondence that direct reference was made during the confrontation to the claimant acting as a workplace companion. We accept that was enough to require the respondent to show the reason for what happened.

450. The employment tribunal concluded that on her return to the office from holiday, Ms Mitchell had been irritated and concerned to find out that not only had the claimant not done what she thought they had agreed and decline to accompany KH, he had gone further and taken on the role of KH's representative which he had used as the reason not offer legal advice to the trade union.

451. We accepted that the reason Ms Mitchell had the confrontation with the claimant on 10 November and the reason why she told the claimant he could not be a workplace companion, was the professional embarrassment she felt the claimant had caused her by sending the email to Mr Perkins declining to advise him because of "a conflict of interest". That in turn had caused Mr Perkins to raise concerns with the general secretary and Mr Cash to ask for her comments. We concluded that Ms Mitchell was angry about that and that what was drove her behaviour and her comments. We accept that the senior managers had a reasonable perception that that the claimant had been giving KH legal advice and that it was a result of that that he had been unable to advise Mr Perkins. That was reflected in Ms Mitchell's comments about the claimant "bringing claims against the union". One of the reasons we were satisfied that this was the case because

on both accounts of the confrontation, much was made of the checking the professional conduct rules (albeit incorrectly referred to as being an issue for the Law Society, rather than the SRA).

452. Mr Panesar argued that when the claimant was acting as KH's representative and giving him legal advice, the claimant was not acting as a workplace companion. The claimant argues that it is not possible to sever his actions and the reasons for the employer's actions in this way.

453. We accept that what had caused Ms Mitchell's embarrassment and her anger was not the claimant undertaking any of the statutory duties of a workplace companion set out in the ERelA, and we also accepted that there must be distinction between an employee undertaking the statutory duties and an employee who goes further and takes on an active representative role, which is what we concluded that the claimant did. The claimant told us that he had not given KH legal advice, but we were concerned with was what factors, conscious or unconscious, influenced Ms Mitchell, and we concluded that she and indeed Mr Perkins, believed that the claimant had given legal advice. That was what had influenced what they did.

454. We rejected Mr Panesar's contention that the claimant did not fall within the ambit of the statutory protection because the grievance hearing had never happened, but we did accept his submission that the claimant had not simply told the respondent that he was going to be KH's workplace companion. He had gone further in using the fact he was going to undertake that role as the basis to decline to give Mr Perkins advice on how to approach KH's grievance as part of his role as the in-house solicitor because there was a conflict of interest, and to propose to Mr Perkins a way to resolve the grievance. The claimant took various positions in the course of his evidence about whether advising the union was part of his role as in-house solicitor, but we found it was significant that he did accept that being asked to give this advice was a reasonable management instruction.

455. The panel concluded that Ms Mitchell, Mr Perkins, and the other senior managers regarded it as part of the claimant's role that he give advice to the trade union about employment law matters. Although the claimant disputed that he given KH legal advice, he did use a "conflict of interest" as the reason for not doing what Mr Perkins asked him, so in Mr Perkins' view refusing to undertake his contractual duties to the trade union. We accept Mr Perkins could reasonably reach that conclusion. The legislation which relates to workplace companions refers to various things which a workplace companion will do in the course of their role. Nothing in the legislation gives an employee undertaking workplace companions duties the right to refuse to meet their contractual obligations under their contract of employment. The list of things that a workplace companion may do does not include giving advice and it does not include representing an employee in correspondence with the employer or negotiating on their behalf. We accept these are things which are distinct from acting as a workplace companion and we concluded that we could draw a distinction in this case for the reasons for Ms

Mitchell's and Ms Perkins' actions bearing in mind the guidance in the caselaw referred to by the claimant and set out above.

456. In terms of the other matters raised by the claimant, we understand these to be references to Ms Mitchell saying that the claimant was acting against the trade union (we understand that to be the "false accusation") and making derogatory comments. We accepted that the respondent reasonably believed that the claimant had given KH legal advice and in those circumstances Ms Mitchell did not make a false accusation, nor was it improper for her to raise that concern with the claimant, albeit it would have been better if she had done so in a more temperate way.

457. The claimant referred to at various points in his evidence to Ms Mitchell making derogatory comments or talking to him in a derogatory way, but he largely failed to explain what he meant by that. We understand this claim to relate to the following passage in his witness statement *"As I got up to get my coat and leave, the Third Respondent shouted again the accusation that I was brining [sic] claims against the RMT, made personal derogatory comments, stating that I did not like to take orders. I do consider Ms Mitchell instructing me not to be a work place companion and being aggressive was a detriment for being a workplace companion."*

458. We accept those things were said. Were they a detriment? The case of *Shamoon* tells us that something is a detriment if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. However, Ms Mitchell said what she did responding to the claimant acting in an angry and aggressive way. We think that both parties bear a mutual responsibility for what happened, but insofar as these things were detriments we find that the reason for them was Ms Mitchell's irritation that the claimant had given KH legal advice and refused to advise Mr Perkins.

459. When the claimant declined to advise Mr Perkins and put forward a possible resolution for KH's case, he was not doing any of the things listed in s10 of the ERelAct. Whilst it is clear from the decision in *Toal* that the scope of the statutory right in relation to being a workplace companion is triggered by the issuing of an invitation, we concluded that the protection can only cover the companion in so far as they are proposing to undertake those statutory tasks. The employer is not obliged to permit an employee to act as representative in negotiations before the hearing and we accept that there must be a distinction.

460. For all these reasons we conclude that the claims recorded in issues 1 to 4 fail.

Issue 5 The other alleged detriments in November 2015

461. "November 2015 Did the Respondent subject C to a detriment on the grounds that he was seeking to accompany his colleague KH to a grievance hearing by:

a. The procedure it adopted in dealing with the Claimant's grievance?

b. Specifically failing to appoint an investigation officer by 19.11.15

c. Failing to update the Claimant about the progress of the grievance?

d. Appointing an investigation officer 'against the rules of natural justice'?

e. Having an unfair investigation hearing

f. The Respondent's general secretary refusing to see C?

g. The Respondent refusing to investigate C's complaint that the hearing was unfair"

462. In his submissions the claimant identified a number of points in support of these claims, as follows:

"The procedure organised by the Respondent to investigate the Claimant's was not fair, reasonable and predetermined and therefore a detriment for being a WPC, the protected concerns he raised, including the assault and health and safety concerns: The procedure organised by the Respondent was a detriment for the following reasons:

I. The Respondent was aware from Ms Mitchell's grievance dated the 10th of November 2015 the Claimant was going to raise a grievance first, he raised serious allegations of assault but the Respondent contrary to the bullying procedure insisted in also investigating Ms Mitchell's counter allegations at the same time

II. Ms Mitchells counter allegations were that of misconduct against a junior employee and should not have been investigated under the Bullying procedure

III. Respondent was aware that Ms Mitchell raised a number of grievances, the 19th of November 2015, 15th of December and the January 2016 but failed to provide the Claimant with the more detailed grievance dated the 15th of December 2015 so the Claimant could defend himself against the allegations Ms Mitchell raised.

IV. Both Mr Carey and Mr Croy who were the managers who investigate the Claimant's complaints and both were aware of Ms Mitchell's grievance, Mr Carey received the email and Mr Carey admits in his grievance that he considered Ms Mitchells' grievance dated the 15th of December was her grievance but they failed to provide the Claimant with a copy (Despite what Mr Rakesh Patel of Thompsons stated in sworn evidence defending the Claimants strike out of the Respondents case in front of Judge Leach on a number of grounds including providing misleading statements for stating to EJ Franey there was no written

grievance by Ms Mitchell before January 2016 but he advised Mr Carey on the grievance during 2016).

V. The appointment of Mr Kevin Carey to hear the grievance (he was the person who Mr Kevin Hall made a grievance against in which the Claimant was to be a workplace companion) the appointment of Mr Carey to hear the grievance was not appropriate and risked causing impartiality

VI. Mr Kevin Carey allowed Ms Mitchell to read out a prepared statement

VII. Mr Carey's reluctance to consider the Claimants bundle of evidence

VIII. The fact the Claimant had to ask to present his evidence before being questioned by Mr Carey

IX. The fact that Ms Mitchell was interviewed first although the Claimant raised a grievance first

X. The fact that Mr Carey didn't seem to believe that the Claimant was attacked by Ms Mitchell

XI. Oppressive questioning by Mr Carey

XII. The fact that Mr Carey asked the Claimant a number of times in a raised voice if he had given advice to the colleague for whom he was asked to be a companion

XIII. The fact that Mr Carey accused the Claimant of behaviour which supported Ms Mitchell's assertion about his personality

XIV. Mr Carey was aware that the case that could end up in the employment tribunal

XV. Mr Carey had a fairly clear pre –formed views of whether or not the Claimant was in conflict

XVI. Mr Carey was resistant to look at the Claimant's documentation

XVII. The tone Mr Carey's interview with Ms Mitchell, compared to Mr Edwards, asking Ms Mitchell can he ask her questions

XVIII. Mr Carey admitted under cross examination that he had the power to increase the remit of the investigation and he did so to the detriment of the Claimant, he alleged that the investigation grew organically to include whether or not the Claimant was in breach of the solicitors' code of conduct for being a WPC on in a grievance against Mr Carey.

They [sic] procedure exacerbate the detriment the Claimant suffered had the Claimant had a fair grievance procedure the impact of the detriments upon him might have been mitigated, this was not the case, their effect was exacerbated."

463. Mr Panesar's submissions about these claims are shown in tabular form in his skeleton arguments and we do not seek to reproduce those in detail, but we will touch on them as required.

The procedure

464. In terms of what we had concluded about what had happened, we found in our fact-finding that Mr Perkins had determined that the bullying procedure should be used to investigate the incident on 10 November and whilst Mr Perkins seemed to lose sight of the fact that he had asked the claimant for his consent to the process that he had recommended, there was nothing improper or unfair with that process being chosen.

465. In straightforward terms, an investigation into what had happened was required. Mr Perkins faced a difficult situation with allegations between two senior lawyers which amounted to an unwitnessed dispute about what had been said and done and the scenario he faced seems to fall squarely into the scope of improper described as bullying in the bullying procedure. The claimant suggested that because he managed to send his email a few minutes before Ms Mitchell, and because he was junior to her, his allegations should have taken precedence over hers. We found that argument to be without merit. In the circumstances we did not accept that even taking the allegations from the claimant's viewpoint, that a reasonable worker would regard Mr Perkins decision to initiate an investigation into what happened using the bullying policy was to his detriment. The reality is that what the claimant was unhappy about was the conclusions reached in the investigation about what happened.

Failing to appoint an investigator by 19.11.15

466. There is no dispute that Mr Perkins had not appointed an investigation officer by 19.11.15. The claimant's assertion that this was detriment was based on his assertion that this had been promised by Mr Perkins on 13 November. In our fact finding we found it implausible that Mr Perkins had given the claimant any such commitment.

467. It took several months for the first bullying investigation to be completed. During that time the claimant was in regular contact with Mr Perkins. Part of the delay arose from the small size of the senior management team and the need for a suitable senior manager to be identified who could investigate this matter, but in part delays arose because of the claimant's own conduct and his lengthy correspondence raising objections to what was happening.

468. We accept that the delay was to the claimant's detriment, but we accepted Mr Perkins evidence about the reasons for that delay. The delay was created through a combination of two senior professionals making numerous complaints about each other and who both appear to have been difficult to manage. The claimant was in part responsible for the delay he now complains about, for example when Mr Perkins sought his permission for the use of a particular procedure, the claimant ignored that and wrote to raise other matters. The claimant points to his mental health problems and that may well the explanation for this behaviour, his conduct still made it more difficult for Mr Perkins to manage the process and it caused delay. That reason was unrelated to the claimant having agreed to be KH's workplace companion.

Failing to update the claimant about the progress of the grievance

469. We do not accept that the claimant showed us that this had happened. The claimant was in frequent contact with the respondent. There was some delay in the process caused in part by the claimant himself, but in the view of the panel the evidence shows Mr Perkins trying to respond to the claimant's correspondence as best he could. The difficulty he faced was the claimant's attempts to challenge the process that Mr Perkins and Mr Cash had determined upon which inevitably created delays.

470. We accepted Mr Panesar's submission about this. Usually, the claimant would have been kept updated about progress by his line manager. As that was Ms Mitchell, that was clearly inappropriate. Mr Perkins did the best he could to undertake that role whilst juggling his other responsibilities and dealing with and responding to the correspondence from the claimant.

471. If the claimant expected more from Mr Perkins, that expectation was unreasonable and the respondent's actions in this regard cannot be said to be a detriment.

The identity of the investigation officer

472. The claimant alleges that Mr Carey's appointment was 'against the rules of natural justice' because KH had raised grievances about decisions taken by Mr Carey. The claimant therefore perceived that Mr Carey was biased because the claimant had intended to act as KH's workplace companion. The panel had some sympathy with the claimant about this. It would perhaps have been helpful to identify a different manager in these circumstances, or perhaps at the very least for Mr Perkins and Mr Carey to have sought to address the claimant's concerns head on from the start. However, we also accepted Mr Carey's evidence that the grievances raised by KH were not, as the claimant suggested, of bullying or a similar nature with a very personal element. Significantly the claimant was to act as a workplace companion in that process, he had not brought accusations against Mr Carey himself and Mr Carey, as an experienced trade unionist could be expected to distinguish between the complainant and the companion. The claimant

accepted that he had worked with Mr Carey in the past and they seemed to get on. There was no suggestion of any personal bias from Mr Carey against the claimant for any other reason.

473. We accepted that Mr Perkins faced a difficult task in finding a manager to deal with this investigation. Not only did he have to take into account immediate availability amongst a small management team, he had to bear in mind who would be available to deal with later matters depending on how the investigation progressed. It will have been obvious from the start that there was at least some prospect of disciplinary action being taken against one or other of two senior employees, including the head of the legal department. The claimant suggested that when he raised concerns, Mr Perkins should have considered another manager but when challenged about that, the claimant suggested that a senior manager from outside the small London team should have been appointed. The tribunal panel accepted that this was an unreasonable suggestion. The respondent needed to take a proportionate approach bearing in mind its need to use resources in a sensible manner to manage costs in the interests of its members.

474. Notwithstanding our initial sympathy for the basis for the claimant's concerns, we did not accept that Mr Carey's appointment was, as a matter of fact, a breach of natural justice and we did not accept that it was a detriment but even if we are wrong about that, we accept the respondent's reasons for the appointment and do not accept that the claimant being a workplace companion was the reason for Mr Carey's appointment.

Having an unfair investigation hearing

475. We did not accept, as a matter of fact, that the hearing the claimant had with Mr Carey was unfair. Mr Carey spent a considerable amount of time with the claimant. He tried to focus on the issues in the letter which formed the basis of his terms of reference. The claimant alleges that it was unfair when Mr Carey did not explore the additional matters he sought to raise but given the length of the hearing and the scope of the task he had to undertake, we did not find Mr Carey's approach to that to be unreasonable or unfair.

476. The claimant also suggested that Mr Carey meeting with Ms Mitchell before him was in itself unfair, but he seemed to argue that because he says that he had submitted his grievance first. We do not accept this is a persuasive argument. Mr Carey was investigating both sets of complaints and he had to meet one or other of the complainants first. This could not reasonably be regarded as a detriment.

477. We do not accept that it was unfair for Mr Carey to put to the claimant that he had advised KH – that was after all what Mr Perkins and Ms Mitchell believed had happened and the claimant himself had said in the email that he believed that that had a conflict of interest. We accept that Mr Carey listened to the claimant and what he said about that and the workplace companion issue – this was reflected in

his recommendation that the legal team should have a protocol to deal with the issue of being a workplace companion in the future.

478. In terms of the other issues raised by the claimant about the hearing, we considered that all of these stemmed from the fact that it appears that at the times the meeting became rather difficult for Mr Carey to handle. The claimant presented his arguments in a forceful way. He challenged Mr Carey's right to conduct the meeting and the procedure he was following, making his disagreements with Mr Carey's approach very clear. The claimant's own account of the meeting in his witness statement shows that the claimant expected to be able to make assertions about what he said had happened but was resentful and upset if an alternative version of events or viewpoint was put to him. We have no doubt that the meeting was challenging for all involved, but we do not accept that the handling of it amounted to a detriment. If the claimant perceived that it was unfair, we conclude that this perception was unreasonable. It was not unfair simply because it did not go as the claimant had hoped.

Mr Cash's refusal to see the claimant

479. It is not in dispute that the Mr Cash refused to meet the claimant, but the claimant did not show us on what basis he could have any reasonable expectation that he could claim a right to meet the general secretary simply because he wanted to. We were not shown that any right exists. Mr Perkins told us that he advised Mr Cash not to meet with the claimant because ultimately it could have been Mr Cash who would be the decision-maker in the final stage of a process and there would be risk of him being tainted by his prior involvement in the process. In circumstances, and where the claimant could have no reasonable expectation of a right to meet Mr Cash, it could not be reasonably be perceived by the claimant that it was detriment for Mr Cash to refuse to meet him.

The respondent refusing to investigate the claimant's complaint that the hearing was unfair

480. The panel found this complaint hard to follow. The claimant raised concerns about the process undertaken by Mr Carey and those were considered by Mr Croy as part of his reconsideration process. In his letter of 10 May 2016 Mr Cash told the claimant that Mr Croy would consider the points raised in his letter of appeal as part of the reconsideration process. The claimant appeared to object to this being referred to as a reconsideration, rather than an appeal, but we accept that Mr Croy did satisfy himself that Mr Carey had not acted improperly by looking at the transcript.

481. For all these reasons the claims in issue 5 fail. Some were not detriments at all but those that were, were not caused by the claimant acting as a workplace companion.

Issue 6

482. Issue 6 is somewhat curiously recorded as a comment from the clamant. It records "*Did the Respondent subject C to a detriment on the grounds that he was seeking to accompany his colleague to a grievance hearing by*

- *The General Secretary refusing to appoint a different investigations officer*
- *The Respondent accusing the Claimant of being in breach of regulation 3 of the SPR.*

483. The first bullet point is simply a different iteration of the fourth bullet point in Issue 5 (appointing an investigation officer against the rules of natural justice". The same reasoning as above applies, and this claim fails.

484. The second bullet point relates to the claimant being accused of being in breach of the solicitor's conduct rules. Our reasoning about this is set out in the section which deals with our conclusions about having an unfair investigation hearing. In summary Ms Mitchell and Mr Perkins believed that the claimant was the union's solicitor and he had professional duties as a result, and that he had breached those duties by advising KH, and his email to Mr Perkins acknowledged that breach. For the reasons set out above we accept the respondent' case that this is distinct from the claimant acting as a workplace companion.

Issues 7 to 9

485. Issues 7 to 9 are claims under s44 of the Employment Rights Act which are dismissed for the reasons explained above.

THE SECOND TRIBUNAL CLAIM

Issues 10 to 30

486. Issues 10 to 22 relate to claims about the victimisation allegations brought under the Equality Act 2010. These are dismissed for the reasons explained above.

487. Issues 23 to 30 relate to claims about protected disclosures which are dismissed for the reasons explained above.

THE THIRD TRIBUNAL CLAIM

488. Issue 31 relates to the application of time limits which it has been unnecessary to for us to address.

Issues 32 and 33

489. Issue 32 *"Did the RMT subject C to a detriment for seeking to accompany another worker to hearing:*

By reason of Mr [Croy's] findings on C's appeal?

b. The appeal not being impartial?

c. Not listening to the original investigation interview?

d. Failing to give weight to contemporaneous evidence?

e. Failing to interview witnesses such as Mr Carey and the General Secretary?

f. Not being impartial when considering evidence?

g. Failing to adhere to deadlines in the investigation?

490. *The list of issues records that issue 33 is that the claimant further clarifies these claims by saying that the issues are that "Did the RMT subject C to a detriment for seeking to accompany another worker to hearing by failing to re-interview witnesses after the Claimant was interviewed?"*

491. The claimant made the following submissions about these claims:

"The Claimant has already stated that Mr Croy was not fair or impartial and he was appointed as part of a predetermined procedure.

Mr Croy failed to interview Mr Carey and determine why he had come to his conclusions.

Mr Croy was well aware that Ms Mitchell raised detailed grievance on the 16th of December 2016, as he was recipient of the email and as he reviewed the file he would be aware the Claimant did not receive Ms Mitchell's detailed grievance to defend himself from the allegations.

Mr Croy would be aware that it was breach of the bullying procedure for the Claimants allegations to be considered together with Ms Mitchells, his line manager's complaints of misconduct.

Mr Croy was a willing participant in a discriminatory procedure, as he was aware that the Claimant allegations regarding [RW] should have been investigated under the Equal Opportunity Statement, his allegations investigated the RMT grievance procedure, which had many stages of appeal, the procedure adopted by the RMT and used by Mr Croy, resulted in the Claimant not being allowed an appeal.

Mr Croy had already given factually incorrect evidence in the Carey investigation, which supported Ms Mitchell's narrative regarding the Claimant's request for his probation to be extended during November 2013, therefore there having to be two meetings. As a result of participating in the procedure by giving evidence Mr Croy

should not have taken the appeal and there was serious allegations that the evidence he gave was factually incorrect.

Mr Croy failed to give appropriate weight to the documentary evidence the Claimant provided to the investigation appropriate weight. The Claimant provided the Respondent with time dated text messages, time dated pictures showing the bruising of the assault, time dated emails regarding events in the workplace.

