EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000236/2023

Final Hearing Held in person in Glasgow on 6 and 11 to 13 March, 2 and 30 April; members' meeting on 23 May 2024

Employment Judge: R Bradley
Tribunal Member: Ms N Elliot
Tribunal Member: Mr G McKay

Mr G Allan	**Claimant** **Represented by:** **Ms L Weetman -** **Student advisor**
Caledonian MacBrayne Crewing	**Respondent** **Represented by:** **Ms G Todd -** **Solicitor**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that: -

1. The claimant was unfairly dismissed;

2. The dismissal of the claimant was unfavourable treatment contrary to section 15 of the Equality Act 2010;

3. The claim of an alleged failure to make reasonable adjustments is dismissed under Rule 52 of the Employment Tribunals Rules of Procedure 2013 it having been withdrawn in the course of this hearing;

4. The respondent is ordered to pay to the claimant a basic award of **FOUR THOUSAND TWO HUNDRED AND EIGHTY TWO POUNDS AND FIFTY PENCE £4,282.50);**

5. The respondent is ordered to pay to the claimant the sum of FIFTEEN **THOUSAND THREE HUNDRED AND EIGHTY FOUR POUNDS (£15,384.00)** as compensation for loss of earnings caused by the unfavourable treatment; and

6. The respondent is order to pay to the claimant the sum of **EIGHT THOUSAND EIGHT HUNDRED AND TWENTY POUNDS AND SEVENTY FIVE PENCE (£8,820.75)** as compensation for injury to feelings caused by the unfavourable treatment.

REASONS

Introduction

1. On 23 May 2023 the claimant presented an ET1. The claims in it were resisted. On 28 July 2023 a case management preliminary hearing took place at which various orders were made. We clarified that none was outstanding.

2. On 26 October EJ Kearns sitting alone considered various matters at a preliminary hearing. On 21 November her judgement and reasons were issued. To the extent relevant we refer to them below.

3. On 10 January 2024 EJ Eccles at a preliminary hearing fixed the March dates for this final hearing. She also noted that the claimant would give his evidence first. It became obvious early in this hearing that the original four days (in March) would be insufficient. This was in part as a result of the copies of the bundles containing illegible material and not having all of the pages. Further evidence was heard on 2 April. Parties then exchanged and lodged written submissions on 14 April. We heard oral submissions on 30 April.

4. The claimant was employed by the respondent from April 2017 until 3 March 2023 as ship's cook aboard "*the Rothesay Ferry*", operated between Wemyss Bay and Rothesay on the Isle of Bute. More accurately he was employed on the MV Argyle, one of the two ferries which operated on that route.

The claims

5. The claims were of (1) unfair dismissal and (2) discrimination. The protected characteristic is disability. The claims were made under sections 15 and 20/21 of the Equality Act 2010. The disability is bursitis. The claimant was disabled by reason of bursitis from mid-January 2023 onwards as per EJ Kearns' judgment.

The Bundle and other documents

6. An indexed paginated bundle of 260 pages was provided for this hearing. Regrettably, some time was lost while sufficient full, legible copies of it were produced. At the same time new pages which became 233/1 to 233/8 were added.

7. At our request and at various times before the members' meeting the respondent produced (i) a series of drawings of the RV Argyle (ii) three colour photographs of the vessel's galley and (iii) information relating to the claimant's pay in the period February 2022 and January 2023. The claimant agreed their accuracy.

The Issues

8. The list provided for the start of the first hearing was amended in the course of discussions with the parties before any evidence. We have set out in the Appendix the final list of issues. The insertion is in bold. The deletions are scored through. The claimant agreed that the ACAS Code was not relevant.

Witnesses

9. As well as the claimant we heard from Gerry Puczynski, a union representative from the RMT union. For the respondent we heard from Natasha Kerr, HR business partner, Gordon Smith, Retail Development Manager, and Finlay MacRae, Head of Operations.

Findings in Fact

10. Taking account of what was agreed, what was uncontentious from the paperwork including the agreed chronology and the evidence that we heard we made the following findings in fact.

11. The claimant is George Degan Allan. His date of birth is 11 October 1958.

12. The respondent is Caledonian Macbrayne Crewing (Guernsey) Limited. It is the employer of the crew members who work aboard Caledonian MacBrayne ferries on the west coast of Scotland.