Mr Croy failed to given any weight to the fact that Ms Mitchell had never been suspended, sat opposite to the trainee solicitor Ms Henderson and that Mr Welch, was Ms Mitchell's son. Mr Croy and Mr Carey both failed to give any weight that if the Claimant was aggressive and made derogatory comments to Ms Mitchells son she would not have sent him a cheerful text on the 27th of August 2015 blowing him kisses.

Both Mr Croy and Mr Carey failed to note that on their false narrative both Mr Welch and Ms Mitchell collude and state they discovered the allegations of assault on the 28th of August 2018, resulting in Ms Mitchell informing on her narrative the General Secretary of the allegations of the assault on the 28th of August but when she raised a number of grievances during 2015 and 2016 she failed to mention false allegations of physical violence, which would amount to gross misconduct.

Mr Croy and Mr Carey failed to draw inferences from the fact that Ms Mitchell informed the General Secretary of the RMT of the allegations (according to her narrative) on the 28th of August 2015 and then the Claimant informed both them that Ms Mitchell threatened him on the 15th of October 2015, that she:

"…informed someone in the Union as to what happened on the Sun Public House last time and there was nothing he could do about it"

How would the Claimant know Ms Mitchell had informed someone unless she told him?

Mr Croy failed to draw inferences that Mr Carey failed to interview General Secretary Mr Cash as what he was actually informed by Ms Mitchell on the 28th of August 2015.

Mr Croy and Mr Carey failed to draw inferences regarding Ms Mitchell alleging that the Claimant was aggressive at a team meeting on the 16th of July 2015 about not being consulted about a change of p[l]ans about bringing the work in house, the Claim provided email evidence the incident happened on the 29th of June 2015. Ms Mitchell was aware of this allegation at the latest during April 2016 when she read the Claimant's interview with Mr Carey and failed to provide any counter evidence that her notes asserting recording the incident dated the 16th of July 2015 are incorrect as they contain the wrong date until the substantive hearing Employment Tribunal during May 2022.

It is to be noted that on oath Ms Mitchell stated the minutes of the 10th of November 2015 were not taken at the time the incident occurred and the Claimant alleges that the Ms Mitchell took no notes at the meeting on the 1st of October 2015 but factually incorrect minutes have been provided."

492. In essence the claimant alleges that Mr Croy acted unfairly because he believed Ms Mitchell rather than the claimant. However, overall, the panel accepted that Mr Croy acted genuinely and with good faith when he reached the conclusions that he did. We are satisfied that Mr Croy was entitled not to draw the inferences that the claimant alleges that he should have done

493. In terms of the specific claims:

By reason of Mr [Croy's] findings on C's appeal

494. We accepted that Mr Croy's findings on the appeal grounds were reasonable. It was not material whether that process was called a reconsideration or an appeal. In essence the claimant's submissions amount to an argument that Mr Croy should have believed him and not Ms Mitchell, but his submissions do not reflect that there was evidence before Mr Croy which does not support the claimant's case and in particular his failure to raise such serious matters at the relevant times. We found no evidence that in reaching his decisions Mr Croy was influenced in any way by the fact that the claimant had agreed to be a workplace companion for KH. We are satisfied Mr Croy simply reached conclusions from the evidence before him and this could not reasonably be perceived by him as a detriment.

The appeal not being impartial

495. The claimant's argument about Mr Croy's alleged lack of impartiality related to the fact that he had told Mr Carey that the claimant's probationary period had not been extended, and the fact the claimant said Mr Croy was a friend of Ms Mitchell.

496. We did not find that Mr Croy was partial in his approach. We accepted his view that his involvement in the Carey investigation was trivial (in relation to the probation extension) and he had only provided brief factual evidence. We accepted that Mr Croy was only on friendly terms with Ms Mitchell in the usual way of colleagues who have worked together for a long time, but that did not make him biased. We did not accept that the claimant could reasonably see any detriment in Croy hearing the reconsideration.

497. Even if we were wrong about that, we had no evidence that Mr Croy had been influenced in any way by the fact that the claimant had agreed to be a workplace companion for KH.

Not listening to the original investigation interview

498. It is not in dispute that Mr Croy did not listen to the original investigation interview. He told us that this was because he was aware it had been a long

interview and he had notes of the meeting. As Mr Panesar pointed out, very detailed notes of the interview had been taken and sent to the claimant, who had also belatedly been sent the audio recording of the interview. The claimant was asked to specify what in the notes of the interview with Mr Carey was inaccurate but failed to identify anything and stated that he had not checked the audio recording because he had not been well enough to do so. It was in the absence of there being identified inaccuracies that Mr Croy determined that it was not appropriate to add to the time already been taken in his decision-making by listening to the audio recording.

499. We did not consider that a reasonable employee could have an expectation that they could expect to dictate to a manager how a grievance appeal should be conducted, and that they could not therefore expect to be able to insist that a recording was listened to except, perhaps, in circumstances where there was a very particular dispute about something which had been said.

500. We accept that Mr Croy doubted the recording would help him very much and he did not regard this as a good use of his time. Mr Croy told us that he looked first to see if he thought Mr Carey's decision had been right in principle, in other words would he have taken the same decision, and in that sense attached little weight to why Mr Carey had reached his decision. We accept that this was an approach he was entitled to take no employee could reasonably believe that they had been subject to a detriment in these circumstances. Even if we were wrong about that, we had no evidence that Mr Croy had been influenced in any way by the fact that the claimant had agreed to be a workplace companion for KH in reaching his decision to take that approach.

Failing to give weight to contemporaneous evidence

501. We are satisfied that Mr Croy took into account the evidence the claimant offered him, but we accept that he decided that he did not attach the weight to it that the claimant thought he should. Mr Croy had to make decisions on the basis of contested evidence, so he was bound to make a decision that he believed one party over the other. We are satisfied that Mr Croy reached a careful and considered decision and accept Mr Panesar's submissions about that. Insofar as that was to the claimant's detriment, we had no evidence and did not find that Mr Croy had been influenced by the fact that the claimant had agreed to be a workplace companion for KH in reaching this decision.

Failing to interview witnesses such as Mr Carey and the General Secretary

502. The claimant had failed to produce any cogent evidence of impropriety on the part of Mr Carey or Mr Cash's part to Mr Croy. We accepted Mr Panesar's submission that there was no detriment in this regard.

503. Mr Croy's report shows that he took a careful approach, and we accept that given the approach he adopted it was reasonable for him to determine the appeal without interviewing Mr Carey. We have dealt with that claim above.

504. Mr Cash had not given evidence to Mr Carey and had not determined any of the decision-making save for approving Mr Perkin's approach in terms of processes and decision makers. We agreed with Mr Croy that in those circumstances there seemed to be little gained from interviewing him and it would draw him into a process where he might later be asked to decide an appeal. We accept however that the claimant believed that Mr Cash's evidence about what he had been told about the assault was relevant, and that he perceived a detriment when Mr Croy decided not to interview him.

505. We accept however that Mr Croy had good reasons for making these decisions and that these which were not made on the grounds that the claimant had sought to accompany a worker to a grievance hearing.

Not being impartial when considering evidence

506. We considered that we had determined this claim in considering the claim that Mr Croy was not impartial. The claimant failed to explain how this was in any way a separate and distinct claim.

Failing to adhere to deadlines in the investigation

507. It is not in dispute that there was a long delay between Mr Croy's appointment, and his decision and we accept that delay could be a detriment. However, it is also clear that much of the delay was caused by the claimant himself. As Mr Panesar identified in his submissions, much of June and July was taken up with the claimant's correspondence objecting to Mr Croy's appointment. We accept that the matters to be determined were complex, involving the interviewing of multiple witnesses, and while Mr Croy got on with many of the interviews, the claimant declined multiple dates offered for interview in late July. The earliest date the claimant made himself available was 16th August. Once the claimant made himself available he was interviewed quickly on 18th August.

508. Unfortunately, by that time Mr Croy was due to take his booked annual leave and on his return from leave he needed to prepare for and attend the TUC and Labour Conferences. We accept that these events were crucial and key events in Mr Croy's year. We accept that Mr Croy had to prioritise this work over the investigation given its significance in terms of his national role and he could not of course rearrange or delay that work. We accept that when he agreed to take on the claimant's reconsideration process in spring, Mr Croy would have had no reason to anticipate a clash with his work commitments in the autumn. The delay in producing the outcome of Mr Croy's report cannot have been said to have been caused by or been ground of the claimant having sought to accompany a worker.

509. The list of issues records that the claimant further clarifies these claims by saying that the issues are that *"Did the RMT subject C to a detriment for seeking to accompany another worker to hearing by failing to re-interview witnesses after the Claimant was interviewed?"*

510. The claimant failed to refer to which witnesses he says Mr Croy should have re- interviewed in his witness statement. He had referred to this issue in passing in a letter to Mr Cash in November 2016 but did no more than make an assertion about that as he did here. There is no explanation as to why this is said to be related to the claimant having been a workplace companion.

511. In his submissions the claimant said this *"Mr Croy after the Claimant raised serious allegations of physical assault and a detriment for being a work-place companion failed re-interview Ms Mitchell and the other witnesses, even though the Claimant informed him that he may have been called untrustworthy and assaulted after the [RW incident]. When the Claimant informed Mr Carey of the allegations of discrimination and the crime of perverting he failed to put the allegations to Ms Henderson or re-interview Ms Mitchell or Mr Welch."*

512. That submission did not help us very much. Mr Croy was aware when he interviewed Ms Mitchell that there was an assault allegation. He gathered evidence about that from her and from the claimant and reached a conclusion about that. We do not accept that that Mr Croy was bound or required to reinterview Ms Mitchell, this depended on whether he was satisfied he had sufficient information to reach a conclusion on the facts. We accept that Mr Croy was satisfied he had sufficient information that he could and did not think that in the absence of any explanation for why re-interviewing Ms Mitchell would have made any difference. We did not accept that this could be reasonably regarded as a detriment but in any event we accepted that Mr Croy made decisions in good faith based on the evidence and he was not influenced in this by the fact that the claimant had agreed to be a workplace companion for KH.

513. For these reasons we did not uphold any of the claims in issue 33.

514. **Issue 34 Did the RMT subject C to a detriment for seeking to accompany another worker to hearing:**

a. By not adhering to its sickness, absence and ill health and capability process?

b. Taking 8 months to refer C to Occupational Health?

c. Not upholding his grievance about delay?

d. Failing to contact C once a month pursuant to the above policy?

515. The claimant made the following submissions about this:

516. *"The RMT sickness and absence procedure …, the Claimant alleges that the Respondent failed to follow its own procedures because he was a workplace companion rather than just incompetence because;*

a. The Claimant should be kept in contact at least once a month ..but the Respondent from November 2015 until November 2017 failed to adhere to this procedure, even though Mr Croy upheld this complaint during 23rd October 2016 .. but still did not adhere to their keeping in touch procedures

b. The Union did not contact Mr Edwards once a week or refer him to occupational health: the reason being why? The Union has advanced no reason for this – the accumulation of detrimental treatment

c. The Claimant requested a referral to occupational health at his meeting with Mr Perkins on the 5th of January 2016, by email 29th of January 2016.., 1st of February 2016 …. At the latest Thompsons Solicitors (Mr Rakesh Patel) was advising the Respondents on its internal procedures from the 29th of January 2016 …and he could have advised on referring the Claimant to a specialist occupational provider. It should be noted that when Mr Patel instructed Mr Panesar to request a psychiatric report at a PHR during July 2017, in a short time Thompsons Solicitors managed to find three specialists who could provide a report in a limited time frame (before the substantive hearing listed for September 2017)

d. The RMT used the bullying procedure to investigate the Claimant's and Ms Mitchell's complaints, which states the procedure should be completed within four weeks… The Claimant had already complained by email, on the 26th of January 2016 ….he did not receive the promised update by the 19th of November 2015 on the procedure how his complaints would be investigated as he raised a complaint on the 10th of November 2015. The Claimant did not receive the outcome until 15th of April 2016 .., over five months after he raised a complaint and four months after the Claimant submitted a written grievance on the 11th of January 2016 .."

517. Mr Panesar's submissions accepted that there had been delays in the process of referring the claimant to occupational health, but he argued this was not because the claimant had sought to accompany a worker. He referred us to Mr Perkins' evidence about the difficulties he faced in finding the right provider and the claimant's "refusal at times to meet or to be referred to occupational health save in very particular and the unique stipulations he placed on basic sickness management steps". This included delaying or limiting consent for access to his medical records.

518. Mr Panesar pointed out that sickness absence matters were normally dealt with by an employee's line manager, which was not possible here for obvious reasons and so it fell to Mr Perkins to manage amongst his other duties which included administering personnel matters, the Union's constitution, property, and IT

facilities, overseeing elections, dealing with NEC matters and statutory meetings. Mr Panesar also pointed out that over his absence the claimant not only insisted at times on appointments in Liverpool (despite still having a London workplace and the London flat and the fact he was in London at various times), he also refused multiple occupational health appointments. The claimant had refused to see any occupational health provider but Dr Elanjithara, and then when an appointment was made with Dr Elanjithara in Liverpool, the claimant refused to see him again.

519. Although we accept that the claimant was subject to a detriment in this regard the first bullet point is in essence a summary of the specific issues or matters identified as detriments in the following list. In summary we accepted Mr Perkin's evidence about the reasons for the detriment and that this was not related to the claimant being a workplace companion, but we have set out below in more detail why we concluded that.

Taking 8 months to refer the claimant to Occupational Health

520. The tribunal were concerned about the delay in referring the claimant to occupational health after his absence began in November although in light of the claimant told us about his health it seems to be unlikely that he would have been able to return to work if a referral had been made. We were still satisfied that the circumstances amounted to a detriment and that in the circumstances the burden of proof shifted to the respondent to explain the reason for delay.

521. The reasons put forward by the respondent – essentially that it fell to Mr Perkins who was already juggling a wide range of duties and the union did not have a dedicated occupational health provision for its workforce outside London, do not reflect very well on the trade union. However, we accepted that this was the reason for the delay. It would be good practice for an employer to refer an employee to occupational health at early stage and the trade union should have been more diligent about following its own policy, but we also accept that it is clear on the claimant's own case that he was very unwell with no prospect at that time that he could return to work. We accept that was clear to Mr Perkins.

522. The reason for referring an employee to occupational health is to assess their ability to return to work and to identify measures that might facilitate a return. There was nothing in the information provided by the claimant or his own GP to suggest there was a prospect of the claimant returning to work at that time. It was clear that the claimant would not return to work until his grievance about Ms Mitchell had been determined. We concluded that this why Mr Perkins did not progress a referral, he did not think it would serve any useful purpose. That reasons were not related in any way to the fact that the claimant had agreed to be a workplace companion for KH.

Not upholding his grievance about delay

523. The claimant did not explain this claim in his witness statement, it does not seem to be addressed in his submissions above nor did he explain it when the list of issues was clarified. Paragraph 25 of the relevant claim forms which refers to this claim does not add anything and the narrative in the claim form says no more than this.

524. This made it difficult for the tribunal panel to determine this claim. Insofar as it seems to be a reference to a grievance about the delay in referring the claimant to occupational health, Mr Croy had addressed that in his outcome, and he had made clear he was concerned about this delay and made recommendations that action be taken – so in essence he upheld the claimant's grievance about that.

525. The tribunal concluded that the claimant had not shown he had been subject to a detriment in this regard. Mr Croy agreed with the claimant and made recommendations as a result.

Failing to contact the claimant once a month pursuant to the above policy

526. It is clear that the claimant was not contacted once a month as envisaged by the trade union's capability policy. Even when contact was made under the guise of "welfare" that contact resembled formal absence monitoring and there appears to have been little in the way of the sort of welfare contact that the policy anticipates. The claimant says that he felt isolated as a result and this subjected him to a detriment. We accepted that and found that he was subject to a detriment as a result.

527. We found however that there is no evidence that the reason for the lack of contact was that the claimant had agreed to be a workplace companion for KH. Mr Panesar did not make specific submissions about this, but we understand the reasons relied upon to be the same as above in relation to the delays for the occupational health referral, particularly Mr Perkins' workload. We also think it is likely that a significant reason for the lack of welfare contact was the nature of the contact between the claimant and the trade union and Mr Perkins generally. There may not have been welfare contact with the claimant, but Mr Perkins spent a great deal of his time, virtually every month throughout the claimant's absence, dealing with correspondence from the claimant, much of it raising concerns about whatever Mr Perkins had last done to try and progress the case. It is clear to the panel that the respondent found that the claimant was not an easy man to deal with and we have no doubt that did little to encourage Mr Perkins to make welfare contact with the claimant, especially when it seemed so unlikely to have any positive outcome given the claimant's reaction to any contact he had with Mr Perkins.

528. For these reasons we did not uphold any of the claims in issue 34.

Issues 35 to 58

529. Issues 35 to 58 relates to claims under s44 and s47B of the Employment Rights Act and the victimisation claim under the Equality Act which is dismissed for the reasons explained above.

THE FOURTH TRIBUNAL CLAIM

Issues 59 to 93

530. Issues 59 to 93 relates to claims s47B of the Employment Rights Act and the victimisation claim under the Equality Act which are dismissed for the reasons explained above.

531. **Issue 94 Did the RMT (R1) and Karen Mitchell (R3) subject the Claimant to a detriment on the grounds that he was seeking to accompany an [unspecified] colleague to an [unspecified] hearing by Karen Mitchell stating that the Claimant 'raised a number of protected concerns including race discrimination because he was a workplace companion'.**

532. The claimant says in his submissions that "The Claimant asserts that Ms Mitchell made other derogatory comments and false statements against the Claimant: the Respondents assert these comments are not listed in the fourth claim"

533. Paragraph 58 of claim 4 which is identified as the relevant paragraph in the list of issues says this

> 58. Further or in the alternative of a victimisation claim and / or claim for the protected disclosure, the Claimant contends he was subjected to a detriment for being a work place companion contrary to the Employment Relations Act 1999, when he discovered that the Third Respondent stated he had raised a number of protected concerns including race discrimination because he was a work place companion. The Claimant raised a grievance under the staff handbook but the First Respondent failed to take any action and therefore condoned the Third Respondents remarks and therefore they are vicariously liable for the Third Respondents comments.

534. In paragraph 17 (f) of the fourth claim the claimant refers to what he said in a letter on 17 March 2017 as set out below, but that is background to the claims the claimant then goes on to identify in the pleadings. The panel concluded that the respondent was correct in the list of issues to identify the claim as it did.

> (f) The Claimant informed the Second Respondent that the Third Respondent's statement had been read to him and he had suffered further detriments for the protected concerns he had raised, as Third Respondent stated that the Claimant was motivated to raise the protected concerns by money and because he was a work place companion (the Third Respondent also subjected the Claimant to other detriments, as she made a number of detrimental remarks against the Claimant). The Claimant raised a grievance against the Third Respondent under the staff handbook.

535. We accept that the claimant's complaint relates to the section of the notes between Mr Croy and Ms Mitchell recording Ms Mitchell's comments, when Mr Croy asked Ms Mitchell why she thought the allegations of assault and perverting the course of justice had been made.

KM	Again you can only ask him and again it would only be my opinion I think this all arises out of the conflict of interest position that I pulled him up on regarding Kevin Hall and he realised then that he was caught out and followed it with allegations of my assault again has been proved the Police are not taking it any further so there is no action there, it is a series of assaults and allegations against me to discredit me as his manager, I really don't know. He is unhappy here he wants out of the union so the best way he can get out of the union is to allege discrimination, to allege detriments to allege trade union activities to allege whistleblowing so that he can ultimately get a package to depart from this union because he wants to go back up to Liverpool, he is not happy with the union he has had a series of different grievances against the union serious matters he has raised with the union that again have been dealt with by the union and really I can't say any more than that because none of them have been upheld and neither has the complaint I made been upheld so again this allegation is part of the overall one is I think just to dis-credit me as a manager and to hide the fact that he knew that he was conflicted out in the Hall case and he should not have taken instructions

536. Ms Mitchell was expressing an opinion in part to defend herself against allegations that this tribunal panel considers to be false. It is clear that Ms Mitchell offers this opinion in the context of the concerns she had that the claimant creating a legal conflict of interest by acting for KH. For the reasons previously explained, the panel concluded that this was a reason distinct from the claimant acting as a workplace companion and this claim was not upheld.

THE FIFTH TRIBUNAL CLAIM

Issues 95 to 133

537. Issues 95 to 133 relates to claims under s47B of the Employment Rights Act and the victimisation claims under the Equality Act which is dismissed for the reasons explained above.

538. It is accepted by the respondent that the claimant was a disabled person by reason of his depression and PTSD. We find that at all relevant times the respondent had knowledge of the claimant's disability for the purposes of s15 (1) (2) and Sch 8 para 20 (1) (b) EqA .

539. The claims we considered fell under s20/21 of the EqA which relate to a failure to comply with the duty to make reasonable adjustments, and s15 of the EqA, that is unfavourable treatment because of something arising in consequence of disability.

540. Although we found that the respondent had knowledge of disability, there were disputes about whether the respondent had knowledge of the disadvantage created by PCPs operated by the respondent and we have explained our findings about that for each claim. The knowledge of disadvantage is separate from knowledge of disability (Sch 8, para 20(1)(b)).

Issue 134: Did the RMT (R1) and Mr Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled. The alleged failure is when despite knowing that the Claimant was seriously ill and at risk of suicide the Respondents insisted that the disciplinary procedure proceed and failed to suspend the disciplinary procedure.

541. It is perhaps surprising when the claimant is an employment solicitor and the respondents have been represented by a leading firm in employment law, that more regard was not given by the parties to the statutory test in relation to making reasonable adjustments. Regretfully the very limited time at the outset of the hearing in which the list of issues could be considered, meant that what the claimant's claim about this was in terms of his claims was not examined in light of the parties' assurances that they were satisfied the list of issues correctly recorded the legal issues in the case. However, the different elements of a reasonable adjustment claim had not been appropriately identified and this caused us some difficulty.

542. Applying the statutory definition to the issue, in deliberations the tribunal panel understood the claim to be framed as follows:

543. The provision, criterion or practice (PCP) complained about was the application of the disciplinary procedure to proceed to a disciplinary hearing . The claimant says that this placed him as a substantial disadvantage because of his depression and PTSD because he had been identified as a suicide risk and that is what should have triggered the duty to make an adjustment, that is the suspension of the procedure.

544. We accept that there was a PCP in place in this regard.

545. The claimant said this in his submissions

"The Respondents were well aware that the Claimant was off work form [sic] November 2015 and from Dr Elanjithara reported provided on the 4th of January 2017 ….. The Respondent were aware that the Claimant could be a disabled person as defined by the Equality Act 2010, as a result of the report it obtained from Dr Elanjithara

The Respondents with the knowledge of the risk of suicide issued the Claimant with a letter dated the 3rd of February 2017 .. and a disciplinary bundle over 90 pages in content.

This placed the Claimant in his current mental state at serious risk of harm and placed him at a substantial disadvantage and therefore the duty to make an adjustment to applies.

A reasonable adjustment would have been to suspend the disciplinary process to determine whether or not the Claimant was well enough to attend or suspend the disciplinary process until the Claimants health improved. The Respondent failed to make this adjustment and discriminated against the Claimant contrary to S21.

The Respondents delay would not have resulted in substantial costs, and the RMT is a national Union".

546. We were assisted by Mr Panesar's submissions. He reminded us that the disciplinary hearing in this case was adjourned pending an occupational health assessment of the claimant's fitness to attend, and ultimately never took place. The claimant was invited to a disciplinary meeting (with a range of potential dates) on 3rd February 2017 by Mr Todd which the claimant objected to on the ground that that the notice was too short, and it should be adjourned for his health. The Union replied on 22 February 2017 stating that, provided the claimant had medical evidence that he was not fit to attend a disciplinary hearing, that hearing would be adjourned. When the claimant provided a letter to that effect, the hearing was postponed and was never rearranged. However, from July 2017 the claimant sought to have the disciplinary hearing rearranged and wanted it to go ahead.

547. We accepted that it was appropriate for the claimant to be informed that disciplinary action was to be taken because it was considered that there was substantial evidence that he had falsely made an allegation of perverting the course of justice against the head of the legal department. The claimant was employed as a solicitor. This was a disciplinary charge which not only had implications for his employment, it also had wider implications for him professionally. This was an extremely serious disciplinary charge which the claimant had a right to be told about. We considered carefully whether in those circumstances there had been a breach of legal obligations.

548. Although Dr Elanjithara had referred to being concerned about the risk of suicide, he had not made any particular recommendations about that risk, for example recommending that all contact with the claimant cease or warning against the progression of any procedures. The assessment had been undertaken some 6 months earlier and Dr Elanjithara had noted that with treatment the claimant might be expected to recover in 6 to 12 months' time. In the meantime, the clamant had constantly and actively corresponded with the respondents, in detail and at great length about a variety of matters. The claimant knew that there was a possibility

of disciplinary action, that had been raised in the course of the Croy process and neither he nor his doctors had raised any concerns about a particular risk about suicide arising from the progression from a possibility of disciplinary action being considered to the formal initiation of a disciplinary process.

549. We do not accept that in those circumstances the respondent was on notice that there was a such an immediate and serious risk of suicide that any contact with the claimant about a disciplinary hearing would have been inappropriate. In other words the respondent did not the requisite knowledge of disadvantage for the duty to make reasonable adjustments to be triggered.

550. When the claimant made clear that he was not well enough to cope with disciplinary action at that time, it was promptly suspended.

551. In the circumstances the tribunal found that the claim failed. There was a PCP which caused substantial disadvantage but the respondent did not have knowledge of that disadvantage until the claimant provided specific information about that. When he did, the trade union had met its duty to make reasonable adjustments in relation to the PCP identified by the claimant.

Issue 135 Did the RMT (R1) and Mr Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled. The alleged failure is when despite knowing that the Claimant was seriously ill and at risk of suicide the Respondents insisted that the disciplinary procedure proceed with limited notice: an adjustment would have been to suspend the disciplinary procedure or provide the Claimant extra time for the Claimant to prepare for the disciplinary.

552. This is a reference to the specific terms of Mr Todd's letter he had written on 3 February 2017 proposing a series of dates. Although the first of those was in 10 days' after the letter, the letter offered a rage of proposed dates, it was not an absolute requirement to attend a hearing on the first of those dates.

553. Although not raised by Mr Panesar, in terms of this being a PCP, the PCP cannot be a one-off event so we understand the claim to be that the respondent had a practice of providing limited notice for disciplinary hearings.

554. We had no evidence that the respondent had a practice of only providing limited notice for disciplinary hearings. The only evidence before us related to this one occasion. The claimant appears to be an objection to a one-off action framed as a failure to make a reasonable adjustment.

555. In the circumstances we did not find that the respondent had the asserted PCP.

556. Even if we care wrong about that, insofar as the claimant makes a claim that there was PCP of applying the disciplinary procedure, that would seem to be covered within the previous claim. As Mr Panesar identified there is clearly a very significant overlap between the two claims. In any event our conclusions on this claim were the same. Our reasoning is not repeated for that reason.

557. We did not find there was knowledge of the substantial disadvantage when the notice of hearing was issued. It was reasonable for disciplinary action to be initiated in the circumstances. In response to the claimant's objection based on his health a reasonable adjustment was made and the process was halted. In other words when the respondent had knowledge of disadvantage, a reasonable adjustment was made.

558. This claim is not upheld.

Issue 136 Did the RMT (R1) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled. The alleged failure was that R1 insisted on numerous occasions that the Claimant attend a different medical expert (BUPA) rather than referring the Claimant to Dr Elanjithara.

559. The claimant told us this in his submissions

"The Respondent was fully aware from the Claimants interview with Mr Perkins he found the interview with the psychiatrist to be "traumatic" and it effected his health. On numerous occasions in 2017, the Respondents insisted sending the Claimant to BUPA: the Claimant requested a reasonable adjustment and be sent to the same psychiatrist Dr Elanjithara, as this would be less stressful and less triggering for the Claimant as he had already met Dr Elanjithara.

The Respondents insisted sending the Claimant to BUPA by letter dated 22nd of February 2017…, 14th of March 2017…, 9th May 2017…, 19th May 2017 …., 6th of July 2017 …, appointments in Manchester on the 12th of June 2017, 24th of July 2017.

This failure to make reasonable adjustment caused the Claimant further distress and a decline in health.

There can be no justification for this continuous failure to make a reasonable adjustment, as the RMT had already referred the Claimant to Dr Elanjithara.
It is not correct, as suggested that the Claimant saw a variety of medical experts and this was not a reasonable adjustment at one time, the Claimant only saw one psychiatrist".

560. The tribunal accepted that after BUPA's retention as the trade union's occupational health providers, the respondent had a policy or practice of referring

all employees requiring an occupational health assessment to BUPA. That was a PCP.

561. The panel accept that the claimant told Mr Perkins that his assessment by Dr Elanjithara had been traumatic, but we did not accept that because the claimant had told Mr Perkins that, that he (or the trade union) had knowledge that the claimant would be subject to a substantial disadvantage if he was assessed by another specialist occupational health doctor.

562. We accepted Mr Panesar's submission that there was nothing apparently unreasonable or improper in referring the claimant to a doctor at a reputable medical services firm. It became clear that the claimant's objections to attending any other medical expert than Dr Elanjithara was on the basis that he found discussing his medical history triggering, but we do not accept that was inherently obvious and when he understood the claimant's concerns Mr Perkins offered a sensible and reasonable adjustment. That adjustment was to share the Elanjithara report with BUPA, so that the claimant would not be asked to recount the history of his case again and offered other accommodations such as the claimant being accompanied or arranging the appointment locally to the claimant in Liverpool.

563. The tribunal accepted that given the delay between the initial assessment by Dr Elanjithara in September and the provision of his report in January, Mr Perkins had reasonable grounds to seek a referral to another provider. For a time, the respondent also reasonably believed that Dr Elanjithara was not accepting any work. It is material that we were satisfied that Mr Perkins had good grounds for seeking a further report, not only because it was sensible for an updated report to be sought given there had been a prognosis that improvement might be seen in 6 months, but also because the Elanjithara report dealt with fitness for work but not fitness to participate in other procedures and meetings. We accept that it was appropriate for further advice to be sought about that.

564. In the circumstances we accepted Mr Panesar's submission that the respondent had not failed in its duty to make a reasonable adjustment in this regard. Standing back from the claim, we could not ignore the fact that even when the trade union did agree to refer the claimant to Dr Elanjithara the claimant found grounds not to attend any further occupational assessment. We could not escape the conclusion that it did not matter what the trade union did, the claimant was not prepared to attend a further appointment in any circumstances in any event.

565. In the circumstances the tribunal found that the claim failed. There was a PCP which caused substantial disadvantage, but the respondent did not have knowledge of that disadvantage until the claimant provided specific information about that.

566. When the respondent was provided with information which meant it had knowledge of substantial disadvantage, at first it had reasonably believed a re-referral to Dr Elanjithara would not be possible so it could not make the reasonable adjustment sought. When it became clear that a referral could be made the adjustment was put into place. The trade union had met its duty to make reasonable adjustments in relation to the PCP identified by the claimant.

567. For these reasons we did not uphold the claimant's claim in issue 136.

Issue 137 Did the RMT (R1) and Mick Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled. The alleged failure was that R1 and R2 insisted that the Claimant provided medical evidence that he was too ill to attend a disciplinary within 3 working days: The adjustment being not to insist on such a strict deadline.

568. Although not raised by Mr Panesar, the tribunal panel considered that it was difficult to see this as something which could be seen a practice which might be repeated or applied to someone else, and the claimant provided us with no evidence about that. His submissions focus on why the request was unreasonable but, as in relation to his other claims under this heading, he failed to address how this could be said to be a PCP. Rather than a practice of the respondent, this appears to have been a one-off instruction made in rather particular circumstances and in response to correspondence received from the claimant.

569. Although the issue refers to a "disciplinary" we understand this issue to relate to the arrangement for the capability hearing with Mr Gilchrist because it was that occasion when the claimant was only given 3 days to produce medical evidence.

570. In any event, we did not accept that the claimant had shown us that this placed him a substantial disadvantage with persons who are not disabled. To be clear, we did not consider that the insistence on evidence being provided within this timescale was reasonable. However, we thought that it is likely that the vast majority of employees would have struggled to produce evidence within the timescale set. What is striking is that in fact the claimant was able to comply with the request, perhaps because he did have designated psychiatric support.

571. In the circumstances we found that the claimant had failed to either show that he was subject to a PCP in this regard (as opposed to the union doing something unreasonable), nor had he shown that it placed him at a substantial disadvantage compared to persons who are not disabled.

572. Accordingly, we did not uphold the claimant's claim in issue 137.

Issue 138 Did the RMT (R1) and Andrew Gilchrist (R8) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled
The alleged failure was that R1 and R8 refused to postpone the capability hearing until after the 27th of September 2017

573. The panel again struggled with the claimant's case about this because of his failure to address the essential components of failure to make a reasonable adjustment claim. His submissions were framed in the way one might expect for a claim relating to less favourable treatment. In his witness statement and in his submissions he failed to address on what basis he asserted this was a practice provision or criterion. It appears to be a complaint about a very particular situation.

574. The claimant asserted in his submissions that *"…the adjustment required was delaying a referral until the Claimant was no longer on stepped up care and / or his increased medication took effect.*

The Claimant was suffering a decline in health, he was back on stepped up care and his medication was increased, he requested a postponement of a referral to Dr Elanjithara until the mediation [sic] took effect.

The Claimant contends at this period of ill health a referral to another psychiatrist could have endangered his health further, the Respondents were aware from the meeting on the 21st of October 2016 how traumatic such experiences were for him."

575. We had little medical evidence from the claimant. We could see the contents of the correspondence from his doctors of course, but that contains very little detail. The claimant refers frequently to being on "stepped up care" but did not offer us evidence about what that means nor what its implications are. We accept there were significant concerns about the claimant's mental health, but we are not in position to assess the extent of those concerns or how they had changed over time. There is reference to a suicide risk and that is of course a very serious matter, but the claimant had not been admitted for in-patient care on a voluntary or compulsory basis and we received no evidence of an assessment of the extent of the risk or how it had changed or was worsened. We do not make that observation wishing to appear unsympathetic, but to make the point that this tribunal panel found it difficult to understand what the position was here from a medical or psychiatric viewpoint. This made it difficult for us to understand disadvantage.

576. Although not raised by Mr Panesar, the tribunal panel found it difficult to see this as something which could be seen a practice which might be repeated or applied to another individual and the claimant provided us with no evidence about that. It seems to be a complaint about a one-off situation that was very particular to him at that particular time. The claimant's submissions focus on why Mr Gilchrist was behaving unreasonably in circumstances where he was increasingly unwell

and in his words "back on stepped up care with increased medication" and he was facing the additional stress of an MRI scan and also facing a forthcoming full tribunal hearing. The claimant's case about this is that it was an unreasonable thing to do but he did not seek to explain how it was a practice.

577. Mr Panesar submitted that the respondent did not fail to make a reasonable adjustment in this respect. He argued that by that stage the claimant had been off work for a considerable period of time and there was no indication as to when, in the foreseeable future, he would be able to return to work. The claimant had failed to attend at five occupational health appointments that had been arranged for him, including appointments made with Dr Elanjithara at his request, and in Liverpool and Manchester. It was therefore a reasonable and appropriate thing to do to refer him to a capability meeting in the circumstances.

578. Sickness capability meetings had been arranged for 7th and 13th September 2017, but they were postponed because the claimant said he was not well enough to attend. We accept that, as Mr Panesar points out, this has to be seen in the context of the claimant's wider interactions with the respondent. Throughout this period the claimant was writing to Mr Perkins, the National Executive, and others within the respondent in detail and at length. In those circumstances it was not unreasonable for Mr Gilchrist to write to the claimant to say that he would need to provide medical evidence to support a contention that he was too unwell to attend a sickness capability meeting because his own conduct suggested someone who was willing and able to engage with this employer. In fact, that that had prompted the claimant to write to Mr Gilchrist to say that he was willing to attend a capability meeting, on 11th, 12th, or 13th October.

579. We accepted Mr Panesar's submissions. In circumstances where the claimant seemed to be able and indeed insistent on engaging with the respondent about matters of concern to him and appeared to be unreasonably refusing to attend occupational health appointments, it was reasonable for Mr Gilchrist to seek to insist on a meeting under the capability procedure. Insofar that this was a PCP that a hearing under the capability be arranged within a timescale set by the employer, we could not find that the respondent had knowledge of any particular specific disadvantage for the claimant and when it did have that knowledge, the respondent made a reasonable adjustment to the PCP because the meeting was postponed until after 27 September; and the meeting did not go ahead until 13 October.

580. For these reasons we did not uphold the claimant's claim in issue 138.

Issue 139 Did the RMT (R1) and Andrew Gilchrist (R8) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled. The alleged failure was that R1 and R8 was that they insisted that the Claimant attend BUPA to determine whether or not the Claimant could continue with the capability procedure: an adjustment being to ask KCMHT or Dr Elanjithara.

581. In relation to this issue, in his submissions the claimant says this

"The alleged failure was that R1 and R8 was that they insisted that the Claimant attend BUPA to determine whether or not the Claimant could continue with the capability procedure: an adjustment being to ask KCMHT or Dr Elanjithara.

The RMT finally made adjustments and referred the Claimant to Dr Elanjithara on the 2nd of August, 5th of August and the 16th of August 2016 but due to the Claimants decline in health, the Claimant requested a delay for the referral until after 27th of September 2017.

The Claimant is very ill during the capability hearing dated 21st of November 2017 …. and the meeting has to be stopped.

Mr Gilchrist sends a letter dated the 22nd of November 2017.. insisting the Claimant once again seeing BUPA, without reference to any adjustments.

The reasonable adjustment to Dr Elanjithara, is no longer granted.

Sending the Claimant to BUPA would be triggering and the Claimant had provided medical evidence in the form of a letter from Dr Regan.

The reasonable adjustment would have been to contact the Claimant's mental health carers at Kirkby Community Mental Health Team or once again refer the Claimant to Dr Elanjithara."

582. Mr Panesar points out that this is a substantial repetition of issue 136 above (referring the Claimant to BUPA rather than Dr Elanjithara). Our attention was drawn again to the submissions on that. He also points out that that the respondent was willing to make an adjustment to making a referral to BUPA because it was suggested that Dr Elanjithara's report would be provided to BUPA to avoid the claimant having to repeat his history. In relation to Dr Elanjithara, the respondent had initially reasonably believed that he was no longer taking cases and latterly the claimant had refused to attend appointments with him.

583. In relation to KCMHT, Mr Panesar submitted that the respondent had a designated occupational health advice provider, and it was not a reasonable adjustment to require a separate referral to KCMHT.

584. Although it is not specifically pleaded, we understand the PCP to be a practice of referring individuals to BUPA. We found that the respondent did not initially have knowledge of specific disadvantage to the claimant in terms of why he objected to a referral to BUPA but when it did come to have that knowledge, it made a reasonable adjustment to that referral process, albeit not the one the claimant wanted them to make.

585. We accept that it is legitimate for employers to refer employees to their own occupational health advisors. That is because employers need advice in long term sick absence cases which an employee's own doctors are likely to be unable or unwilling to give in terms of fitness for role and whether in fact the employer had reached the stage where it is reasonable to terminate employment.

586. We accept that in this case, Mr Gilchrist had determined that advice was need from the employer's perspective and we accept that in those circumstances a referral to KCMHT was not a reasonable adjustment. The respondent's attempts to get the claimant to see Dr Elanjithara over the summer had failed and in those circumstances we accept that it was not a reasonable adjustment to go back to those attempts.

587. For these reasons we did not uphold the claimant's claim in issue 139.

Issue 140/141 Did the RMT (R1) and Mick Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled. The alleged failure was that R1 and R2 insisted that R8 (Mr Gilchrist) chair the capability hearing: a reasonable adjustment would have been to appoint a different officer / employee.

588. The claimant made a single set of submissions about issues 140 and 141. In the agreed list of issues presented to the panel issue 141 had been deleted as simply a repetition of 140 and we have proceeded on that basis.

589. The claimant argued that because he was aware of what he described as a close relationship between Mr Gilchrist and Ms Mitchell, based in part on the fact he knew Mr Gilchrist had attended a meal at Ms Mitchell's home and because of the claimant's mental health, he was placed at a disadvantage by Mr Gilchrist's appointment because it caused him anxiety and stress. He submitted that a reasonable adjustment would have been to appoint a regional manager, an assistant general secretary, or an outside organisation to run / chair the capability process.

590. In his submissions Mr Panesar argued that this claim is misconceived because it is not an issue of disability discrimination, "rather [it is] a matter that the Claimant disagreed with to which he has, again, applied the label of unlawful discrimination without foundation".

591. Mr Panesar submitted that the Respondents did not operate a PCP which placed the claimant at disadvantage compared to people who are not disabled, by the appointment of Mr Gilchrist. There is no evidence or reasonable basis for asserting that the appointment of Mr Gilchrist placed the claimant at a substantial disadvantage to people who are not disabled, and in any event it was not the case that he was in fact at such a disadvantage, he merely objected to Mr Gilchrist.

592. He further submits that it would have not been a reasonable adjustment to have appointed a different officer then Mr Gilchrist to chair the claimant's capability hearing. Mr Gilchrist was an experienced, dedicated officer, a former general secretary of another trade union and someone who had had no previous involvement in the management of the claimant's capability process or sickness absence. His appointment did not place the claimant at a disadvantage compared with a non-disabled person.

593. We concluded that the claimant had failed to explain how this was a PCP and how it placed him at a substantial disadvantage compared to a non-disabled person. If Mr Gilchrist was biased because of a friendship with Ms Mitchell, any employee is a similar situation to the claimant would have been similarly disadvantaged, although we did not find that there was any evidence of such a bias.

594. The claimant had objected to every manager appointed by the respondent. It appeared to the panel that what the claimant wanted was a right to have say or veto in relation to the person the respondent appointed to determine any formal process he was subject to. We cannot accept that it is reasonable adjustment. Employers have a right to apply their formal processes to employees and to bring employment to an end where someone is unable to continue in post for health reasons, subject of course to the legal principles which apply to such terminations. That includes a right for employers to determine who should take that decision, subject to principles of natural justice. It is not a breach of natural justice because managers are on friendly terms with each other as long as that friendship does not cause them to be biased, and as our findings of fact make clear we were satisfied that Mr Gilchrist's relationship with Ms Mitchell was not one that meant he was bound to be biased.