13. The employs about 1000 seagoing staff on the ferry network on that coast.

Before 15 February 2022

14. On 5 April 2017 the claimant began employment with the respondent as chief cook on the MV Argyle. The MV Argyle sails between Wemyss Bay on the Scottish mainland and Rothesay on the Isle of Bute. It is one of two vessels which operate that route. The other is the MV Bute. They are similar in size, meaning in length and draught.

15. The Argyle is about 72m in length. It has 6 decks. It has capacity for 450 passengers. It has a crew of about 13. One of them is chief cook. Another is a "*spare man*." It has three stewards. Its galley is designed for one person. It is situated on deck 4. Adjacent to it is the Mess Room.

16. The claimant described his duties as "*Prepare and serve 3 meals and snacks for crew. Daily menu planning. Prepare and cook snacks for passengers. Orders and stock take. Knowledge of food hygiene. Clean galley, dishes, equipment and mess room. Temperature control. Work with Saffron system on computer. Set up mess room for meals. Keep fridges stocked with fresh produce and snacks for crew. Assist with other duties within retail. Muster duties including being in charge of first aid. Weekly drill. Work on own initiative and with a team. Customer service with passengers. Keep tickets and certificates up to date. Participate in training needed*." (**page 129**)

17. There was not a "*constant*" requirement to move goods around the vessel or within the galley.

18. The stewards served the passengers and assisted the claimant to bring stores to the galley. While the vegetable store was on the car deck (situated below deck 4) a mechanical lift was available for use in bringing goods from there to the galley. Some of the stewards assisted the claimant with his first aid muster duties.

19. The claimant's working pattern was one week on, one week off, Wednesday to Wednesday. He worked 12 hour shifts. His hours were ordinarily from 5.30 or 6.00am until 5.30 or 6.00pm. Depending on the level of work, it was possible for the claimant to sit down while on shift. He could do so in the Mess Room.

20. The respondent operates in two seasons per year. They are summer and winter. The respondent's summer season is generally between March and October. Ordinarily, the respondent requires to increase its staff numbers for the summer season. It normally begins a recruitment process to do so in about December of the preceding year.

21. On 19 November 2021 the respondent's absence policy and procedure (**pages 241 to 260**) was approved. Part 8 sets out the Formal Absence Management Procedure. It includes (8.2) a right to be accompanied at any meeting under the procedure. Part 8 refers to Appendices 2 and 3. Both of them provide that "*Any decision to dismiss must be discussed and approved by an appropriate member of HR. In the case of a seagoing Employee, a representative of CalMac Crewing Guernsey Limited is required to approve any dismissal*."

22. In or about mid-January 2022, the claimant began to experience a lot of pain in and around his right hip. He had never experienced it before. The claimant found it hard to sleep due to the pain and discomfort. He could not sit or stand for long periods but had to get up and walk around. If he went for a walk, he would have to stop every two hundred yards and take a rest. He walked with a limp.

15 February to 8 April 2022

23. On 15 February 2022 the claimant saw his GP (**page 93**). The claimant was certified as being unfit for work until 8 March 2022. The reason was "*hip pain*". He was prescribed painkillers.

24. On 25 February 2022 the claimant spoke with Tessa Urquhart Crew Resources Analyst (**page 101**). She made a note of the call. It recorded; the claimant had seen his GP on 16 February and received pain killers; he had extreme pain on his hips, especially at night time, he was getting around but limping. The nurse had advised that physiotherapy might be the option next.

25. They spoke again on 3 March. Ms Urquhart made a note of that call (**page 101**). In summary she noted his GP had; increased his medication; reassured him it was the muscles connecting to his hips and that was the pain travelling down his leg and back side; and referred him for

physiotherapy. It also noted the claimant's consent for a referral to Medigold Health, the respondent's occupational health advisors. On 14 March the claimant was referred to occupational health (**page 101**).

26. On 8 March the claimant's doctor mirrored the earlier fit note about unfitness for work and the reason. He certified the claimant as unfit until 29 March (**page 94**).

27. On 15 March the claimant had a telephone call with his line manager, Gordon Smith Retail Development Manager. Ms Urquhart prepared a note of the call (**pages 104 to 106**). The note was on pro forma paper headed "*Welfare Support Meeting*". It recorded a general discussion on the claimant's symptoms and treatment. In answer to a question about extending his sick line the claimant said that he "*wouldn't like to*". The note recorded the fact of the OH referral. It noted Mr Smith's view that he would "*wait and see how you get on with your Physio and your anti-inflammatory*."

28. On 25 March the claimant's doctor provided another fit note. He certified the claimant as unfit until 25 April (**page 95**).

29. The claimant and Ms Urquhart spoke again on 8 April (**page 101**). She noted; "*another physiotherapy appointment*" on 21 April; he hoped it would be his last before going back to work; occupational health appointment had been on 5 April and was awaiting the report; and the claimant was "*feeling okay but wanting to go back to work now*." By that time he had been absent for just over 7 weeks.

8 April to 13 May 2022

30. On 8 April Medigold Health's occupational health advisor issued her report on the claimant (**pages 107 to 109**). She noted that; he reported a lot of pain in his right hip and has been diagnosed with bursitis; he said that he was struggling to sleep at night due to discomfort, managed to walk short distances and had a bit of a limp; he informed her that he had a steroid injection into his hip a few weeks prior and felt some improvement after it; he was receiving weekly physiotherapy and continued to self-manage via an exercise programme with which he had been provided; and was due a further steroid injection on 21 April. She said that she was "*hopeful that, in view of the success of the first steroid injection, his symptoms will continue*

to improve and he will start to find that walking is more comfortable, and that he sleeps better at night over the next few weeks." It appears from the report that the advisor was asked 7 questions. They were:

1. Is the employee fit to be at work?

Mr Allan is currently not fit for work. However, I anticipate that he will be able to return to work in some capacity in early May 2022.

2. Does the employee need any adjustments to their role? If so, are these permanent or temporary? If temporary, please indicate timescales.

Once Mr Allen is able to work, some temporary reasonable adjustments are advisable.

For approximately four to eight weeks, to allow him to stabilise back into work after his bursitis has resolved and to help to prevent any recurrence of the inflammation, please could you look at providing him with a role either in the kitchen environment or in an alternative position, whereby he is not spending long periods of time on his feet.

He will need to sit down periodically throughout the day for a comfort break or, if tasks are available that allow him to be seated, then these would be appropriate.

I am hopeful that he will continue to improve and stabilise and will be in a position to return to his normal role in his full capacity as Chief Cook after a few weeks, as stated, once he has returned to work.

3. Does the employee need a phased return to work? If so, what is the benefit?

Please consider providing Mr Allan with a graduated return to work, commencing on approximately 50% of contracted hours for the first two weeks, increasing to approximately 75% of contracted hours for a further two weeks and resuming his normal working hours around week five. During the time that he is on board, I strongly advise that he will need to spend some time carrying out tasks for which he can be seated, periodically throughout the day, to prevent a recurrence of the inflammation in his right hip.

Mr Allan is staying in touch with his Physiotherapist for some face-to-face treatment and will return to work when the Physiotherapist states that he is fit to do so; at this stage I anticipate that this may be early in May 2022.

4. Is the employee likely to be covered by the Equality Act?

Although this would essentially be a legal decision, it is unlikely that the condition of bursitis would be considered to be long-term and chronic under the remit of the Equality Act at this early stage. I am not aware that Mr Allan has any long-term, chronic underlying health conditions.

5. Is a review or obtaining further medical information required?

I do not feel that there would be any benefit in obtaining a GP report at this stage, as it is unlikely to reveal any new or pertinent information. Mr Allan has been able to communicate with me today regarding his current state of health.

6. Is there an underlying health concern?

Mr Allan has bursitis affecting his right hip.

7. Is a full recovery expected?

Most cases of hip bursitis are successfully treated with non-surgical interventions and do not recur. I am hopeful that Mr Allan's condition will continue to improve.

31. On 22 April the respondent wrote to the claimant about his sick pay entitlement. It advised that; full pay would expire on 27 May; half pay would be paid between 28 May and 16 September; and that that entitlement would expire on 16 September. The letter was produced for this hearing by the respondent on 14 May 2024.