595. In the circumstances we concluded that the claimant had not established that there was a PCP which caused him a disadvantage as a disabled person or that the respondent had knowledge of that disadvantage. In those circumstances the question of the reasonable adjustments did not arise, and his claim is not upheld.

Issue 142 The Respondents failure to appoint another Chair of the capability process was an act of discrimination. Did the RMT (R1) and Mick Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled. The alleged failure was that R1 and R2 insisted that Mr Gilchrist (R8) continue to chair the capability hearing despite his threatening and intimidating manner: a reasonable adjustment would have been to appoint a different officer / employee.

596. The claimant submitted that he had been threatened by Mr Gilchrist on 2 November and because he suffers from PTSD and anxiety, this placed him at a

substantial disadvantage when Mr Gilchrist continuing to chair the capability meeting, leading to the claimant described as a collapse on 21 November 2017. A reasonable adjustment would have been to appoint a different Chair of the capability meeting.

597. Mr Panesar submitted that as with issue 140 above, this is in fact another instance of the claimant applying a label of discrimination to something he was not happy about. He submits that Mr Gilchrist's appointment did not place the claimant at a disadvantage compared with a non-disabled person.

598. He also argued that when the claimant was faced with (wholly appropriate) challenges to inappropriate behaviour on his part, it was a habit on the claimant's part to label such challenge as being threatening behaviour. Rather, he suggested Mr Gilchrist had been obliged to take appropriate steps to manage the claimant's inappropriate and aggressive conduct which had included insisting that Mr Gilchrist deal with matters that were not in fact the subject of the capability hearing and adopting an extremely intimidating manner himself with Ms Mitchell to whom it was clearly apparent he had a very strong antagonism.

599. We concluded that it is particularly difficult to see that was a claim about a PCP. The complaint seems to be about Mr Gilchrist's conduct. In order for it to amount to a PCP we would have be satisfied that this was a practice, something that was likely to be repeated or would also be applied to another person in similar circumstances. We would either have to find that Mr Gilchrist had a practice of behaving in a threatening way or that the respondent had or would have, a practise of keeping the same hearing officer in place in the event that the employee being subject to a formal procedure raised concerns about threatening conduct. We had no evidence to suggest that the respondent had a practice of doing either of those things.

600. We accepted that Mr Gilchrist had told the claimant he did not expect certain allegations to be repeated outside the capability hearing. Mr Gilchrist told us that that this was had happened he would have considered taking legal action. That is threatening and we did not consider that that was a helpful or indeed appropriate thing for Mr Gilchrist to have said. It was an ill-judged comment, and we think is likely that it was said in a moment of temper. However, we have to consider that in the context of the meeting in question. We found on balance that the claimant had also behaved inappropriately. Mr Panesar is right that the claimant sought to insist that Mr Gilchrist looked at matters that were not relevant to the issue of capability, in essence he tried to force Mr Gilchrist to hold a grievance meeting which would reopen the conclusions already reached by Mr Carey and Mr Croy and which would pre-empt the disciplinary process. We accepted Ms Mitchell's evidence that she felt threatened by the claimant's conduct in that meeting. The claimant had behaved in a difficult and challenging way and made allegations about Mr Gilchrist which he must have known would be provocative. Mr Gilchrist reacted with inappropriately, but we did not consider that his conduct overall could be described as intimidating.

601. Insofar as the PCP asserted is simply the application of a capability procedure chaired by a senior manager, we do not find that the claimant has shown us that he was subject to a substantial disadvantage nor do we find that the respondent had knowledge of any disadvantage. Insofar as there was knowledge of disadvantage from Mr Gilchrist's comment, for example through the claimant's reaction to it, we found that replacing the chair of the hearing process in the circumstances, bearing in mind the respondent's resources, was beyond a reasonable adjustment.

602. When the respondent became aware from the claimant that the capability hearing was causing him significant disadvantage we accept that Mr Gilchrist and Mr Perkins did reflect on how what they should do when the claimant raised concerns via his representative after the final day of the capability that went ahead. They were concerned about the claimant's mental health and decided that occupational health advice should be sought. That was an appropriate thing for an employer to do at that stage. We consider that the decision to halt the procedure pending medical evidence until the respondent had further information about the claimant's health was a reasonable one. That was a reasonable adjustment although it was never taken further because the claimant resigned. However, there was no breach of the duty to make reasonable adjustments established by the claimant.

603. For these reasons we did not uphold the claimant's claim in issue 142.

Issue 143 Did the RMT (R1) and Mick Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled. The alleged failure was that R1 and R2 insisted that R2 continue to control the investigation, disciplinary and capability procedure: a reasonable adjustment would have been to appoint a different officer / employee to determine the above procedures.

604. The claimant complained that Mr Cash continued to control the investigation, disciplinary and capability procedure despite the fact he had raised allegations against Mr Cash since 22 April 2016, Mr Cash was aware that the claimant had raised an allegation of assault, the procedures he had put in place were unfair and the claimant had continued to repeat his allegations against Mr Cash and had submitted tribunal claims against Mr Cash.

605. The claimant says that knowing that Mick Cash had control of the internal procedures, caused him additional stress and anxiety, placing him at a substantial disadvantage and that a reasonable adjustment would have been to appoint another officer or for the NEC to take control of the procedures.

606. Mr Panesar repeated his assertion that this claim is misconceived because this claim is not in reality an issue of disability discrimination. In any event he argues that Mr Cash's involvement in the claimant's case did not place the claimant at a disadvantage when compared with a person who is not disabled. The claimant objected to Mr Cash because he had disagreed with the claimant's subjective perspective in the past, and so the claimant sought to remove his involvement by portraying it (without foundation) as discrimination and unlawful detriment.

607. Mr Panesar pointed out that Mr Cash had delegated the determination of the claimant's capability procedure to Mr Gilchrist and he also submits that the General Secretary plays an important role in the operation of the Union. In those circumstances his involvement in the claimant's case was wholly appropriate, not a disadvantage to the claimant as a disabled person, and not failure to make a reasonable adjustment.

608. We accept that the respondent had a practice that the determination of procedures applicable to senior employees and managers, would be in the hands of the General Secretary.

609. However, the claimant did not show facts from which we conclude that he was placed at a substantial disadvantage compared to non-disabled employees. The claimant was unhappy with how his complaints had been handled and he was unhappy his concerns had not been upheld but those are complaints about the decisions taken by Mr Carey, Mr Croy, and the decisions he expected Mr Gilchrist and Mr Todd to take. A non- disabled employee in similar circumstances would also have been unhappy, we do not see that there is any particular disadvantage to the claimant. The disadvantage for the claimant came from the outcomes of the procedures not because Mr Cash, as general secretary, was responsible for the instigation of the procedures.

610. In any event, we find that, within the trade union, staffing decisions are taken by the general secretary, but it is clear that many of the day-to-day decisions were in fact being taken by Mr Perkins as the HR manager. We accept that it is clear from Mr Perkins' evidence that what Mr Cash did was to seek to appropriately delegate the investigation and decision-making process to senior managers having taken advice from Mr Perkins, as the HR and constitutional manager, and legal advice. We consider that is highly likely that if the process had been assigned to someone else, exactly the same events would have happened.

611. We also accept Mr Panesar's argument that it is clear that Mr Cash appears to have tried as much as he could not to get involved. That was difficult because the claimant kept involving him and expressing his dissatisfaction with Mr Cash's decisions about the process, but if the claimant had simply let the procedures run their course Mr Cash would not have been so involved. The claimant complains about something that only happened because of his own actions.

612. This claim is not upheld.

Issue 144: Did the RMT (R1) and Mick Cash (R2) subject the claimant to disability discrimination as a consequence of something arising from the Claimant's disability. The alleged discrimination was when the Respondents insisted on the capability hearing prior to the 27th of September 2017.

613. In his submissions about his claims under s15 of the Equality Act, the claimant referred to some relevant caselaw. He highlighted that he need only establish that he had been unfavourable treated, there is no need to show "less favourable treatment" and no comparator is required.

614. The claimant rightly identified that section 15(1)(a) requires findings about two distinct things – that there was been the unfavourable treatment "because of" the relevant "something"; and that the something "arises in consequence" of the disability. He then went onto highlight the decision in *Basildon and Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/397/14 (2016) ICR 305, that the tribunal must be careful not to elide the distinction between the two limbs of the test – it is not a question of whether the complainant was treated less favourably because of their disability.

615. He submitted that *"in respect of the first element of causation (the "because" of), the test is the same in respect of direct discrimination and focuses on the alleged discriminator's reason for action. Something must be more than a trivially influence the treatment, but it need not be the sole or principal cause Pnasier[1] v NHS England and another UKEAT/0137/15 (2016) IRLR 170*

616. He also submitted that *"the required state of mind is simply that the unfavourable treatment should be because of the relevant something. There is no requirement that the alleged discriminator should have known that the relevant something arise from the claimant's disability – City of York Council v Grosset (2018) EWCA Civ 1105. In respect of the consequence issue, the second element, there is no need to look at what was in the mind of the alleged discriminator – Pnasier . Where the question of knowledge is in issue, the Claimant must establish that the individual that took the decision being challenged either knew or ought to have known of the Claimant's disability – IPC Media Ltd v Millar (2013) IRLR 707 EAT"*

617. The claimant highlighted to us that *"The EAT in the Pnasier case provided guidance to the correct approach to S15:*

[1] There is minor typographical error here by the claimant, the correct reference is Pnaiser v NHS England

A: A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

B: The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought process of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason in a S.15 case. The "something" that causes the unfavourable treatment need not be the sole reason but must at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

C: Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant…….

D: The tribunal must determine whether the reason or cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regard to the legislative history of S15 of the Act……, the statutory purpose which appears form the wording of S15 of the Act, namely, to provide protection in cases where the consequence or effects of a disability lead to the unfavourable treatment and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

E: ….. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

F The stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator"

618. In terms of his specific submissions on issue 144 the claimant then submitted this

"*The alleged discrimination was when the Respondent's insisted on the capability hearing prior to the 27th of September 2017.*

The Claimant refers to his comments in issue 103 and 138 above. The Claimant was off work on long term illness due to his disability, the Claimants health was declining and he requested that the capability hearing was re-listed after the 27th of September 2017: the Respondents initially refused this request, discriminating against the Claimant as a result of something arising out of his disability: attending

a capability hearing before the 27th of September 2017 effected the Claimant's anxiety and health, amounting to less favourable treatment on the grounds of the Claimants disability."

619. It is unfortunate that having set out the legal tests which we have to apply, the claimant did not address how he says we should apply these to the facts he has presented. In particular what the claimant failed to address was what the "something arising" is in his case. In the paragraph above the claimant refers to his anxiety and health (that is his disability) and that the fact that he had been off ill for long term – that is something arising, but the complaint is not that he was required to attend a capability hearing per se, but the fact that the respondent "insisted on the capability hearing prior to the 27 September". We found it difficult to understand what the claimant was saying about the connection between the something arising and the alleged "insistence". It seems that what the claimant is complaining about is that the insistence on the hearing before 27 September made him more unwell. In other words, he appears to complain about the effect of the unfavourable treatment on his disability which he says was less favourable treatment, rather than complaining that the unfavourable treatment was *because* of something arising in consequence of his disability.

620. In any event our difficulty in understanding the claimant's case was further compounded by the fact that the capability hearing did not in fact go ahead before 27 September.

621. The claimant had referred us to comment about issues 103 and 138 but that did not assist us. In relation to issue 103, the claimant alleged that the reason why the respondent would not delay the capability meeting until his increased medication took effect and he was no longer on stepped up care, was because he had submitted Employment Tribunal claims about discrimination and whistleblowing and that *"a delay until after the 27th of September 2017 would be reasonable but the Respondents would organise the capability hearing just before the substantive Employment Tribunal hearing in London, placing the Claimant under further pressure and damaging his health*". His submissions on issue 138 (the failure to make reasonable adjustments) are explained above.

622. Mr Panesar submissions about this focus on the issue of justification, but we do not consider that unless we find the claimant has established that he was subject to unfavourable treatment within the scope of s15.

623. We accept that the claimant's initial request to have the capability hearing after 27 September 2017 was refused, although in fact the respondent did not insist on the hearing going ahead before then. It is not disputed that it was adjourned after the claimant provided further information, including a copy of his appointment letter

for an MRI scan. Insofar as there was a detriment, it was not as pleaded, but rather an initial refusal and a delayed decision to postpone the capability hearing.

624. As explained in our findings of fact we accepted that it was Mr Gilchrist who made this decision. We found it surprising that he was not aware of the employment tribunal hearing, but the claimant had not given that hearing as the reason why he needed the delay, so we have no reason not to accept his evidence about that. At this point in time the claimant had not brought any claims about the capability process so of course Mr Gilchrist was not involved in the litigation himself. We accept that Mr Gilchrist had no reason to consider the relationship with the tribunal hearing when the claimant himself did not refer to it. We were surprised and concerned by the response of Mr Gilchrist to the letter from the claimant's GP and his insistence that he had not received evidence that the claimant was unfit to attend a capability hearing. It is clear to us that Mr Gilchrist was frustrated by the claimant's refusal to attend for an occupational health assessment which he considered to be unreasonable, and he told us in cross examination that he thought it was important that occupational health evidence was available to him.

625. The question then arises whether that reason for the initial refusal was because of "something arising" from the claimant's disability. The occupational health assessment was required because the claimant was absent on a long-term basis but, we concluded, Mr Gilchrist did not initially refuse to postpone the hearing because the claimant was disabled or because he was absent form work but because he thought the claimant had been unreasonable and the evidence the claimant had submitted was inadequate.

626. Applying the test in *Pnaiser* as set out by the claimant, we were not satisfied that the claimant had shown that the claimant had been subject to unfavourable treatment because of something arising because of his disability even when looking for a causal connection between the reason and the something arising on the approach there may be a number of links in the chain (to reflect the language of the EAT). However in case we are wrong about that, we went on to consider Mr Panesar's submissions about justification.

627. He argued that that the claimant had been absent from work for over 21 months, he had refused to comply with reasonable instructions to attend at occupational health (multiple times over a period of months) and was fully capable of setting out his position throughout, which he did in detail, repeatedly to multiple different people in relation to a wide range of complex matters.

628. He argued that it was a reasonable means of achieving the legitimate aim of managing the exceptional amount of sickness absence on the claimant's part by

scheduling a capability meeting in early September, subject to the possibility of adjournment if the claimant was unwell.

629. We accept that it was legitimate for the respondent to have sought to require the claimant to attend occupational health and we accept that it was legitimate for Mr Gilchrist to wish to satisfy himself that if the capability hearing was to be delayed, there had to be good evidence for that. We did not accept that the claimant had good reason to refuse to attend all of the occupational health appointments. Looking at his reasons for non- attendance, it seemed to the panel he was avoiding the assessment. That is not to say we doubt he was unwell, but it was striking how the claimant's position changed. First he would not attend an appointment because it was not with Dr Elanjithara. When meetings were arranged with Dr Elanjithara that too became an unreasonable thing for the respondent to request.

630. We think it is more likely than not that, as an experienced employment lawyer, the claimant recognised the implications of an occupational health assessment which was likely to paint a bleak picture of the likelihood of him ever being fit to return to work. The claimant knew that the expectation of the respondent's capability procedure was that an update occupational assessment was required before he could be dismissed. The respondent sought to take reasonable steps to obtain the assessment and we had some sympathy with Mr Gilchrist's frustration that the claimant was delaying the respondent following its procedures. We do know the claimant sought to rely on the absence of an occupational health report as a reason not to have the capability hearing.

631. We consider it significant that although the hearing was not initially delayed, when the claimant provided further information about his reasons for seeking postponement, it was delayed. We accept that the respondent had a legitimate aim, that is managing workplace resources and the impact of sickness absence and that its approach was a proportionate and reasonable in difficult circumstances.

632. Accordingly we find that the claim is not upheld because the claimant had not shown facts form which we could conclude that ne could have been subject to unfavourable treatment because of something arising in consequence of his disability but if he was, that unfavourable treatment was a proportionate means of achieving a legitimate aim. This claim is not upheld.

Issue 145 Did the RMT (R1) and Mick Cash (R2) subject the Claimant to disability discrimination as a consequence of something arising from the Claimant's disability.

The alleged discrimination was the insistence that the Claimant obtain medical evidence within such a short time

633. The claimant's submissions are somewhat difficult to follow. He says this "*The alleged discrimination was the insistence that the Claimant obtain medical evidence within such a short time. The Claimant refers to his comments at issue 67 above."*

634. At issue 67 the claimant says this

"The Claimant could not attend the disciplinary during February 2017 due to his ill health, as a result the Respondent's insisted he provide medical evidence within 3 days. This was an act of discrimination contrary to S15, as such a short deadline could not be justified in the circumstances, it caused the Claimant distress and amounted to less favourable treatment.

Did the First Respondent (RMT) and the Second Respondent (Michael Cash) subject the Claimant to Victimisation by reason of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET claims

The Victimisation alleged is requesting the Claimant provide medical evidence in 3 working days that he was unfit to attend a disciplinary.

Insisting on medical evidence and the disciplinary proceeding within a short timescale was an act of discrimination contrary to the Equality Act 2010: the respondents were well aware of the Claimants health and the risk of suicide from Dr Elanjithara's report. No reasonable employer with the Respondents knowledge would request a medical evidence in such a short time, knowing the effect it could have on the Claimant, who suffered from anxiety and depression and likely to have an adverse effect of the Claimants' medical health. The Claimant alleges that the Respondent was motivated by the Employment Tribunal claims for discrimination the Claimant submitted and the allegations he had raised regarding [RW].

Victimisation in requesting medical evidence in 3 working days that the Claimant was not fit to attend a disciplinary hearing: R2 was motivated to pressure the Claimant. Mr Cash's letter dated the 22nd of February 2017, postponing medical evidence was not fit to attend within 3 days, this was an unreasonable timescale. No valid reason for this timescale and therefore an act of victimisation."

635. As Mr Panesar points out, as well as being a repetition of issues 67, it is also a repeat of issue 137 above, put there as firstly victimisation and then as a failure to make a reasonable adjustment, but repeated here as an act of discrimination as a consequence of something arising from disability.

636. In terms of this matter being pleaded as a section 15 claim, as the claimant himself points out in his submissions as referred to above, for this claim to succeed it is necessary to identify the "something arising". The claimant appears to have

wholly failed to address this. It is unclear what the claimant says was the something arising in this regard.

637. In relation to this Mr Panesar simply denied that the claimant was asked to obtain medical support in the said timescale in consequence of something arising from his disability and submits that it was a reasonable an appropriate step on the part of the Respondent, to ask the claimant for medical evidence in that time scale given that he was plainly in touch with his medical health providers, and he was (readily) able to do so.

638. We know the claimant was absent from work for reasons arising in consequence of his disability. The respondent required him to attend a disciplinary hearing and the claimant said he was too unwell to attend. The reason why the claimant could not attend the hearing was a reason arising in consequence of his disability. The respondent asked for evidence that the claimant could not attend so that was also a reason arising in consequence of his disability.

639. However, what the claimant complained about was being asked to provide evidence that he was too unwell to attend in short timescale, 3 days which the claimant considered to be unreasonable, although the claimant was able to comply.

640. The claim is about the reason why the claimant was asked to provide the evidence so quickly. In his evidence the claimant suggested various reasons, relating to his alleged victimisation. The claimant says that *"this was an act of discrimination contrary to S15, as such a short deadline could not be justified in the circumstances, it caused the Claimant distress and amounted to less favourable treatment"* but, in suggesting that the claimant falls into the error he warned us against above. The something arising must be the cause (in a broad sense) of the unfavourable treatment, not the consequence of it.

641. We found on the balance of evidence that the claimant did not establish facts to show that reason why he was asked to provide the medical evidence in a short timescale was something connected to his disability.

642. This claim is not upheld.

Issue 146 Is the Claimant disabled within the meaning of S6 of the EqA? (The respondent admits that the Claimant is disabled.)

643. This was not a dispute before us it because the respondents accepted that that the claimant is (and was at the relevant time) disabled.

Issue 147 Did the First (RMT) and/or Second (M Cash) and/or Seventh (S Perkins) Respondents apply a provision, criterion, or practice (PCP) to the Claimant? The PCP being a requirement to attend an appointment with Dr Elanjithara for an occupational health meeting on 2nd August 2017. If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a

disability? If so did the Respondents take such steps as were reasonable to avoid any substantial disadvantage to the Claimant.

The adjustment required was delaying a referral until the Claimant was no longer on stepped up care and/or his increased medication had [sic] took effect.

644. This is a complaint about a one -off decision, that is about a particular referral to a particular occupational health adviser at a particular time. It appears what the claimant complains about is that the fact that he says at the time he was not well enough to attend, the respondents knew that, and they could have waited. We know that the words 'provision, criterion or practice' are not to be narrowly construed but, as Lady Justice Simler pointed out in *Ishola v Transport for London* the wording of the statutory provisions is significant. There must be something which suggests repetition or that this is something that would be done to someone else in similar circumstances. That cannot be said of the arranging of an occupational referral on a particular date to a particular person. The PCP must be the referral of an employee to occupational health.