32. On 25 April 2022 the claimant saw his GP (**page 96**). He again certified the claimant as being unfit for work until 26 May. The reason was "*hip pain*".

33. On 13 May the claimant had a second telephone call with Gordon Smith. Ms Urquhart prepared a note of the call (**pages 111 to 113**). The note was on pro forma paper headed "*Welfare Support Meeting*". It erroneously recorded the date as being 20 February 2022. The note recorded that; on the question of the position the claimant said that; he was still attending physiotherapy, was going every week to Inverkip to an osteopath "*to try and push it along quicker*"; his physiotherapist had said that (about getting back to work) the problem was the stairs on the ship and how he wouldn't cope, and he thought another 4 weeks and "*standing for 12 hours won't be feasible at this point.*" It recorded that Mr Smith had looked at the occupational report. He wondered "*if we could even get a seat in the galley or something like that. But because you are on a week on week off roster, it would be quite difficult to do a phased return. We could look into different options to return to work that would help, like working in the port*." In the claimant's opinion it was possible to put a chair in the galley. In Mr Smith's opinion it was difficult to do so because of its (small) size.

13 May to 7 September 2022

34. On 26 May 2022 the claimant saw his GP (**page 97**). He again certified the claimant as being unfit for work for one month. The reason was "*hip pain*".

35. On 28 May the claimant's sick pay reduced to half pay.

36. On 7 June, Ms Urquart's note (**page 102**) records that the claimant had sent in a letter from his osteopath. She quoted it as saying "*It is of my opinion that this condition can be resolved for Mr Allan as this involves a primarily muscular cause & is not degenerative in nature*." The letter (**page 110**) does not bear an intelligible date. It was probably written on or about 24 May 2022. It suggests that his first consultation had been on 27 April. It says that the claimant had had 4 sessions and that to that point in time there has been some degree of improvement in the presenting symptom pattern and recommended another 4 sessions. The claimant's purpose in obtaining the letter (**page 110**) was to give it to the respondent as an indication of his efforts to return to work.

37. On 17 June Ms Urquhart noted (**page 102**) that the claimant had told her that he was to submit another fit note and he didn't "*feel fit enough for ENG1. He is worried about his duties if he were to return e.g. stairs and muster duties*." The claimant did not agree that that was an accurate record of the conversation. His recollection was that it was in this conversation that he "*brought in a phased return to work*" and said that his trade union representative would need to talk to Mr Smith.

38. An ENG1 is a certificate issued by the Maritime and Coastguard Agency (MCA). In general, no person may work as a seafarer on a vessel such as the MV Argyle unless they have been issued with a medical fitness certificate which is valid and is not suspended (Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010 Reg 6). The relevant certificate is an ENG1.

39. The ENG1 is pro forma. It has a "*medical fitness category*." It requires the doctor to indicate whether a seafarer is "*fit*" with no limitations or restrictions on fitness or "*fit*" subject to restrictions which are to be detailed. The requirement to do so is prefaced with the words, "*I have examined the seafarer named above and have found him/her to be free from any medical condition likely to be aggravated by service at sea, or to render the seafarer unfit for such service, or to be endanger the health of other persons on board*." The four pro forma choices on the question of occupation are; Deck; Engine; Catering; Other (to be specified).

40. On 26 June 2022 the claimant saw his GP (**page 98**). He again certified the claimant as being unfit for work for one month. The reason was "*hip pain*".

41. On 29 June the claimant told Ms Urquhart that he had appointments with his osteopath, his physiotherapist and his GP on 1,7 and 8 July respectively, was "*feeling the same, trying to do everything to get fitter*."

42. On 8 July 2022 the claimant saw his GP (**page 99**). He advised the claimant that he may be fit for work taking account of (i) a phased return to work (ii) amended duties and (iii) altered hours. The GP commented "*Many thanks for allowing this man back to work. Light duties are encouraged. Short breaks every 4 hours are recommended. He is feeling able to assist in kitchen. He should avoid heavy lifting for short term*." It certified the position to 8 August. The claimant asked the respondent for a phased return to work from 8 July. Its advice via HR was to refer him to Mr Smith.

43. On 8 August 2022 the claimant saw his GP (**page 100**). The certificate was substantially identical to that dated 8 July. It certified the position to 8 September.

44. On 9 August Natasha Kerr one of the respondent's HR business partners emailed Mr Smith (**page 116**). She said that the claimant was "*at 167 days of absence now and think we need to set up a capability meeting. He has requested a face to face meeting*".

45. On 10 August and in an exchange of emails with Ms Kerr the claimant agreed to a referral to occupational health (**pages 117 and 118**).

46. On 10 August the respondent wrote to the claimant (**page 119**). In inviting him to a "*contractual review meeting*" on 18 August it noted that; he had been absent since 23 February a total of 168 days; he was entitled to be accompanied at the meeting; he had already confirmed he would attend. Its purpose was to discuss his ongoing absence. In that context it said, "*We are keen to provide as much support as we can to get you back to work, however I must advise you as you have been un fit for your current job for an extended period of time, we may have to consider terminating your employment on ill health grounds. However, please be advised no*

action will be taken without full investigation and we will explore all options available including reasonable adjustments and if there is any suitable alternative employment we can offer."

47. On 12 August the claimant had a telephone conversation with a Medigold Health occupational health advisor. On 15 August they wrote their report (**pages 120 to 122**). Under the heading of "*Medical Factors*" the report said, "*He told me that he can walk however he cannot walk far distances and needs to take frequent rest breaks. He cannot stand for prolonged periods of time and has restricted movement due to the pain. He is currently under the care of his GP and has been prescribed medication to help alleviate his symptoms of pain. Mr Allan is also currently attending physiotherapy sessions and is following a home exercise programme. He attends regular sessions with an Osteopath and says that he is finding these beneficial. He mentioned that his sleep is often interrupted as he experiences pain whilst laying on his right side. His GP has stated that he is currently not fit to work in his role as Chief Cook but can return to work in an adjusted role*." In her conclusions and recommendations she said that the claimant was "*currently managing symptoms of a musculoskeletal condition in his right hip. From my assessment based on information provided to me today by Mr Allan and in conjunction with information provided in the referral, I would advise that he is not currently fit for his role. However, management may wish to consider temporary redeployment into an adjusted role with lighter duties. Mr Allan appears to be in receipt of appropriate treatment and support but I am hopeful that his condition will improve with treatment over time*." The same 7 questions were asked. The questions and answers to each were:

1. Is the employee fit to be at work?

In my opinion, Mr Allan is not currently fit for his role however management may wish to consider temporary redeployment into an adjusted role with lighter duties until his symptoms are well managed.

2. Does the employee need any adjustments to their role? If so, are these permanent or temporary? If temporary, please indicate timescales.

Following the consultation with Mr Allan, management may wish to consider the following:

- Temporary redeployment into a role with lighter duties, for example an admin type role.

- No prolonged standing or sitting tasks.
- Allow regular rest breaks throughout his shift.
- No repetitive bending or low floor work tasks.
- No heavy lifting or strenuous manual handling tasks.
- He can continue with his master duties.
- Regular management contact during this time would be beneficial to review his progress and outline any further adjustments required to his role.

Whether adjustments can be accommodated is of course a management decision. Management are advised to discuss these with the employee and document any mutual concerns, supportive measures or adjustments agreed. I am hopeful that these adjustments will be temporary and only be required to help him manage his symptoms.

3. Does the employee need a phased return to work? If so, what is the benefit?

In my professional opinion, Mr Allan would benefit from a phased return to work. I would suggest returning on 50% of his hours for the first 2 weeks, increasing gradually until his full hours are reached over a period of 4-6 weeks. This is due to the length of time which he's had off and likely fatigue on return to work. The workload should be commensurate with hours worked. Regular management contact during this time would be beneficial to review his progress and outline an increase in hours as tolerated.

4. Is the employee likely to be covered by the Equality Act?

In my opinion, the provisions of the Equality Act 2010 are likely to apply as there is a medical condition which is long-term, that significantly impacts on his activities of daily living or work and the symptoms of the condition have remained for longer than 12 months. However, this is my opinion on what would ultimately be a legal and not a medical decision.