645. We consider that this claim as pleased is misconceived because it is not a claim about a PCP.

646. Insofar as it is clear that the respondent did have a PCP of referring employees to occupational health, that is not disputed, we make the following findings. Referring absent employees to occupational health is a legitimate thing to do, indeed it is clear that the claimant agrees with that because one of his complaints in this case is that a referral to occupational health was not made earlier.

647. The claimant had PTSD and anxiety. The purpose of an occupational health referral is to see if someone is fit to return to work and when and if there is anything that can be done to assist that return. Although that can be positive thing (and indeed it was something which at various points the claimant had pressed for and complained about a referral not being made, we accept that referring a person with these disabilities was likely to cause increased stress and because of the claimant's condition at that time, we accept that he thought the timing of the request was insensitive. However, we accept Mr Panesar's submission that what the respondent was seeking to do was to refer to the claimant to the individual, Dr Elanjithara, that the claimant had specifically asked to be referred to, rather than the usual occupational service then being used. That was already an adjustment to the PCP.

648. Further Dr Elanjithara was a professional with a duty of care to the claimant and he was already familiar with the claimant's case. He is a psychiatrist, so someone trained to deal with people with severe mental health problems and he was familiar with the claimant's case. We accept that the respondent would have no reason to perceive this course of conduct as being unreasonable or improper or something which would cause a disadvantage.

649. In any event adjustments were made for the claimant's ill-heath. The claimant complains that the respondent sought to refer him at a particular time. It was legitimate for the employer to have sought a referral, but the claimant was not ever forced to attend occupational health. For example, he was not threatened with disciplinary action for failing to attend because that was a reasonable management instruction. The respondent had incurred cost when the claimant failed to attend appointments, but that did not result in any sort of action being taken. The meetings were re-arranged to accommodate the claimant.

650. The respondent did not fail to make a reasonable adjustment in this regard and the claimant is not upheld.

Issue 148 Did the First (RMT) and/or Second (M Cash) and/or Seventh (S Perkins) and/or Eighth (A Gilchrist) Respondents apply a PCP to the Claimant? The PCP being a referral on 18th August 2017 to a formal meeting under the First Respondent's sickness absence procedure? If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so did the Respondents take such steps as were reasonable to avoid any substantial disadvantage to the Claimant.

The adjustment required was delaying a referral until the Claimant was no longer on stepped up care and/or his increased medication had took effect

651. This is a complaint about a one -off decision, that is about a particular referral to a meeting under the capability process and the comments above apply. Arranging of a hearing on a particular date cannot be a PCP, the PCP must be the referral of an employee to a capability hearing after a period of sick leave. The claim as pleaded appears to be somewhat misconceived because it is not a claim about a PCP.

652. Insofar as it is clear that the respondent did have a PCP of expecting employees to the workplace on a regular basis to perform their duties, that was a legitimate policy. Where employees are unable to meet that requirement because of ill-health, referring employees to a capability process where absence, even when caused by disability, may result in the termination of their employment is also legitimate, subject to employers being prepared to make adjustments to the workplace, to the role and so on, before they take a decision to dismiss.

653. In this particular case, the claimant had, by August 2017, been off work for around 21 months, on full pay. His absence could not be covered by colleagues given the nature of the work he did and the small size of the team so in addition to the cost of sick pay, the respondent had to incur the cost of locum cover and the additional costs of using external lawyers. Although the respondent had been largely unsuccessful in its attempts to refer the claimant to occupational health (other than one assessment by Dr Elanjithara), it was clear on the information that

the claimant himself was providing that there seemed no reasonable prospect of the claimant returning in the foreseeable future.

654. It would be inevitable that whenever the respondent initiated that capability referral process it would be difficult and stressful for the claimant. Accordingly, although we accept that the application of the capability procedure would cause a substantial disadvantage to the claimant, and the respondent must have been aware of that in the circumstances, the respondent did not fail to make a reasonable adjustments. The impact of his continued absence did have to be looked at it. When the claimant raised concerns about a meeting in August the respondent made an adjustment to that and the meeting did not in fact go ahead until November. That was a reasonable approach to take.

655. This claim is not upheld.

Issue 149 Did the First (RMT) and/or Seventh (S Perkins) and/or Eighth (A Gilchrist) apply a PCP to the Claimant. The PCP being a referral to the Bupa, the First Respondent's Occupational Health providers. If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so did the Respondents take such steps as were reasonable to avoid any substantial disadvantage to the Claimant? The Claimant contends that the step that it would have been reasonable to obtain medical opinion from his treating medical team, Knowsley Community Health, instead of Bupa.

656. Issue 139 in this case is set out by the parties as follows "Issue 139 Did the RMT (R1) and Andrew Gilchrist (R8) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled. The alleged failure was that R1 and R8 was that they insisted that the Claimant attend BUPA to determine whether or not the Claimant could continue with the capability procedure: an adjustment being to ask KCMHT or Dr Elanjithara."

657. The only difference between these issues is that Issue 139 does not include Mr Perkins relates specifically to the capability procedure whereas issue 149 is more generally stated. However, Mr Gilchrist was only involved in the capability process, so it is difficult to see this has a material difference.

658. Even when we considered this issue in terms of Mr Perkins referring the claimant to BUPA before the capability process started, the conclusions we reached were exactly the same. Although Mr Gilchrist was responsible for capability process, and he was the one who made decisions about the postponement of capability hearings, for example, it was clear that the occupational health process and decisions in relation to that were taken by Mr Perkins.

659. Our reasons for not upholding this claim, are the same as for issue 139. We understand the complained about PCP to be a practice of referring individuals to BUPA. We found that the respondent did not initially have knowledge of specific disadvantage to the claimant in terms of why he objected to a referral to BUPA but when it did come to have that knowledge, it made a reasonable adjustment to that referral process, albeit not the one the claimant wanted them to make. We accept, for the reasons set out in in relation to issue 139, that the reasonable adjustment sought, a referral to the claimant's own doctors, went beyond what was reasonable.

Issue 150 (a) Did the First (RMT) apply a PCP to the Claimant? The PCP being the decision not to arrange a disciplinary hearing against the Claimant in August 2017. If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so, did the Respondent take such steps as were reasonable to avoid any substantial disadvantage to the Claimant?

660. One of the curious features of this case is that the claimant says he was subject to unlawful treatment when the respondent initiated disciplinary action against him in February 2017. That action was paused when he submitted medical evidence, but then six months later when a decision is taken to consider his claim under the capability procedure, the claimant says it is unlawful for the respondent not to have completed the disciplinary procedure which he had said would pose a risk to his health. We can understand why the respondent found that to be an apparent contradiction.

661. Insofar as the PCP raised by the claimant appears to be that the respondent had a practice of not proceeding with disciplinary hearings in cases of long-term absence, we accept that this is likely to the case. However, we do not accept that there is any substantial disadvantage to the claimant as a disabled person from that practice.

662. In his submissions, the claimant contends that "as a result of having threat of disciplinary hanging over him since the outcome of Mr Croy's report regarding RW since October 2016, his health was not going to improve until the matter was resolved, and his health could not improve until the disciplinary was listed and heard. He says that his placed the claimant at a substantial disadvantage as his health could not improve until the stress of the disciplinary was removed.

663. Mr Panesar points out *that "the Claimant was invited to a disciplinary meeting (with a range of potential dates) on 3rd February 2017 by Mr Todd and the Claimant replied to say the notice was too short and it should be adjourned for his health. The Claimant provided, via his medical health providers, a letter that he was currently unfit to attend at a disciplinary hearing on 24.02.17. Over the ensuing months up to the time of the Claimant's resignation, the Respondent attempted multiple times to get the Claimant to attend for occupational health assessment as*

to his fitness to participate in disciplinary proceedings. Those attempts included making at least 5 appointments for such assessment. The Claimant refused to attend any of those appointments."

664. Mr Panesar argues that given that the claimant had stated that he was not fit to attend the disciplinary hearing, and provided medical evidence specifically that he was not fit to attend a disciplinary hearing in February 2017, it was both reasonable and appropriate that the respondent not convene a disciplinary hearing until they had updated medical evidence as to the claimant's fitness to attend and in the circumstances it was not a reasonable adjustment to convene a disciplinary hearing in August 2017 at a time when the claimant's previous medical evidence suggested he was not fit.

665. We accept Mr Panesar's submissions about that. We do find a contradiction in the claimant's case. The respondent had received information that the claimant was not fit to attend a disciplinary hearing and there were grounds to suggest that the claimant continued to be too unwell to undertake his role as a solicitor after a significant absence from work. In those circumstances considering his case under the capability procedure was a reasonable approach. This claim is not upheld.

Issue 150 (b) Did the Respondents subject the Claimant to discrimination in consequence of something arising from the Claimant's disability, in stopping the Claimant's pay.

666. The claimant received full pay despite being absent from work for just over two years. Although the process of stopping the claimant's pay began in the summer of 2017 it was not until November that his pay was actually stopped.

667. The reason why that pay stopped was because of his continued absence. That reason is undoubtedly for something arising in consequence of the claimant's disability. That is accepted by Mr Panesar. The issue for us was whether that was justified.

668. The claimant points to the respondent's policy regarding sick pay and to the words in "cases of genuine illness of a prolonged nature" for sympathetic consideration and "provision made for indefinite payment of full salary during sickness".

669. He says that the most striking issue about his sick pay was the timing. He says that his pay was stopped despite him having serious mental health issues, when he was trying to achieve sufficient fitness to participate in stressful internal capability proceedings and was looking to deal with an impending disciplinary hearing. He suggested that "stopping pay could be viewed as a further significant contribution to the pattern of detriments or detrimental decisions being made in respect of the claimant - and this in the context of a pay scheme in which the claimant had a legitimate expectation of full pay continuing."

670. He also says this *"stopping of pay an act of disability discrimination contrary to S15. Difficult to justify the action taken or a failure to make a reasonable adjustment but the O'Hanlon v HMRC but this case can be distinguished by reason of the Union's sick pay , the timing issue set out above and the impact the cessation of sick pay was likely to have on the Claimant's state of health.*

As noted above the Respondent failed to follow its own procedures as Mr Perkins failed to consult before deciding to stop pay, at the capability hearing on the 20th of November 2017 he states he did not consult, and the staff representatives noted his decision.

The claimant according to the respondent's disciplinary procedures should have been paid until the end of the procedure, including when the appeal was heard".

671. Those submissions are not entirely clear, but we do note this about the matters raised by the claimant. There was a meeting with the staff representatives at which they would have had the opportunity to make representations or challenge the decision to end sick pay. They did not raise any concerns and we accept that Mr Perkins followed the agreed process. We rejected the claimant's submissions about that.

672. Mr Panesar submitted that stopping the claimant's pay in November 2017 in respect of an absence which began in November 2015, having paid the claimant 2 years full pay without any attendance at work, was justified as a proportionate means of achieving a legitimate aim. He points out that whilst the claimant was being fully paid for his absence, the respondent was also obliged to pay for the full-time equivalent cover for his work. By the time of his resignation, shortly after the claimant's sick pay was stopped, the claimant had been paid £93,918.16 and had incurred very significant costs in addition to the additional cost of paying for locums and external firms to carry out the work that the claimant would have undertaken if he had not been unwell.

673. Mr Panesar submitted that in circumstances where there was no indication of when the claimant might be fit to return to his (or any) work, given the claimant had not given any such indication, and having refused to attend multiple occupational health appointments, it was entirely justified to curtail the claimant's pay.

674. We have taken into account (see for example *Hensman v Ministry of Defence* UKEAT/0067/14/DM) that the approach we should adopt is to apply the justification test as described in *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846, which is about indirect discrimination, when we consider justification under s15(1)(b) of the EqA. We must determine whether the employer's decision was objectively justifiable and reasonably necessary. Although, the employer did not have to demonstrate that no other course of action was possible, the use of the word reasonably did not permit a margin of discretion or range of reasonable responses. The principle of proportionality requires us to take into account the reasonable needs of the business, but we have to make our own judgment, upon a fair and

detailed analysis of the working practices and business considerations involved, as to whether the proposal was reasonably necessary.

675. We took into account that the respondent is a trade union. As such it has limited resources which have to be managed in the interests of its members whilst meeting its legal obligations to its staff. The financial resources of the trade union are not only required to pay its employees and associated overheads, we heard that the resources of the RMT will also be required for other reasons, not least to ensure that funds are available to seek to support and enforce the rights of its members including through the payment of support for striking members in the event of industrial action which we understand to be £50 per day per striker. We accept that in those circumstances this amounted to a legitimate aim of managing the efficient running of the union and its resources.

676. We accept that in this case the impact of the claimant's absence was not only the sick pay paid to him beyond the minimum entitlement in the RMT sick pay policy but also that it had a wider negative impact on the resources available to the trade union to meet the needs of its members. We rejected the claimant's argument that the entitlement he enjoyed was for sick pay as long as he was ill if the reasons for his absence was a genuine and serious condition. The policy allowed enhanced sick pay to be ended provided the trade union consulted with workplace representatives. We were satisfied that this showed that the union had sought to have a process which was proportionate and fair – allowing workforce representations to be made on the basis of specific financial and other information, rather than for example, simply ending sick pay when a particular level of absence had been reached. That process also involved a weighing up of the costs of absence in terms of the impact on the union, not only in a general sense but looking at a particular department.

677. We accepted the evidence of the respondent and submissions of Mr Panesar, that the impact of the claimant's absence on the legal team was significant and that the cost of continuing to pay him in full was substantial. We accept that continuing those payments would inevitably impact on the resources available to the trade union's members, to support individual and group legal cases and to have wider funds available to support the work of the union, including supporting industrial action.

678. We also accept that at the time the claimant's sick pay was ended there was no reason for the respondent to believe that the claimant would be able to return to work. This was not a case where continuing sick pay for a little longer would be likely to achieve or see a return to health, nor was this a case where the claimant could return if reasonable adjustments in the workplace were made with the payment of sick pay facilitating that process. We are satisfied that in its decision making the respondent had taken these issues into account.

679. We accept that ending sick pay had a significant impact on the claimant. That will always be the case when sick pay ends, but in this case the impact would be all the greater in light of his mental health. However, in taking into account the evidence above, we find that the respondent had a legitimate aim in managing the limited resources for its members and employees and we accept that limiting sick pay is an appropriate and reasonably necessary approach to achieving that aim. In approaching the individual decision in the case of the claimant, the trade union had taken a careful and measured approach, looking at the individual circumstances of the claimant and the impact of his absence and its cost on the small legal department. We accepted that was a proportionate response bearing in mind the impact on the claimant. For this reason we accept that the respondent had shown it could rely on the defence in s15(1)(b) and accordingly this claim is not upheld.

Issue 151 Did the First Respondent apply a PCP to the Claimant? The PCP being a refusal to remove the Eighth Respondent (A Gilchrist) from being the hearing officer of the Claimant's capability procedure, following an alleged threat by the Eighth Respondent towards the Claimant. If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so, did the Respondent take such steps as were reasonable to avoid any substantial disadvantage to the Claimant by removing Mr Gilchrist? If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so, did the Respondent take such steps as were reasonable to avoid any substantial disadvantage to the Claimant?

680. The claimant says that *"this issue is repeated from above and the Claimant refers the Employment Tribunal to his comments at issue 142".* Mr Panesar says that it is repetition of issue 140. The panel consider that they are both right and note it is disappointing given the extremely limited time we had at the outset of the hearing to review the list of issues and the length of time the parties had had to agree a sensible list of issues that this could not be resolved before submissions.

681. We considered that our findings in relation to issues 140 and 142 explain our conclusions about this and it is necessary to set that out again.

Issue 152 Did the Claimant's resignation amount to a "dismissal" under S39(7) ((b) of the Equality Act 2010? If so was the dismissal on grounds disability?

682. S.39(2)(c) and (4)(c) of the Equality Act 2010 (EqA), provides that an employer (A) must not discriminate against or victimise an employee of A's (B) by dismissing B. For the purposes of S.39, dismissal includes constructive dismissal, which occurs where the employee, owing to the repudiatory conduct of the employer, is entitled to resign and regard him or herself as dismissed — S.39(7)(b).

683. This issue is dependent on the claimant showing that he had been constructively dismissed. We found that he had not been but our reasons for that are more logically considered under the next issue.

684. **Issue 153 Did the Claimant's resignation amount to a constructive dismissal under s95 (1) (c) Employment Rights Act 1996 (ERA)? If so, was the dismissal unfair in all the circumstances?**

685. The burden of proof falls on the claimant to show that he had been constructively dismissed, that is that there had been a fundamental breach of his contract of employment. We recognise that a breach of the implied term of mutual trust and confidence may result from a number of actions over a period when taken together may cumulatively amount to a breach.

686. The claimant made the following submissions

687. *"The Claimant contends that the Respondent committed a repudiatory breach of contract, a significant breach of contract going to the root of the contract organising an unfair, not impartial investigation procedure, a discriminatory procedure, subjecting the Claimants to detriments for the protected concerns he raised, failing to make a reasonable adjustment, stopping pay contrary to sickness procedures and with an outstanding disciplinary for gross misconduct, Mr Gilchrist's threat and the unfair, not impartial capability and discriminatory procedure he devised: the claimant refers to his resignation email dated 24th of November 2017*

688. *The Claimant also relies upon*

a. The assault of Ms Mitchell

b. Ms Mitchell's treatment of the Claimant in relation to his appearing as a workplace representative and trying to leave the workplace when threatened

c. The conduct of the Claimants internal proceedings including matters such as an appointment of a succession of inappropriate decision makers, the absence of a right to appeal on the Ms W in respect of the Mrs W matter.

d. The disciplining of the Claimant Mr Edwards for raising the RW matter

e. Proceeding with the disciplinary even though it was plain that the Claimant was very unwell

f. Proceeding with the disciplinary in a very short time scale

g. Adding matters to a disciplinary that was already stressful

h. Requiring the Claimant to obtain medical advice that he was not fit to participate in the disciplinary process in an unreasonably short timescale

i. Refusing to defer the Claimant seeing Dr Elanjithara until he was well enough after 27/09/2017

j. Refusing to delay the capability meeting until after 27/09/2017

k. Failing to seek an OH report before the capability meeting

l. Cutting the Claimant's pay to zero contrary to the Respondent's capability procedure and the Claimant faced outstanding charges of gross misconduct and until the disciplinary process was completed pay should not have been stopped.

m. Mr Gilchrist's threat and his decision not bring Mr Mick Cash as a witness in the capability hearing and veto the questions to Ms Mitchell

n. Insisting repeatedly on the Claimant attending a 2nd OH meeting with a different doctor, at first by Mr Perkins and latterly by Mr Gilchrist, who also insisted the Claimant make decisions about the capability process when he was clearly unwell.

Case law
Every breach of the implied term of mutual trust and confidence is a repudiatory breach of contract – Morrow v Safeway Stores (2002) IRLR 284
Kaur v Leeds Teaching Hospitals NHS Trust (2018) the Court of Appeal proposed that the Tribunals should ask themselves the following questions:

1. What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation?

3. *Has he or she affirmed the contract since that act?*

4. *If not, was that act (or omission) by itself a repudiatory breach of contract*

5. *If not, was it nevertheless a part …….of a course of conduct comprising several acts and omissions, which viewed cumulatively, amounted to a repudiatory (breach) of the Malik term?*

6. *Did the employee resign in response (or partly in response) to the breach?*

In BG plc v O'Brien (2001) IRLR 496: the EAT rejected an argument that the implied duty of trust and confidence could not impose a positive obligation upon an employer: it held that the employer in that case had breached the duty of trust and confidence by failing to offer a him a revised contract when all his colleagues were offered a revised contract.
The burden of establishing the reason for the dismissal rests on the employer, the burden in relation to this second limb of the tribunal enquiry is neutral. Was the dismissal procedurally fair? The band of reasonable responses applies to the reason to dismiss and also followed the procedure adopted by the employer.

Discretionary Benefits

Braganza v BP Shipping Ltd and Ors (2015) ICR 449: Supreme Court held that an employer's decision regarding eligibility for contractual death benefits was subject to a review on public law Wednesbury reasonableness / principles and the employers decision was unlawful for failing to take relevant matters into account.

The Claimants continued pay in relation to the completion of the disciplinary process was not discretionary.

689. Mr Panesar's submissions about this are brief. He argues that the Claimant was (a) not dismissed but resigned shortly after his sick pay was eventually stopped (b) not constructively dismissed, there being no breach of his contract, and certainly no sufficiently serious breach by the Respondents to justify the termination of his contract. If it is deemed the Claimant was dismissed, that dismissal was not, in all the circumstances of the case unfair.

690. He submits that the last straw does not have to be a breach of contract in itself or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. An entirely innocuous act by the employer cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets it as hurtful and destructive of their trust and confidence in the employer.

691. In addition to the matters raised specifically in the submissions, it is appropriate to identify the issues referred to in the resignation letter.