5. Is a review or obtaining further medical information required?

In my opinion, there is no requirement for a review appointment or obtaining further medical information as it is unlikely to reveal any additional information at this time.

6. Is there an underlying health concern?

Please can I ask that you see information detailed in the body of this report.

7. Is a full recovery expected?

I am hopeful that with treatment and over time Mr Allan's condition will be better managed.

48. The author answered an eighth question to indicate that the claimant was fit to attend a meeting.

49. On 18 August the claimant attended a capability review meeting. At it also were; his union representative Andy Hunter a Dual Purpose Rating from

MV Coruisk; Mr Smith; and Ms Kerr. A note was taken on a pro forma (**pages 123 to 127**). Referring to the latest update in early August Mr Smith asked the claimant if it was correct that; there was really no further update, progress remained unchanged, the GP had said it would "*take as long as it will take and basically as there is not enough oxygen getting into the muscles*". The claimant agreed but said that that was not to say it was not repairable, it was repairable. He said it was "*not something I will live with for the rest of my life*." There was reference to the claimant's ongoing physiotherapy and osteopath involvement. Mr Smith referred to the two occupational health reports. He noted from the second the option of temporary redeployment with adjusted duties until symptoms calmed down. He said that "*the report also said you would benefit from a phased return to work. There's no mention of an anticipated return to work e.g. 2 weeks, 3 weeks, 4 weeks*." In answer to the question, the claimant's view was that he would get an ENG1. Mr Smith replied, "*Saw when you walked in you were limping. We can't sit and talk about phased returns etc when you don't have an ENG1 – an ENG1 is the starting point of those discussions*." Mr Smith then referred to most of the seven adjustments suggested by OH. He asked, "*how would you see your role on board front of house prolonged periods of on feet and doesn't recommend that or sitting. Manning the till etc – what I'm trying to think about?*" The claimant replied, "*Stocking fridges I don't need to be bent down – there is ways around it. I don't have to keep bending down. Could always ask a colleague if they are available to put it on to the worktop*." On the question of prolonged standing or sitting he said, "*If I feel I need a seat I'll go have a seat*." The note records Mr Smith then saying, "*Get it and hear* [sic] *to support and enable a RTW but my concern is we have a small ship with a small team which is limited in how much support can be offered as you say busy route and long days – I think we would struggle no bending lifting carrying prolonged periods. That's my view if I'm going to be honest. They talked about phased return 50% of hours first 2 weeks and full hours 4-6 weeks. When talking about 50% - you work week on week off 3 and a half days on*". The claimant suggested doing working his "*full*" week but on reduced hours. Mr Smith then asked, "*How would we cover that other 6 hours when core crew?*" A reasonable assumption is that his reference to 6 hours was to 50% of the claimant's hours as suggested by OH for the

first two weeks of any phased return. The OH report (erroneously) said that the claimant worked 2 weeks on/2 weeks off (**page 120**), an error of which both the claimant and the respondent were aware. The claimant then suggested that he could "*go on as spare*." This suggestion would have involved the claimant being (as the word suggests) spare or additional to the core crew. Mr Smith replied, *"Horrible to have conversation to put you on as spare additional cost*." In his opinion it was not viable to have the claimant work as a spare. The note records Mr Hunter saying, "*Willing to pay to sit in house and do nothing and phased to get him back into work*." The inference from his comment is that the respondent was willing to pay the claimant to be off work and at home as opposed to being phased back to work in a way that OH had suggested. The gist of Mr Smith's view as noted was that the first step for the claimant was to get an ENG1. In his view a phased return within the claimant's work pattern of one week on/one week off "*became trickier*" and suggested a need to "*see if crewing*" could accommodate it. In relation to the possibility of doing other work Ms Kerr agreed to send the claimant a "*job search form*." The claimant then returned to the question of the ENG1. He said, "*Don't see why if I don't get my ENG1 can't go on the boat*". Mr Smith replied that ENG1 "*says fit for sea going duties phased return more around back into workplace. When it comes to reduced hours about whether company can accommodate*". The claimant suggested that he was not saying that he could not do 6,7 or 8 hours. Mr Smith said "*We will do whatever we can to get you back – that is the goal however there is the possibility if I* [sic] *can't be avhieved* [sic] *if you don't get youe* [sic] *ENG1 example your employment may be terminated on ill health*." The note then recorded the possibility that the claimant's employment may be terminated on ill-heath and detailed his financial entitlement in that event.