692. In that three-page letter, the claimant identified the following issues as having led to his resignation:

a. The RW allegation and the allegation of assault;

b. The detriments which he says he was subject to on 10 November;

c. That after he raised grievances he was subject, in his words, to an unfair, not impartial, and discriminatory process and had to submit tribunal proceedings as a result;

d. He alleges that there was a further perversion of the course of justice by Mr Cash and by Ms Mitchell and her son in the criminal investigation and there had been a failure to follow grievance procedure and capability procedure;

e. That the decision of Mr Cash to refer him a disciplinary hearing was an act of victimisation when he was aware of the assault allegation and that he was telling the truth about RW matter. The fact the disciplinary case was still outstanding was causing further anxiety and ill-health

f. The union had revised internal procedures and requested case management orders knowing that the claimant would struggle with these as a disabled person and to victimise him

g. That he had been subject to further detriments because procedures had not been followed, he had his pay cut despite outstanding procedures and Mr Cash and the RMT for not following had refused to let the claimant retain his flat until the procedures were completed and had not contacted his mental health carers about his health or made reasonable adjustments

h. That Mr Gilchrist's appointment had been a breach of natural justice, he had not acted fairly or impartially and had threatened the claimant damaging his mental health further;

i. That the senior officers had failed to intervene because the claimant had raised concerns about the general secretary and head of the legal department;

j. That Mr Gilchrist had breached the capability procedure by not having an occupational health report before the capability hearing and his letter of 23 November had been a breach and was discriminatory;

k. Mr Gilchrist had refused to recuse himself from the capability procedure.

693. As our findings of fact explain, we did not uphold the claimant's substantive allegations. To be clear, we did not find the process and procedures applied by the respondent had been perfect by any means. Ms Mitchell had not acted unlawfully on 10 November 2015, but she had lost her temper and she could have dealt with that meeting in a better way, for example by not threatening disciplinary action as the claimant left the office. It would have been appropriate to refer the claimant to occupational health at an earlier point in time in his absence. There had been little

attempt to maintain welfare contact with the claimant, and at times Mr Perkins seemed to lose sight of the procedures and what had been said to the claimant. At times frustration with claimant and his conduct, in raising numerous issues on a repetitive basis, objecting to every decision maker, and refusing to attend occupational health even when the respondent thought they had put in place the arrangements the claimant wanted, had affected how the claimant was dealt with, for example in relation to how the requests to postpone hearings had been dealt with, requiring him to provide evidence of his health and when Mr Gilchrist had told him that he must not repeat certain allegations outside the walls of the capability hearing. We were concerned that Mr Gilchrist seemed to show a certain lack of sympathy towards the claimant and appeared to pay little heed to the significant concerns raised by the claimant's own doctors.

694. Nevertheless, the fact that we did not uphold the claimant's substantive allegations that he had been assaulted was significant in terms of our assessment of whether he had shown that breached his contract of employment through any single act or cumulatively. It is relevant to our findings about the failings of the respondent that we accept that the claimant had acted in a dishonest way and as the respondent sought to follow its procedures to consider not only the claimant's complaints but also the complaints of Ms Mitchell, he became increasingly difficult to manage.

695. We considered whether, in those circumstances, and on the basis of the facts as we had found them, the respondent, through its senior managers and officers, had acted in a way, without reasonable and proper cause, which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

696. We found on balance that that there was no such conduct by the employer. The managers had done their best in dealing with an employee who on occasions could be challenging and difficult to dealt with.

697. Although the wording of the sick policy is somewhat ambiguous, we could also not accept that it was breach of an express term, or the implied term of trust and confidence, to end the claimant's sick pay some considerable time after his minimum contractual entitlement had been exhausted.

698. Our findings about most of the matters raised in the resignation letter are dealt with in our findings above but to be clear in relation to the disciplinary issues, we accept that the respondent was entitled to decide in circumstances of serious ill health, that a disciplinary procedure did not need to be completed when there appeared to grounds to believe that the claimant was no longer capable of undertaking their substantive duties. Indeed, in circumstances where the claimant had such serious mental health issues we find it impossible to conclude that it could be said to be an element of the implied term of trust and confidence for the

employer to be compelled to take a potentially vulnerable employee through a process which could well result in that employee being summarily dismissed for gross misconduct. We could not find that Mr Gilchrist's actions at the capability hearing, and in particular failing to step aside as the decision maker which appears to be relied upon as the final straw, could be said to amount to either a fundamental breach of contract or a final straw which when taken with earlier matters amounted to such a breach.

699. In the circumstances we concluded that the claimant had not been entitled to treat himself as dismissed as a result of the respondents' conduct. In those circumstances his claims about dismissal, either on fairness grounds or on grounds of discrimination cannot be upheld.

Issue 154

Did the RMT (R1) subject the Claimant to unjustifiable discipline as a result of the Claimant asserting that officers / employees of the Union were in breach of the Rule Book and or law

Issue 155

When (R1) and Mr Sean Hoyle (R4) failed to investigate his complaints under the Rule Book did the RMT (R1) subject the Claimant to unlawful discipline as a result of the Claimant asserting that officers / employees of the Union were in breach of the Rule Book and or law

Issue 156

When (R1) and Mr Sean Hoyle (R4) failed to investigate his complaints under the Rule Book.

169. It is regrettable that the claimant failed to address this claim in any meaningful way in his witness statement and submissions. We have dealt with all three issues together because they are linked, and it seems to us they can be dealt with in short order.

170. A complaint of unjustified discipline can only be considered by the tribunal if there has been a 'determination' which finally disposes of the issue (*Transport and General Workers' Union v Webber* 1990 ICR 711, EAT).

171. Mr McDonnell accepted that no appeal had been submitted which complied with the requirement that an appeal to the NEC must be sent with the signatures of the Branch Secretary and Chair, the branch stamp, and the date of the meeting at which the resolution was adopted and recorded. Mr McDonnell sought to argue that in past appeals had been considered without this being done but he did not dispute that the rules requiring this step had been introduced and that after he was told the appeal would be not

considered without this step have been complied with, no action was taken to resubmit it as a properly constituted appeal.

172. Accordingly, there was never a final determination disposing of the claimant's complaints about the investigation of his complaints. The matter had been left unresolved by the claimant's trade union branch and we have no jurisdiction to consider the matter further.

Issue 157

Overarching issue is whether the Claimant's claims have been brought within the statutory time limits.

173. It was not necassry for us to consider this further because none of the claims were well founded.

_____

Employment Judge Cookson
Date: 1 March 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
3 March 2023

FOR THE TRIBUNAL OFFICE

ANNEX THE LIST OF ISSUES

BETWEEN:

JAMES EDWARDS

Claimant

-and-

(1) NATIONAL UNION OF RAIL, MARITIME AND TRANSPORT WORKERS (RMT)
(2) MICHAEL CASH
(3) KAREN MITCHELL
(4) SEAN HOYLE
(5) STEPHEN HEDLEY
(6), MICHAEL LYNCH
(7) SCOTT PERKINS
(8) ANDREW GILCHRIST

Respondents

List of issues

CLAIM NO.1 [1]

Claim No. 2300549/2016

D. The Claimant's first claim is brought against the National Union of Rail Maritime and Transport Workers (the RMT) only.

E. That claim originally included a claim for Unjustifiable Trade Union Discipline contrary to s.64 TULRCA 1992 which has since been withdrawn.

F. Under the Claimant's first ET1 There remain 4 claims.

(i) 3 claims of subjecting the Claimant to a detriment for seeking to accompany another worker to a hearing contrary to s.12 Employment Relations Act 1999.

(ii) 1 claim of subjecting the Claimant to a detriment on the ground that he left the workplace in circumstances of danger that he could not be expected to avert contrary to s.44 Employment Rights Act 1996.

Issue No.	**Paragraph In ET1 No.1**	**Issue/ Date**	**Cause of action**	**Claimant comments (at the time of agreeing the list of issues)**
Detriment for seeking to accompany another worker to a hearing contrary to s.12 Employment Relations Act 1999				
1	15	**10.11.15** Did Karen Mitchell subject C to a detriment on 10.11.15 on the grounds that he was seeking to accompany his colleague KH to a grievance hearing, by: • Acting in a threatening manner? • Requiring him cease acting as a workplace companion for his colleague KH?	**Detriment for seeking to accompany another worker to a hearing contrary to s.12 Employment Relations Act 1999**	The Claimant considers the following to be in issue: Was the Claimant a workplace companion entitled to the protection of [s48] Employment Rights Act 1996
2				Did Karen Mitchell subject C to a detriment by making false allegations on the grounds he was seeking to accompany his

				colleague KH to a grievance hearing.
3	15			Did Karen Mitchell subject C to a detriment by making derogatory comments on the grounds he was seeking to accompany his colleague KH to a grievance hearing.
4	16	**10.11.15** Did Karen Mitchell subject C to a detriment on 10.11.15 on the grounds that he was seeking to accompany his colleague KH to a grievance hearing by: • Threatening C with disciplinary action/ making the claimant feel he was in danger when he tried to leave the office?	**Detriment for seeking to accompany another worker to a hearing contrary to s.12 Employment Relations Act 1999**	
5	17	**November 2015** Did the Respondent subject C to a detriment on the grounds that he was seeking to accompany his colleague KH to a grievance hearing by: • The procedure it adopted in dealing with the Claimant's grievance? • Specifically failing to	**Detriment for seeking to accompany another worker to a hearing contrary to s.12 Employment Relations Act 1999**	

		appoint an investigation officer by 19.11.15 • Failing to update the Claimant about the progress of the grievance? • Appointing an investigation officer 'against the rules of natural justice'? • Having an unfair investigation hearing • The Respondent's general secretary refusing to see C? • The Respondent refusing to investigate C's complaint that the hearing was unfair		
6				Did the Respondent subject C to a detriment on the grounds that he was seeking to accompany his colleague KH to a grievance hearing by • The General Secretary refusing to appoint a different

				Investigations Officer. • The Respondent accusing the Claimant of being in breach of Regulation 3 of the SPR.
7	17	**November 2015** Did the Respondent subject the Claimant to a detriment on 10th November 2015, for leaving the workplace in circumstances of danger for himself in the workplace, which he reasonably believed to be serious and imminent, and which he could not reasonably be expected to avert, by: • The procedure it adopted in dealing with the Claimant's grievance? • Specifically failing to appoint an investigation officer by 19.11.15 • Failing to update the Claimant about the progress of the grievance? • Appointing an investigation		

		officer 'against the rules of natural justice'? • Having an unfair investigation hearing • The Respondent's general secretary refusing to see C? • The Respondent refusing to investigate C's complaint that the hearing was unfair		
8			**Detriment for leaving the workplace in circumstances of danger contrary to S.44 ERA 1996.**	Did the Respondent subject the Claimant to a detriment on 10th November 2015, for leaving the workplace in circumstances of danger for himself in the workplace, which he reasonably believed to be serious and imminent, and which he could not reasonably be expected to avert, by: The General Secretary refusing to appoint a different Investigations Officer.
9	6 & 7		**Detriment for leaving the workplace in circumstances of danger contrary to S.44 ERA 1996.**	Did the First Respondent's legal officer (the First Respondent being vicariously liable for the Legal Officer's actions) subject the Claimant to a detriment by threatening

				the Claimant with a disciplinary when he was about to leave the office as he feared for his safety.

CLAIM NO.2 [33]

Claim No. 2301719/2016

G. The Claimant's second claim, lodged on 07.09.16, is brought against (1) The RMT Union and (2) Michael Cash the General Secretary of the Union and (3) Karen Mitchell.

Issue No.	Paragraph in ET1 No.2	Issue	Cause of action	Claimant comments
10	Overarching issue	Were any claims in relation to acts prior to 8th June 2016 presented outside the time permitted by s.123 Equality Act 2010/ s.48 ERA 1996? If so is it just and equitable to extend time?	**Jurisdiction of the ET**	The Claimant contends this is not an issue.
11	25 [54]	Did the Claimant carry out the following acts, and if so were the said acts protected acts for the purposes of s.27 of the Equality Act 2010 and/or qualified disclosures for the purposes of: (i) On 19.05.15 C said no to Karen Mitchell's (R3) instruction to a trainee solicitor. (ii) On 22.02.16 C told the RMT Union (R1) that Karen Mitchell (R3) had discriminated on the grounds of race.	**Victimisation contrary to Equality Act 2010**	

		(iii) On 22.02.16 C told RMT Union that he had been subjected to victimisation in correspondence from 12th May onwards. (iv) 'Further or in the alternative', on 22.02.16, C told the RMT Union that Karen Mitchell had instructed a trainee solicitor to pervert the course of justice.		
12				Did the Claimant carry out the following acts, and if so were the said acts protected acts for the purposes of s.27 of the Equality Act 2010?: In correspondence from 12 May 2016 onwards complain of being subjected to Race Discrimination.
13				Did the Claimant carry out the following acts, and if so were the said acts protected acts for the purposes of s.27 of the Equality Act 2010?: When the Claimant raised allegations of Race Discrimination in his appeal. (paragraph 18 ET1 no 2)
14	29 [55]	Did R1 and R3 victimise C for having carried out the above protected acts:	**Victimisation contrary to**	

		• By R3 asserting that C's allegations (about changing notes) were vexatious and unfounded? • By R3 stating she wished the matter to be investigated under the disciplinary procedure?	**Equality Act 2010**	
15	30	Did R1 and R2 victimise C for having carried out the above protected acts • By appointing James Croy to hear C's appeal / reconsideration and to investigate the RW matter. • By not taking the allegations against Karen Mitchell (regarding RW) seriously.	**Victimisation contrary to Equality Act 2010**	• By agreeing with R3 that the C's allegations of Race Discrimination be investigated under the disciplinary procedure (p19)
16	31	Did R1 and R2 victimise C for having carried out the above protected acts • By appointing James Croy to hear C's appeal / reconsideration and investigate the RW matter in breach of the ACAS code/ RMT code of conduct add staff handbook?	**Victimisation contrary to Equality Act 2010**	• By agreeing with R3 that the C's allegations of Race Discrimination be investigated under the disciplinary procedure (p19)
17	32	Did R1 victimise C for having carried out the above protected acts : • By failing to investigate C's allegation of race discrimination raised on 22.02.16 (the RW matter)?	**Victimisation contrary to Equality Act 2010**	
18	33	Did R1 and R2 victimise C for having carried out the above protected acts : • By R2 stating that C did not make an allegation of race	**Victimisation contrary to Equality Act 2010**	

		discrimination in his letter of 18.07.16?		
19	34	Did R1 and R2 victimise C for having carried out the above protected acts: • By R2 subjecting C to intimidation by deciding to hear C's allegation of race discrimination and R3's counter allegations together?	**Victimisation contrary to Equality Act 2010**	• By agreeing with R3 that the C's allegations of Race Discrimination be investigated under the disciplinary procedure (p19)
20	34			The Claimant wishes to add that hearing the allegations together was contrary to the procedure in the RMT Staff handbook.
21	35	Did R1 and R2 victimise C for having carried out the above protected acts: • By R2 failing to deal with the following allegations of race discrimination set out in C's letter of 7th July 2016. • 'Point II (victimising C by appointing Mr Croy to investigate the Waiyego matter), • Point III (appointing Mr Croy in breach of. Natural justice) and • Point IV (not taking action against KM/ taking C's complaint against her seriously) as contained in his letter dated 7th July 2016'	**Victimisation contrary to Equality Act 2010**	
22	35			The Claimant wishes to add "under the procedure as

				contained within the RMT staff handbook."
Detriment contrary to s.47 of the Employment Rights Act 1996.				
23	25	Did the Claimant carry out the following acts? If so were the said acts (a) Qualifying disclosures pursuant to s43B (1) ERA 1996. (b) Made in the public interest? And thereby (c) Protected acts for the purposes of ERA 1996? : (i) On 19.05.15 C said no to Karen Mitchell's (R3) instruction to a trainee solicitor. (ii) On 22.02.16 C told the RMT Union (R1) that Karen Mitchell (R3) had discriminated on the grounds of race. (iii) On 22.02.16 C told RMT Union that he had been subjected to victimisation in correspondence from 12th May onwards. (iv) 'Further or in the alternative', on 22.02.16, C told the RMT Union that Karen Mitchell had instructed a trainee solicitor to pervert the course of justice.	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	
24	18			Did the Claimant carry out the following acts? If so were the said acts (a) Qualifying disclosures pursuant to s43B (1) ERA 1996. (b) Made

				in the public interest? And thereby (c) Protected acts for the purposes of ERA 1996? His appeal dated 21 April 16 (paragraph 18 ET1 no 2)
25	29	Did R1 and R3 subject C to a detriment for having made a protected disclosure/ protected disclosures: • By R3 asserting that C's allegations (about changing notes) were vexatious and unfounded? • By R3 stating she wished the matter to be investigated under the disciplinary procedure?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	
26	30	Did R1 and R2 subject C to a detriment for having made a protected disclosure/ protected disclosures: • By appointing James Croy to hear C's appeal / reconsideration and to investigate the RW matter. • By not taking the allegations against Karen Mitchell (regarding RW) seriously.	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	
27	31	Did R1 and R2 subject C to a detriment for having made a protected disclosure/ protected disclosures: • By appointing James Croy to hear C's appeal / reconsideration and investigate the RW matter in breach of the ACAS code/ RMT code of conduct add staff handbook?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	• By agreeing with R3 that the C's allegations of Race Discrimination be investigated under the disciplinary procedure (p19)

28	32	Did R1 subject C to a detriment for having made a protected disclosure/ protected disclosures: • By failing to investigate C's allegation of race discrimination raised on 22.02.16?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	
29	33	Did R1 and R2 subject C to a detriment for having made a protected disclosure/ protected disclosures: • By R2 stating that C did not make an allegation of race discrimination in his letter of 18.07.16?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	
30	34	Did R1 and R2 subject C to a detriment for having made a protected disclosure/ protected disclosures: • By R2 subjecting C to intimidation by deciding to hear C's allegation of race discrimination and R3's counter allegations together?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	• By agreeing with R3 that the C's allegations of Race Discrimination be investigated under the disciplinary procedure (p19)

CLAIM NO.3 [72]

Claim No.230041/2017

H. The Claimant's third claim lodged on 27.01.17 appears to be brought against brought against (1) Michael Cash the General Secretary of the RMT Union and (2) the RMT Union.

Issue No	Paragraph No. in ET1 No.3	Issue	Cause of action	Claimant Comments

31	Overarching issue	Were any claims in relation to acts prior to 26th October 2016 presented outside the time permitted by s.123 Equality Act 2010/ s.48 ERA 1996? If so is it just and equitable to extend time?	**Jurisdiction of the ET**	The Claimant contends this is not an issue.
32	24	Did the RMT subject C to a detriment for seeking to accompany another worker to hearing: • By reason of Mr Carey's findings on C's appeal? • The appeal not being impartial? • Not listening to the original investigation interview? • Failing to give weight to contemporaneous evidence? • Failing to interview witnesses such as Mr Carey and the General Secretary? • Not being impartial when considering evidence? • Failing to adhere to deadlines in the investigation?	**Detriment for seeking to accompany another worker to a hearing contrary to s.12 Employment Relations Act 1999**	
33				Did the RMT subject C to a detriment for seeking to accompany another worker to hearing: By failing to re-interview witnesses after the Claimant was interviewed?
34	25	Did the RMT subject C to a detriment for seeking to accompany another worker to hearing : • By not adhering to its sickness, absence and ill health capability policy? • Taking 8 months to refer C to Occupational health? • Not upholding his grievance about delay?	**Detriment contrary to s.12 employment Relations Act 1996**	

		• Failing to contact C once a month pursuant to the above policy?		
35	24	Did the Respondent subject the Claimant to a detriment on 10th November 2015, for leaving the workplace in circumstances of danger for himself in the workplace, which he reasonably believed to be serious and imminent, and which he could not reasonably be expected to avert, by: • Mr Carey's treatment of the Claimant's appeal as set out above at issue 21 to 22 above? • The RMT failing to adhere to its own sickness absence policy as set out above at issue 21 to 22 above?	**Detriment for leaving the workplace in circumstances of danger contrary to S.44 ERA 1996.**	
36	25	Did the Claimant carry out the following acts, and if so were the said acts protected acts for the purposes of s.27 of the Equality Act 2010? (i) On 19.05.15 C said no to Karen Mitchell's (R3) instruction to a trainee solicitor. (ii) C repeating the same allegations in his grounds of appeal. (iii) C bringing a claim of race discrimination under Claim 2301719/16.		(iv) Raising allegations of race discrimination during the grievance hearing (v) C in correspondence to R from the 12th of May 2016 raised allegations of race discrimination contrary to the Equality Act 2010
37	26	Did R3 (?) victimise C by: • Not providing C with all of the RW investigation notes?	**Victimisation contrary to Equality Act 2010**	

38	26			Did R1 and R2 victimise C by: Not providing C with all of the RW investigation notes?
39	26			Did R1 and R2 victimise C by R2 authorising a procedure designed to suppress the truth.
40	27	Did R3 victimise C and subjecting him to a detriment: • Refusing C a right of appeal into the findings of the RW matter?	**Victimisation contrary to Equality Act 2010**	
41	27			Did R1 and R2 victimise C by: Refusing C a right of appeal into the findings of the RW matter contrary to the RMT handbook?
42.	28	'The Respondent and R3'(?) victimised C / subjected him to a detriment • Referring C to a disciplinary hearing • Refusing to uphold his grievance?	**Victimisation contrary to Equality Act 2010**	
43.	28			The Respondent and R2 victimised C / subjected him to a detriment • Referring C to a disciplinary hearing • By adopting an unfair procedure/hearing and refusing to uphold his

				appeal/grievance?
44.	29	R3(?) subjecting C to victimisation / detriment • When R3 refused to excuse himself from the internal investigation?	**Victimisation contrary to Equality Act 2010**	
45.	29			R1 and R2 subjecting C to victimisation / detriment When R2 refused to excuse himself from the internal investigation? And When R2 appointed a personal friend of his to be the Investigating Officer and to hold the disciplinary
46.	30	R1 subjected C to victimisation / detriment • Threatening to cut C's sick pay?	**Victimisation contrary to Equality Act 2010**	
47.	30			R1 subjected C to victimisation / detriment • Threatening to cut C's sick pay?
48.		Did the Claimant make a qualifying disclosure pursuant to s43B (1) ERA 1996 on 22nd February 2016. If so was such disclosure made in the public interest? Was such a disclosure thereby a protected act for the purposes of ERA 1996?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	
49.				Did the Claimant make a qualifying disclosure pursuant to s43B (1) ERA 1996 in

				correspondence subsequent to 22 February 2016 If so was such disclosure made in the public interest? Was such a disclosure thereby a protected act for the purposes of ERA 1996?
50.	26	Did R3 subject C to a detriment for having raised a protected disclosure by: • Not providing C with all of the RW investigation notes?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	
51.				Did R2 subject C to a detriment for having raised a protected disclosure by: Not providing C with all of the RW investigation notes?
52.	27	Did R3 subject C him to a detriment for having raised a protected disclosure by: • Refusing C a right of appeal into the findings of the RW matter?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	
53.				Did R2 subject C him to a detriment for having raised a protected disclosure by: Refusing C a right of appeal into the findings of the RW matter?
54.	28	'The Respondent and R3'(?) subject C to a detriment for having raised a protected disclosure by: • Referring C to a disciplinary hearing • Refusing to uphold his grievance?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	

55.				Did R2 subject C to a detriment for having raised a protected disclosure by: • Referring C to a disciplinary hearing • Refusing to uphold his grievance?
56.	29	Did R3(?) subject C to detriment for having raised a protected disclosure: • When R3 refused to excuse himself from the internal investigation?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	
57.				Did R2 subject C to detriment for having raised a protected disclosure: When R2 refused to excuse himself from the internal investigation?
58.	30	Did R1 subject C to a detriment for having raised a protected disclosure by. • Threatening to cut C's sick pay?	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	

CLAIM NO.4 [123]

Claim No. 2301738/17

I. The Claimant's fourth claim lodged on 28.06.17 is brought against (1) The RMT Union and (2) Michael Cash the General Secretary of the Union and (3) Karen Mitchell.

Issue No.	Paragraph in ET1 No.4	Issue	Cause of action	Claimant comments
59.	Overarching issue	Were any claims in relation to acts prior to 29 March 2017 presented outside the time permitted by s.123 Equality Act 2010/ s.48 ERA 1996?? If so is it just and equitable to extend time?	**Jurisdiction of the ET**	The Claimant contends that the claims were in time as the Claimant has suffered continuous and on – going detriments and this is not an issue
60.	44	Did the First Respondent (RMT) and Second Respondent (Michael Cash) subject the Claimant to Victimisation by reason of the Claimants having raised (a) allegations of race discrimination and (b) having brought ET claims? The Victimisation alleged is the refusal to allow the Claimant an appeal against the findings of Mr Croy's investigation.	**Victimisation contrary to s.27 Equality Act 2010**	
61	45	Did the First Respondent (RMT) and Second Respondent (Michael Cash) subject the Claimant to Victimisation by reason of the Claimants having raised (a) allegations of race discrimination and (b) having brought ET claims? The Victimisation alleged is (a) insisting that the disciplinary procedure continue, and (b) failing to adopt a fair and impartial disciplinary procedure.	**Victimisation contrary to s.27 Equality Act 2010**	The Victimisation alleged is (a) insisting that the disciplinary procedure continue (***despite the evidence),*** and (b) failing to adopt a fair and impartial disciplinary procedure.

62	46	Did the First Respondent (RMT) and Second Respondent (Michael Cash) subject the Claimant to Victimisation by reason of the Claimants having raised (a) allegations of race discrimination and (b) having brought ET claims? The Victimisation alleged is that despite the evidence by the Claimant and by Occupational Health Report R2 insisted on the disciplinary procedure continuing.	**Victimisation contrary to s.27 Equality Act 2010**	
63	47	Did the RMT (the First Respondent) subject the Claimant to Victimisation by reason of the Claimants having raised (a) allegations of race discrimination and (b) having brought ET claims? The Victimisation alleged is providing the Claimant with only 7-10 days' notice to prepare for a disciplinary.	**Victimisation contrary to s.27 Equality Act 2010**	This also applies to the Second Respondent
64	48	Did the First Respondent (RMT) and Second Respondent (Michael Cash) subject the Claimant to Victimisation by reason of the Claimants having raised (a) allegations of race discrimination and (b) having brought ET claims? The Victimisation alleged is adding additional charges to the list of misconduct allegations against the Claimant.	**Victimisation contrary to s.27 Equality Act 2010**	
65	49	Did the First Respondent (RMT) and Second Respondent (Michael Cash) subject the Claimant to Victimisation by reason of the Claimants having raised (a) allegations of race discrimination and (b) having brought ET claims for race discrimination?	**Victimisation contrary to s.27 Equality Act 2010**	

		The Victimisation alleged is refusing to take any action after Dr Elanjithara's report stated that people and circumstances in the Claimant's workplace had caused the Claimant harm.		
66	50	Did the First Respondent (RMT) and Second Respondent (Michael Cash) subject the Claimant to Victimisation by reason of the Claimants having raised (a) allegations of race discrimination and (b) having brought ET claims? The Victimisation alleged is insisting during February 2017 that the Claimant attend another occupational health meeting after having received an occupational health report in January 2017.	**Victimisation contrary to s.27 Equality Act 2010**	
67	51	Did the First Respondent (RMT) and Second Respondent (Michael Cash) subject the Claimant to Victimisation by reason of the Claimants having raised (a) allegations of race discrimination and (b) having brought ET claims? The Victimisation alleged is requesting that the Claimant provide medical evidence in 3 working days that he was unfit to attend a disciplinary.	**Victimisation contrary to s.27 Equality Act 2010**	
68	52 & 53	Did the First Respondent (RMT) and Karen Mitchell (The Third Respondent) subject the Claimant to Victimisation by reason of the Claimants having brought ET claims against the Respondents for race discrimination?	**Victimisation contrary to s.27 Equality Act 2010**	

		The Victimisation alleged is that Karen Mitchell stating that the Claimant was motivated to raise his allegations about her discriminating against a black member of the Union for monetary gain.		
69	54	Did the First Respondent (RMT) and Second Respondent (Michael Cash) subject the Claimant to Victimisation by reason of the Claimants having raised (a) allegations of race discrimination and (b) having brought ET claims for race discrimination? The Victimisation alleged is failing to investigate the Claimant's allegations that there had been an attempt to pervert the course of justice.	**Victimisation contrary to s.27 Equality Act 2010**	
70	55	Did the First Respondent (RMT) and Second Respondent (Michael Cash) subject the Claimant to Victimisation by reason of the Claimants having brought ET claims for race discrimination? The Victimisation alleged is refusing to re-refer the Claimant to Dr Elanjithara for an update medical report which the Claimant asserts to be a reasonable adjustment.		
71	2,19,26, 37, 39	Did the First Respondent (RMT) and the Second Respondent (M. Cash) subject the Claimant to Victimisation by reasons of the Claimant to Victimisation by reasons of the Claimant's having raised (a) allegations of race discrimination and (b) having brought ET Claims? By the Second Respondent refusing to provide a detailed response to	Victimisation contrary S27 Equality Act 2010	

		the issues raised in the Claimants correspondence		
72	14,17	Did the First Respondent (RMT) and the Second Respondent (M. Cash) subject the Claimant to Victimisation by reasons of the Claimant to Victimisation by reasons of the Claimant's having raised (a) allegations of race discrimination and (b) having brought ET Claims? By the Second Respondent refusing to attend as a witness at the Claimant's disciplinary for gross misconduct and refusing to confirm the compulsory attendance of other witnesses.	Victimisation contrary S27 Equality Act 2010	
73	22, 25	Did the First Respondent (RMT) and the Second Respondent (M. Cash) subject the Claimant to Victimisation by reasons of the Claimant to Victimisation by reasons of the Claimant's having raised (a) allegations of race discrimination and (b) having brought ET Claims? By the Second Respondent refusing to recuse the himself from the disciplinary process	Victimisation contrary S27 Equality Act 2010	
74	27, 36	Did the First Respondent (RMT) and the Second Respondent (M. Cash) subject the Claimant to Victimisation by reasons of the Claimant to Victimisation by reasons of the Claimant's having raised (a) allegations of race discrimination and (b) having brought ET Claims?	Victimisation contrary S27 Equality Act 2010	

		By the Second Respondent refusing to investigate the Claimant's grievance against the Third Respondent		
75	33	Did the First Respondent (RMT) and the Second Respondent (M. Cash) subject the Claimant to Victimisation by reasons of the Claimant to Victimisation by reasons of the Claimant's having raised (a) allegations of race discrimination and (b) having brought ET Claims? By the Second Respondent refusing to determine whether or not the Claimants transcript regarding the pay and welfare meeting with Mr Scott Perkins was correct	S27 Equality Act 2010	
76	Paras 56 and 57	**Alleged Protected Disclosures** Did the Claimant carry out the following acts? If so were the said acts (a) Qualifying disclosures pursuant to s43B (1) ERA 1996. (b) Made in the public interest? And thereby (c) Protected acts for the purposes of ERA 1996? : (i) Informing the RMT (R1) and Michael Cash (R2) that Karen Mitchell (R3) had committed a crime. (Undated paragraph 56 ET1 No.4) (ii) Reporting the crime of an assault to the Police (Undated paragraph 56 ET1 No.4) (iii) Informing the RMT and Michael Cash that there had been a criminal conspiracy to pervert the	**Protected Disclosure pursuant to s.43B (1) ERA 1996.**	Point 3. The Conspiracy to pervert the course of justice involves the criminal and civil claims, it includes a number of staff

		course of justice (Undated paragraph 57 ET1 No.4)		
77	56	Did the RMT (R1) and Michael Cash (R2) subject the Claimant to a detriment for having raised protected disclosures (i) and (ii) above by: • Adding to the disciplinary charges against the Claimant.	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	
78	57	Did the RMT (R1) and Michael Cash (R2) subject C to a detriment for having raised protected disclosure (iii) above, by: • Failing to take any action when the Claimant informed them that there had been a criminal conspiracy to pervert the course of justice. • Appoint Mr Steven Todd to take the disciplinary	**Detriment contrary to s.47 of the Employment Rights Act 1996.**	Appoint Mr Steven Todd to take the disciplinary

		Detriment contrary to S47 of the Employment Rights Act 1996	**Protected Disclosure pursuant to S43B(1) ERA 1996**	
79	44	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: The alleged detriment is the refusal to allow the Claimant an appeal against the findings of Mr Croy's investigation	Protected Disclosures pursuant to S43B (1)ERA 1996	
80	47	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: The alleged detriments are (a) insisting that the disciplinary	Protected Disclosures pursuant to S43B (1)ERA 1996	

		procedure continue, and (b) failing to adopt a fair and impartial disciplinary procedure		
81	47	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: The alleged detriment is providing the Claimant with only 7 -10 days' notice to prepare for a disciplinary	Protected Disclosures pursuant to S43B (1)ERA 1996	This also applies to the Second Respondent
82	48	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: The alleged detriment is adding additional charges to the list of misconduct against the Claimant	Protected Disclosures pursuant to S43B (1)ERA 1996	
83	49	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: The alleged detriment is refusing to take any action after Dr Elanjithara's report stated that people and circumstances in the Claimant's workplace had caused the Claimant harm	Protected Disclosures pursuant to S43B (1)ERA 1996	
84	50	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: The alleged detriment is insisting during February 2017 that the Claimant attend another occupational health meeting after having received an occupational health report in January 2017	Protected Disclosures pursuant to S43B (1)ERA 1996	

85	51	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: The alleged detriment is requesting that the Claimant provide medical evidence in 3 working days that he was unfit to attend a disciplinary	Protected Disclosures pursuant to S43B (1)ERA 1996	
86	52	Did the RMT (R1) and K Mitchell. Cash (R3) subject the Claimant to a detriment for having raised protected disclosures (3) above by: The alleged detriment is that Karen Mitchell stating that the Claimant was motivated to raise his allegations about her discriminating against a black member of the Union for monetary gain.	Protected Disclosures pursuant to S43B (1)ERA 1996	Ms Mitchell also made other derogatory comments and false statements against the Claimant.
87	54	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures) above by: The alleged detriment is failing to investigate the Claimant's allegations that there had been an attempt to pervert the course of justice	Protected Disclosures pursuant to S43B (1)ERA 1996	
88	55	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: The alleged detriment is refusing to refer the Claimant to Dr Elanjithara for an updated medical report which the Claimant asserts to be a reasonable adjustment	Protected Disclosures pursuant to S43B (1)ERA 1996	
89	2,19,26, 37, 39	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment	Protected Disclosures	

		for having raised protected disclosures above by: By the Second Respondent refusing to provide a detailed response to the issues raised in the Claimants correspondence	pursuant to S43B (1)ERA 1996	
90	14,17	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: By the Second Respondent refusing to attend as a witness at the Claimant's disciplinary for gross misconduct and refusing to confirm the compulsory attendance of other witnesses.	Protected Disclosures pursuant to S43B (1)ERA 1996	
91	22, 25	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: By the Second Respondent refusing to recuse the himself from the disciplinary process	Protected Disclosures pursuant to S43B (1)ERA 1996	
92	27, 36	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by: By the Second Respondent refusing to investigate the Claimant's grievance against the Third Respondent	Protected Disclosures pursuant to S43B (1)ERA 1996	
93	33	Did the RMT (R1) and M. Cash (R2) subject the Claimant to a detriment for having raised protected disclosures above by:	Protected Disclosures pursuant to S43B (1)ERA 1996	

		By the Second Respondent refusing to determine whether or not the Claimants transcript regarding the pay and welfare meeting with Mr Scott Perkins was correct		
94	58	Did the RMT (R1) and Karen Mitchell (R3) subject the Claimant to a detriment on the grounds that he was seeking to accompany an [unspecified] colleague to an [unspecified] hearing by: • Karen Mitchell stating that the Claimant 'raised a number of protected concerns including race discrimination because he was a workplace companion'.	**Detriment for seeking to accompany another worker to a hearing contrary to s.12 Employment Relations Act 1999**	Ms Mitchell also made other derogatory comments and false statements against the Claimant.

CLAIM NO.5

Claim No. 2303957/2017

J. The Claimant's fifth claim lodged on 19.12.17 is brought against (1) The RMT Union and (2) Michael Cash the General Secretary of the Union and (3) Karen Mitchell, (4) Sean Hoyle, (5) Stephen Hedley, (6), Michael Lynch, (7) Scott Perkins and (8) Andrew Gilchrist

List of Issues in fifth claim (2303957/2017)

Issue No.	Paragraph in ET1 No.5	Issue	Cause of Action	Claimant's comments
95.	52	Did the First Respondent (R1) and the Third Respondent (R3) (Karen Mitchell) subject the Claimant to victimisation by reasons of having raised (a) allegations of race	**Victimisation contrary S27 Equality Act 2010**	

		discrimination (b) having submitted ET claims By the third Respondent Making the following false assertions, requesting the Claimant be investigated under the disciplinary procedure, making derogatory comments against the Claimant's personality and professional capability/ work ethic.		
96.	103	Did the First (RMT) and/or Second (M Cash) and/or Seventh Respondent (S Perkins) subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The victimisation alleged is the decision to refer the Claimant to BUPA in May 2017 and the refusal to allow the Claimant an appeal against the findings of Mr Croy's investigation	**Victimisation contrary S27 Equality Act 2010**	
97.	104	Did the First Respondent (RMT) subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The victimisation alleged is that the First Respondent acted vexatiously in its conduct of the preliminary hearing (PH) at London South ET on 6th July 2017 to consider the first three claims (Case No.s 2300549/2016, 2301719/2016, and	Victimisation contrary S27 Equality Act 2010	

		2300414/2017) by seeking case management orders and objecting to the postponement of the full hearing then listed for 18th September 2017.		
98.	105	Did the First (RMT) and/or Second (M Cash) and/or Seventh Respondent (S Perkins) subject the Claimant to victimisation by reasons of the Claimant having brought ET Claims alleging race discrimination? The victimisation alleged is that the Claimant was referred to see Dr Elanjithara on 2nd August 2017 instead of waiting until the Claimant was no longer on "stepped up care".	Victimisation contrary S27 Equality Act 2010	The Claimant also alleged that it was an act of Victimisation by not waiting to refer the Claimant for an updated medical report until the increased medication took effect **[The Claimant accepts this is an evidential point]**
99.	106 and 107	Did the First (RMT), Second (M Cash) and/or fourth (S Hoyle) and/or fifth (S Hedley) and/or sixth (M Lynch) Respondents subject the Claimant to victimisation by reasons of the Claimant having raised (a) protected concerns and (b) having brought ET Claims? The victimisation alleged is the refusal by the RMT NEC to investigate or action the complaints set out in the Claimant's letter to the NEC dated 22nd May 2017.	Victimisation contrary S27 Equality Act 2010	~~The Claimant also contends that the Fourth, Fifth and Sixth Respondent discriminated against the Claimant by way of victimisation by not investigating or forwarding the Claimants complaints~~
100.	108	Did the First (RMT) and/or Second (M Cash) and/or Seventh Respondent (S Perkins) subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race	Victimisation contrary S27 Equality Act 2010	

		discrimination and (b) having brought ET Claims? The victimisation alleged is the refusal to postpone the capability/incapacity hearing and hear the disciplinary hearing first.		
101.	109, 110 and 111	Did the First (RMT) Second (M Cash) and/or Fourth (S Hoyle) and/or Fifth (S Hedley) and/or Sixth (M Lynch) Respondents subject the Claimant to victimisation by reasons of the Claimant having brought ET Claims? The victimisation alleged is a failure to a provide a substantive response to the Claimant's letter dated 3rd August 2017; by the fourth, fifth and sixth Respondents returning the letter dated 3rd August 2017 to the Claimant unopened; and not investigating the Claimant's complaints set out in the letter of 3rd August 2017.	Victimisation contrary S27 Equality Act 2010	~~The First Respondent also being vicariously liable for the NEC refusing to investigate the Claimant's complaints~~
102.	112	Did the Second (M Cash) and/or Fourth (S Hoyle) and/or Fifth (S Hedley) and/or Sixth (M Lynch) Respondents subject the Claimant to victimisation by reasons of the Claimant having raised (a) protected concerns (b) having brought ET Claims? The alleged victimisation is the failure to take action in response to the Claimant's letter to the Second Respondent dated 11th August 2017.	Victimisation contrary S27 Equality Act 2010	~~The Claimant has also stated in paragraph 112 that the Respondents failed to response to correspondence subsequent to the letter dated the 11th of August 2017 and it was an act of Victimisation in not suspending the internal procedures.~~

103.	113	Did the First (RMT) and/or Second (M Cash) and/or Seventh (S Perkins) and/or Eighth (A Gilchrist) Respondents subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of discrimination and (b) having brought ET Claims? The alleged victimisation being a referral of the Claimant to a formal meeting under the First Respondent's sickness absence procedure as set out in the letter dated 18th August 2017 to the Claimant. <u>The Claimant claims the Victimisation also included not delaying the capability meeting until the Claimant's increased medication took effect, he was no longer on stepped up care and then referring the Claimant for an updated occupational health report.</u>	Victimisation contrary S27 Equality Act 2010	~~The Claimant has stated in paragraph 113 that the Respondents act of Victimisation also included not delaying the capability meeting until the Claimant's increased medication took effect, he was no longer on stepped up care and then referring the Claimant for an updated occupational health report.~~
104.	114	Did the First (RMT) and/or Second (M Cash) and/or Seventh Respondent (S Perkins) subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The alleged victimisation being that the Respondents behaved in an alleged vexatious manner and requested case management orders from the London South ET during preliminary hearings (PHs) on 6th and 11th July and 11th	Victimisation contrary S27 Equality Act 2010	

		October 2017, when they knew he would have difficulties in complying with the orders because of his mental health and the same time pursuing internal employment procedures against him.		
105.	115	Did the First (RMT) and/or Second (M Cash) and/or Seventh Respondent (S Perkins) subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The alleged victimisation being that the Respondents insisted on an internal capability procedure continuing against the Claimant, whilst the Claimant had internal complaints against him and devising an unfair and not impartial procedure.	Victimisation contrary S27 Equality Act 2010	
106.	116 and 120	Did the First (RMT), Second (M Cash) and/or fourth (S Hoyle) and/or fifth (S Hedley) and/or sixth (M Lynch) Respondents subject the Claimant to victimisation by reasons of the Claimant having raised (a) protected concerns and (b) having brought ET Claims? The alleged victimisation being their failure to provide a response to the Claimant's email to the Respondents dated 24th August 2017 and "other correspondence" namely the letter of 25.09.17.	Victimisation contrary S27 Equality Act 2010	~~Regarding other correspondence, the Claimant refers to the various paragraphs listed and the correspondence listed in those paragraphs~~ ~~Regarding paragraph 120, this is a discrete allegation of Victimisation and should not be combined with paragraph 116: the~~