50. On 19 August Ms Kerr emailed a job search form the claimant (**page 128**).

51. On or about 20 August someone within the claimant's management emailed a colleague (**page 208**). It began, "*Did the alternative working form go out to George yesterday?*" It continued, "*I had a call with crewing this morning and we discussed the Oct Health recommendation for George. As suspected we cannot accommodate the reduced hours phased return on Argyle/Bute due to both cost and the additional workload*

that this would place on the crewing officer/other Clyde retail crew." It then suggested two possible phased returns. The first appeared to be called "*Weekend working on the IOA (the vessel the Isle of Arran) for 4 weeks*." It would involve working four days out of seven each week. Full shifts were required but "*there are more retail crew onboard and so could likely accommodate more regular rest breaks*." The suggestion was that the claimant could work in that way for 4 or 5 weeks before returning full time on the MV Argyle as cook. The second began "*Western isles - Week on/Week off roster*." Full shifts would again be required but "*there are more retail crew onboard and so could likely accommodate more regular rest breaks*." It ended, "*The Argyle and Bute already work a week on/off system as we know however because of the small amount of retail crew onboard there is no slack to accommodate the potential amount of regular rest breaks that George is likely to require. This is also why we cannot accommodate on the smaller Clyde vessels*."

52. The MV Isle of Arran serves the route between Ardrossan and the island of Arran itself. The vessel can accommodate about 500 passengers.

53. On 22 August the claimant completed the job search form (**pages 129 and 130**). He indicated that he wished to be considered for either permanent or secondment job types. He said that he would consider the roles of steward, SCR (senior catering rating) or roles outwith catering and anywhere within reasonable travelling distance. He ended, "*Hoping in near future I am fit and well enough to return to my current employment …*" On 23 August he returned it (**page 134**).

54. After acknowledging receipt of the completed form (**page 134**) Ms Kerr emailed Ms Urquhart (**page 131**) to update her. She said "*essentially we are exploring reasonable adjustments at the moment*."

55. On 2 September (08.56) and in reply to an email from Mr Smith, Ms Kerr suggested a meeting with the claimant at which they "*could look into*" the two possible phased returns set out on **page 208**.

56. On 2 September Ms Kerr emailed the claimant (**page 138**). She reported on the conduct of an internal job search and about discussions with the crewing department about what temporary adjustments could be

accommodated. She also invited him to a meeting to take place on Thursday 8 September. It was fixed to start at 11.00am.

57. On 7 September the claimant was examined by an MCA approved doctor for the purposes of deciding questions to do with an ENG1 for him (**page 139**). The doctor certified that the claimant was fit subject to restrictions. They were; amended duties, no heavy lifting, regular breaks and no prolonged standing. Its expiry date was 7 September 2023. The claimant signed to indicate that he had read and understood notes "*overleaf*". The page with those notes were not produced. The notes were identical to those produced at **page 203**.

8 September to 26 October 2022

58. On 8 September the claimant attended a meeting with Mr Smith. He was represented by Gerry Puczynski, from RMT union. Ms Kerr was the HR representative. A typed note was prepared from it on a pro forma (**pages 140 to 143**). In answer to questions about his health, the claimant described it as "*fine*". He said, "*I'm getting there, it is improving. I'm not in as much pain as I used to be but I'm still in pain when I'm lying on it and sleeping on it at night, it is still causing discomfort*." And *"I can't be on my feet all the time but if I sit for too long it can be the same; it's a catch 22 really*." While recognising improvements, Mr Smith asked how he was feeling on a scale of 0 to 10. The claimant replied, "*A 5 to 6. The galley isn't problem at such, its everything else like the stairs*." The discussion moved on to ENG1. Mr Smith said, "*If you can get an ENG1 it states you are fully fit for duties; that would include all aspects of the role*." Mr Puczynski replied that the claimant could get one with restrictions. Mr Smith explained, "*Yes absolutely but its what we can accommodate and where when it comes to these restrictions. I explained to George before that problem we have on the Argyle and Bute is its small team so there is not a lot of room for additional support to accommodate restrictions such as n heavy lifting, additional rest breaks etc. The option of putting George on as an extra isn't there*." And "*It is about whether the restrictions are reasonable and whether as a business we could accommodate them*." They then discussed the two options first noted on **page 208** but the respondent needed an ENG1 before they could be explored further. There