		Further the Respondents failed to provide the Claimant with assistance, investigate the Claimants complaints and protect the Claimant from further acts of discrimination.		~~victimisation being when they failed to provide the Claimant with assistance, investigate the Claimants complaints and protect the Claimant for further acts of discrimination.~~
107.	117	Did the First (RMT) and/or Second (M Cash subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The alleged victimisation being the failure of the Second Respondent to put to the NEC the Claimant's allegations of unfair and discriminatory procedures being used against him.	Victimisation contrary S27 Equality Act 2010	
108.	118	Did the First (RMT) and/or Eighth (A Gilchrist) subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The alleged victimisation being that the Eighth Respondent implemented an unfair, biased and discriminatory procedure as the hearing officer of the Claimant's capability procedure.	Victimisation contrary S27 Equality Act 2010	
109.	119			

		Did the First (RMT), Second (M Cash) and Seventh (S Perkins) Respondents, subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The alleged victimisation being the decision to stop the Claimant's occupational sick pay.	Victimisation contrary S27 Equality Act 2010	
110.	121	Did the First (RMT), Second (M Cash) and Third (S Perkins) Respondents, subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The alleged victimisation being the Second Respondent's failure to respond to the Claimant's letter to him dated 25th September 2017.	Victimisation contrary S27 Equality Act 2010	
111.	122	Did the First (RMT), Second (M Cash) and Seventh (S Perkins) Respondents, subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The alleged victimisation being ~~that following the Claimant's resignation of employment~~ not to allow him to continue to retain accommodation provided by the First Respondent <u>until the internal procedures were completed.</u>	Victimisation contrary S27 Equality Act 2010	

112.	123	Did the First and Third (K Mitchell) Respondents, subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The alleged victimisation being that when giving evidence at the Claimant's capability hearing on 2nd November 2017 the Third Respondent was allegedly reluctant to state that the Claimant had 100% attendance record prior to 10th November 2015, that reasonable adjustments were not feasible and that she did not know why the Claimant left the office on 10th November 2015.	Victimisation contrary S27 Equality Act 2010	As listed in paragraph 123 the Third Respondent refused to answer questions and failed to tell the truth in order to obtain the Claimant's dismissal. **The Claimant accepts this was an evidential point.**
113.	124	Did the First (RMT) Respondent, subject the Claimant to victimisation by reasons of the Claimant having raised (a) allegations of race discrimination and (b) having brought ET Claims? The alleged victimisation being the Claimant's dismissal. Did the Claimant's resignation amount to a "dismissal" under S39(7) ((b) of the Equality Act 2010?	Victimisation contrary S27 Equality Act 2010	~~The Claimant referring to all the acts of victimisation / discrimination as contained in the previous claims.~~
114.	52 A17	Did the RMT (R1) and Karen Mitchell (R3) subject the Claimant to a detriment for having raised protected disclosures above by: By the third Respondent	Protected Disclosures pursuant to S43B (1) ERA 1996	

		Making the following false assertions, requesting the Claimant be investigated under the disciplinary procedure, making derogatory comments against the Claimant's personality and professional capability/ work ethic.		
115.	125	Alleged Protected Disclosures Did the Claimant carry out the following acts? If so were the said acts (a) Qualifying disclosures pursuant to s43B (1) ERA1996 (b) Made in the public interest? And thereby (c) Protected acts for the purposes of ERA 1996?; (1)Informing the First Respondent (RMT) and Second Respondent (M. Cash that the Third Respondent (K Mitchell) had committed a crime. (undated paragraph 56 ET1 No4) (2) Reporting the crime of an assault to the Police (3) Informing the First and Second Respondent that the Third Respondent had instructed a trainee solicitor to pervert the course of justice (4) Informing the First and Second Respondent that there had been a criminal conspiracy to pervert the course of justice)	Protected Disclosures pursuant to S43B (1)ERA 1996	
116.	126			The decision to refer the Claimant

		Did the First (RMT) and/or Second (M Cash) and/or Seventh (S Perkins) Respondents subject the Claimant to a detriment for having raised protected disclosures. The alleged detriment being the decision to refer the Claimant to BUPA refusal to allow the Claimant an appeal against the findings of Mr Croy's investigation	Protected Disclosures pursuant to S43B (1)ERA 1996	to BUPA and not make a reasonable adjustment.
117.	127	Did the First (RMT) and/or Second (M Cash) and/or Seventh (S Perkins) Respondents subject the Claimant to a detriment for having raised protected disclosures. The detriment alleged is that the First Respondent acted vexatiously in its conduct of the preliminary hearing (PH) at London South ET on 6th July 2017 to consider the first three claims (Case No.s 2300549/2016, 2301719/2016, and 2300414/2017) by seeking case management orders and objecting to the postponement of the full hearing then listed for 18th September 2017.		
118.	128	Did the First (RMT) and/or Second (M Cash) and (R1) and/or Seventh (S Perkins) Respondents subject the Claimant to a detriment for having raised protected disclosures.		~~The Claimant also alleged that it was an act of Victimisation by not waiting to refer the Claimant for an updated medical report until the increased~~

		The alleged detriment is that the Claimant was referred to see Dr Elanjithara on 2nd August 2017 instead of waiting until the Claimant was no longer on "stepped up care". The Claimant also alleged that it was an act of Victimisation by not waiting to refer the Claimant for an updated medical report until the increased medication took effect		~~medication took effect~~
119.	129 and 130	Did the First (RMT) Second (M Cash) and/or Fourth (S Hoyle) and/or Fifth (S Hedley) and/or Sixth (M Lynch) Respondents subject the Claimant to victimisation by reasons of the Claimant having brought ET Claims? The alleged detriment being the refusal by the RMT NEC to investigate and action the complaints set out in the Claimant's letter to the NEC dated 22nd May 2017.	Protected Disclosures pursuant to S43B (1)ERA 1996	~~The Claimant also contends that the Fourth, Fifth and Sixth Respondent discriminated against the Claimant by way of victimisation by not investigating or forwarding the Claimants complaints~~
120.	131	Did the First (RMT) and/or Second (M Cash) and/or Seventh (S Perkins) Respondents subject the Claimant to a detriment for having raised protected disclosures. The alleged detriment being the refusal to postpone the capability/incapacity hearing	Protected Disclosures pursuant to S43B (1)ERA 1996	

		and hear the disciplinary hearing first.		
121.	132-134	Did the First (RMT) Second (M Cash) and/or Fourth (S Hoyle) and/or Fifth (S Hedley) and/or Sixth (M Lynch) Respondents subject the Claimant to a detriment for having raised protected disclosures. The alleged detriment being a failure to a provide a substantive response to the Claimant's letter dated 3rd August 2017; by the fourth, fifth and sixth Respondents returning the letter dated 3rd August 2017 to the Claimant unopened; and not investigating the Claimant's complaints set out in the letter of 3rd August 2017	Protected Disclosures pursuant to S43B (1)ERA 1996	~~The First Respondent also being vicariously liable for the NEC refusing to investigate the Claimant's complaints~~
122.	135	Did the Second (M Cash) and/or Fourth (S Hoyle) and/or Fifth (S Hedley) and/or Sixth (M Lynch) Respondents subject the Claimant to a detriment for having raised protected disclosures? The alleged detriment being a failure to take action in response to the Claimant's letter dated 11th August 2017 to the Second Respondent.	Protected Disclosures pursuant to S43B (1)ERA 1996	~~The Claimant has also stated in paragraph 135 that the Respondents failed to response to correspondence subsequent to the letter dated the 11th of August 2017 and it was an act of Victimisation in not suspending the internal procedures.~~
123.	136	Did the First (RMT) and/or Second (M Cash) and/or Seventh (S Perkins) and/or	Protected Disclosures pursuant to S43B (1)ERA 1996	~~The Claimant has stated in paragraph 136 that the~~

		Eighth (A Gilchrist) Respondents subject the Claimant to a detriment for having raised protected disclosures? The alleged detriment being a referral of the Claimant to a formal meeting under the First Respondent's sickness absence procedure as set out in the letter dated 18th August 2017 to the Claimant. <u>The Claimant has stated in paragraph 136 that the Respondents act of Victimisation also included not delaying the capability meeting until the Claimant's increased medication took effect, he was no longer on stepped up care and then referring the Claimant for an updated occupational health report.</u>		~~Respondents act of Victimisation also included not delaying the capability meeting until the Claimant's increased medication took effect, he was no longer on stepped up care and then referring the Claimant for an updated occupational health report.~~
124.	137	Did the First (RMT) and/or Second (M Cash) and/or Seventh Respondent (S Perkins) subject the Claimant to a detriment for having raised protected disclosures? The alleged detriments being that the Respondents behaved in an allegedly vexatious manner and requested case management orders from the London South ET during preliminary hearings (PHs) on 6th and 11th July and 11th October 2017, when they knew he would have difficulties in complying with the orders because of his mental health	Protected Disclosures pursuant to S43B (1)ERA 1996	

		and the same time pursuing internal employment procedures against him.		
125.	138	Did the First (RMT) and/or Second (M Cash) and/or Seventh Respondent (S Perkins) subject the Claimant to victimisation by reasons of the Claimant having raised protected disclosures? The alleged detriment being that the Respondents insisted on an internal capability procedure continuing against the Claimant, whilst the Claimant had internal complaints against him and devising an unfair and not impartial procedure.	Protected Disclosures pursuant to S43B (1)ERA 1996	
126.	139 and 143	Did the First (RMT), Second (M Cash) and/or fourth (S Hoyle) and/or fifth (S Hedley) and/or sixth (M Lynch) Respondents subject the Claimant to victimisation by reasons of the Claimant having raised (a) protected concerns and (b) having brought ET Claims? The alleged victimisation being their failure to provide a response to the Claimant's email to the Respondents dated 24th August 2017 and "other correspondence" <u>namely the claimants letter of 25.09.17.</u> <u>Regarding paragraph 143, this is a discrete allegation of</u>	Protected Disclosures pursuant to S43B (1)ERA 1996 Protected Disclosures pursuant to S43B (1)ERA 1996	~~Regarding other correspondence, the Claimant refers to the various paragraphs listed and the correspondence listed in those paragraphs~~ ~~Regarding paragraph 143, this is a discrete allegation of Victimisation and should not be combined with paragraph 116: the victimisation being when they failed to provide the Claimant with assistance,~~

		Victimisation and should not be combined with paragraph 116: the victimisation being when they failed to provide the Claimant with assistance, investigate the Claimants complaints and protect the Claimant for further acts of discrimination		~~investigate the Claimants complaints and protect the Claimant for further acts of discrimination~~.
127.	140	Did the First (RMT) and/or Second (M Cash) subject the Claimant to a detriment by reason of the Claimant having raised protected disclosures? The alleged detriment being the failure of the Second Respondent to put to the NEC the Claimant's allegations of unfair and discriminatory procedures being used against him.	Protected Disclosures pursuant to S43B (1)ERA 1996	
128.	141	Did the First (RMT) and/or Eighth (A Gilchrist) subject the Claimant to a detriment by reason of the Claimant having raised protected disclosures? The alleged detriment being that the Eighth Respondent implemented an unfair, biased and discriminatory procedure as the hearing officer of the Claimant's capability procedure.	Protected Disclosures pursuant to S43B (1)ERA 1996	
129.	142	Did the First (RMT), Second (M Cash) and Seventh (S Perkins) Respondents, subject the Claimant to a detriment by reason of the Claimant having raised protected disclosures?	Protected Disclosures pursuant to S43B (1)ERA 1996	

		The alleged detriment being the decision to stop the Claimant's occupational sick pay.		
130.	144	Did the First (RMT), Second (M Cash) and Third (S Perkins) Respondents, subject the Claimant to a detriment by reasons of the Claimant having protected disclosures? The alleged detriment being the Second Respondent's failure to respond to the Claimant's letter to him dated 25th September 2017.	Protected Disclosures pursuant to S43B (1)ERA 1996	
131.	145	Did the First (RMT), Second (M Cash) and Seventh (S Perkins) Respondents, subject the Claimant to a detriment by reasons of the Claimant having protected disclosures? The alleged detriment being ~~that following the Claimant's resignation of employment~~ not to allow him to continue to retain accommodation provided by the First Respondent <u>until internal procedures were completed.</u>	Protected Disclosures pursuant to S43B (1)ERA 1996	
132.	146	Did the First (RMT) and Third (K Mitchell) Respondents, subject the Claimant to a detriment by reason of the Claimant having raised protected disclosures? The alleged detriment being that when giving evidence at the Claimant's capability hearing on 2nd November 2017 the Third Respondent was allegedly	Protected Disclosures pursuant to S43B (1)ERA 1996	As listed in paragraph 146 the Third Respondent refused to answer questions and failed to tell the truth in order to obtain the Claimant's dismiss **[The Claimant accepts that this point is evidential].**

		reluctant to state that the Claimant had 100% attendance record prior to 10th November 2015, that reasonable adjustments were not feasible and that she did not know why the Claimant left the office on 10th November 2015		
133.	147	Did the Claimant's resignation amount to a constructive dismissal under s95 (1) (c) Employment Rights Act 1996 (ERA)? If so did the First Respondent dismissed the Claimant for raising protected disclosures and if so the dismissal was automatically unfair contrary to section 103A ERA?	Protected Disclosures pursuant to S43B (1)ERA 1996	
134.	138 A (A2)	Did the RMT (R1) and Mr Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled The alleged failure is when despite knowing that the Claimant was seriously ill and at risk of suicide the Respondents insisted that the disciplinary procedure proceed and failed to suspend the disciplinary procedure.	S20 and 21 EqA Failure to comply with duty pursuant to Section 21	
135.	138B	Did the RMT (R1) and Mr Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled The alleged failure is when despite knowing that the		

		Claimant was seriously ill and at risk of suicide the Respondents insisted that the disciplinary procedure proceed with limited notice: an adjustment would have been to suspend the disciplinary procedure or provide the Claimant extra time for the Claimant to prepare for the disciplinary.		
136.	138C	Did the RMT (R1) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled The alleged failure was that R1 insisted on numerous occasions that the Claimant attend a different medical expert (BUPA) rather than referring the Claimant to Dr Elanjithara.	S20 and S21 EqA Failure to comply with duty pursuant to Section 21	
137.	138D	Did the RMT (R1) and Mick Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled The alleged failure was that R1 and R2 insisted that the Claimant provided medical evidence that he was too ill to attend a disciplinary within 3 working days: The adjustment being not to insist on such a strict deadline.	S20 and S21 EqA Failure to comply with duty pursuant to Section 21	
138.	150A	Did the RMT (R1) and Andrew Gilchrist (R8) fail to comply	S20 and s21 EqA	

		with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled The alleged failure was that R1 and R8 refused to postpone the capability hearing until after the 27th of September 2017	Failure to comply with duty pursuant to Section 21	
139.	152A	Did the RMT (R1) and Andrew Gilchrist (R8) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled The alleged failure was that R1 and R8 was that they insisted that the Claimant attend BUPA to determine whether or not the Claimant cold continue with the capability procedure: an adjustment being to ask KCMHT or Dr Elanjithara.	S20 and s21 EqA Failure to comply with duty pursuant to Section 21	
140.	152B	Did the RMT (R1) and Mick Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled The alleged failure was that R1 and R2 insisted that R8 (Mr Gilchrist) chair the capability hearing: a reasonable adjustment would have been to appoint a different officer / employee.	S20 and s21 EqA Failure to comply with duty pursuant to Section 21	

141.	152B	~~Did the RMT (R1) and Mick Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled~~ ~~The alleged failure was that R1 and R2 insisted that R8 (Mr Gilchrist) chair the capability hearing: a reasonable adjustment would have been to appoint a different officer / employee.~~ (repetition of 142)	S20 and s21 EqA Failure to comply with duty pursuant to Section 21	
142.	152 C	Did the RMT (R1) and Mick Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled The alleged failure was that R1 and R2 insisted that Mr Gilchrist (R8) continue to chair the capability hearing despite his threatening and intimidating manner: a reasonable adjustment would have been to appoint a different officer / employee.	S20 and s21 EqA Failure to comply with duty pursuant to Section 21	
143.	152D	Did the RMT (R1) and Mick Cash (R2) fail to comply with the duty to make a reasonable adjustment where a PCP placed the Claimant at a substantial disadvantage compared with persons who are not disabled The alleged failure was that R1 and R2 insisted that R2	S20 and s21 EqA Failure to comply with duty pursuant to Section 21	

		continue to control the investigation, disciplinary and capability procedure: a reasonable adjustment would have been to appoint a different officer / employee to determine the above procedures.		
144.	153A	Did the RMT (R1) and Mick Cash (R2) subject the Claimant to disability discrimination as a consequence of something arising from the Claimant's disability The alleged discrimination was when the Respondents insisted on the capability hearing prior to the 27th of September 2017	Discrimination arising from disability contrary to S15 EqA	
145.	153B	Did the RMT (R1) and Mick Cash (R2) subject the Claimant to disability discrimination as a consequence of something arising from the Claimant's disability The alleged discrimination was the insistence that the Claimant obtain medical evidence within such a short time	Discrimination arising from disability contrary to S15 EqA	
146.	148	Is the Claimant disabled within the meaning of S6 of the EqA? (The admits that the Claimant is disabled.)		
147.	149	Did the First (RMT) and/or Second (M Cash) and/or Seventh (S Perkins) Respondents apply a provision, criterion or practice (PCP) to the Claimant? The PCP being a requirement to attend an appointment with Dr Elanjithra for an occupational health meeting on 2nd August 2017. If	S20 EqA	~~The adjustment required was delaying a referral until the Claimant was no longer on stepped up care and / or his increased~~

		so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so did the Respondents take such steps as were reasonable to avoid any substantial disadvantage to the Claimant The adjustment required was delaying a referral until the Claimant was no longer on stepped up care and / or his increased medication had took effect		~~medication had took effect~~
148.	150 and 151	Did the First (RMT) and/or Second (M Cash) and/or Seventh (S Perkins) and/or Eighth (A Gilchrist) Respondents apply a PCP to the Claimant? The PCP being a referral on 18th August 2017 to a formal meeting under the First Respondent's sickness absence procedure? If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so did the Respondents take such steps as were reasonable to avoid any substantial disadvantage to the Claimant The adjustment required was delaying a referral until the Claimant was no longer on stepped up care and / or his increased medication had took effect	S20 EqA	~~The adjustment required was delaying a referral until the Claimant was no longer on stepped up care and / or his increased medication had took effect~~
149.	152	Did the First (RMT) and/or Seventh (S Perkins) and/or Eighth (A Gilchrist) apply a PCP	S20 EqA	

		to the Claimant. The PCP being a referral to the Bupa, the First Respondent's Occupational Health providers. If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so did the Respondents take such steps as were reasonable to avoid any substantial disadvantage to the Claimant? The Claimant contends that the step that it would have been reasonable to obtain medical opinion from his treating medical team, Knowsley Community Health, instead of Bupa.		
150. (a)	154	Did the First (RMT) apply a PCP to the Claimant? The PCP being the decision not to arrange a disciplinary hearing against the Claimant in August 2017. If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so, did the Respondent take such steps as were reasonable to avoid any substantial disadvantage to the Claimant?	S20 EqA	
150 (b)		Did the Respondents subject the Claimant to discrimination in consequence of something arising from the Claimant's disability, in stopping the Claimant's pay.	S.15 EqA 2010	
151.	155	Did the First Respondent apply a PCP to the Claimant? The PCP being a refusal to remove the Eighth Respondent (A Gilchrist) from being the	S20 EqA	

		hearing officer of the Claimant's capability procedure, following an alleged threat by the Eighth Respondent towards the Claimant. . If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so, did the Respondent take such steps as were reasonable to avoid any substantial disadvantage to the Claimant <u>by removing Mr Gilchrist</u>? . ~~If so, did the PCP place the Claimant at a substantial disadvantage in comparison to someone without a disability? If so, did the Respondent take such steps as were reasonable to avoid any substantial disadvantage to the Claimant?~~		
152.	156	Did the Claimant's resignation amount to a "dismissal" under S39(7) ((b) of the Equality Act 2010? If so was the dismissal on grounds disability?		
153.	158	Did the Claimant's resignation amount to a constructive dismissal under s95 (1) (c) Employment Rights Act 1996 (ERA)? If so, was the dismissal unfair in all the circumstances?	S98 ERA	
154.	158	~~Did the Claimant's resignation amount to constructive unfair dismissal under s 95 (1) (C) Employment Rights Act 1996 (ERA)? If so, was the dismissal unfair in all circumstances~~	S98 ERA 1996	
155.	157 A	Did the RMT (R1) subject the Claimant to unjustifiable discipline as a result of the	Unjustifiable discipline contrary to S64 TULRCA 1992	

		Claimant asserting that officers / employees of the Union were in breach of the Rule Book and or law When (R1) and Mr Sean Hoyle (R4) failed to investigate his complaints under the Rule Book.		
156.	157 A	~~Did the RMT (R1) subject the Claimant to unlawful discipline as a result of the Claimant asserting that officers / employees of the Union were in breach of the Rule Book and or law~~ ~~When (R1) and Mr Sean Hoyle (R4) failed to investigate his complaints under the Rule Book.~~	Unlawful discipline contrary to S64 TULRCA 1992	
157		Overarching issue is whether the Claimant's claims have been brought within the statutory time limits.		