was then a disagreement about whether either option was a phased return. Mr Puczynski's position was that neither option was. Mr Smith explained that a "*phased return could be a change in shift pattern or working hours and with the options we have discussed it would allow George to either reduce the amount of days to be worked each week and accommodate more regular rest breaks etc – something that would not be possible on the Argyle & Bute*" meaning either vessel on the claimant's route. The claimant indicated that he would be happy with the first option, on MV Isle of Arran. At that point (after about 23 minutes) Mr Puczynski sought an adjournment. On their return, Mr Puczynski advised that the claimant had an ENG1 with restrictions. He said, "*Once George is fully fit he can go back and get an unrestricted ENG1. The restrictions are for a year but that's not to say the restrictions will last the full year*." It appears from the note that Mr Smith was shown the ENG1. He noted its restrictions. In that context he said, "*I have no issues with that at all but when we look at making reasonable adjustments it is normally for a period of 4-6 weeks. The end of summer time table is on the 26th of October so will need another review at that time because we can't support restrictions for a year. We couldn't put George on a vessel and accommodate the restrictions for that period of time*." It was agreed that subject to the claimant taking leave, he would undertake *"the Isle of Arran*" option. Ms Kerr noted that the respondent was "*accommodating the restrictions in line with the ENG1 as they would be considered as reasonable adjustments*". Mr Smith's view was that the respondent could not accommodate the restrictions on the Clyde. Mr Puczynski said the respondent could not "*cherry pick when you are going to accommodate recommendation from OH or not*." He wished it noted that this was under the objection from the union. Mr Smith reminded and the claimant understood that; the recommendations had to work for both parties; and the respondent could only accommodate the arrangement on a short term basis e.g. 4 – 5 weeks "*to allow you to build up your strength before taking up your full-time role on the Argyle as Cook*."

59. On 9 September Mr Smith emailed both Catering and the Master (Captain) of MV Isle of Arran (**pages 144 and 145**). It advised that there was an agreement that the claimant would join the IOA from Thursday 15 and undertake the role of the weekend (Dayworker) for the period up to the end

of the summer season. His deployment was then to be reviewed. The summer season was to end on 26 of October. It was expected that his ENG1 restrictions would be honoured.

60. On Thursday 15 September the claimant returned to work on a phased return as an SCR on the MV Isle of Arran working a shift pattern of 4 days out of 7 each week. His duties were "*front of house*", serving food, cleaning tables, cleaning toilets, hoovering and washing down. He worked on board until Sunday 18 September. He returned to work on Thursday 22 September until Sunday 25. It appears that following the "*3 days off*" he had a week's rest, until Wednesday 5 October.

61. The claimant believed that he should have been working in the galley on the Isle of Arran. He asked Mr Smith if he could do so. Mr Smith declined and explained that the Arran had *"regular cooks so we're not moving them*." The claimant worked as SCR on the Isle of Arran until 5 October. He was paid as SCR for that work.

62. On 15 September a "*return to work review*" pro forma was completed (**pages 146 to 148**). It recorded his condition as the reason for his absence. It recorded that he was "*still feeling some pain*."

63. From 17 September the claimant's entitlement to sick pay expired.

64. Between 5 and 19 October the Claimant took pre-booked annual leave. He was paid his normal pay in the period of leave.

65. On 21 October the Claimant was due to start his phased return as an SCR on the MV Caledonian Isles, working a shift pattern of 4 days out of 7 each week. The Caledonian Isles crossed from Ardrossan to Arran. It has capacity for up to 1000 passengers. It has a larger crew than the Isle of Arran vessel. When he arrived for that work, he met John Kerr, the vessel's chief steward/head of catering. The claimant's impression was that Mr Kerr was not expecting him. Mr Kerr noticed the claimant limping. He had been on board the vessel for a short period of time, less than 10 minutes. The claimant's recollection was that Mr Kerr said to him *"you're no good to me, you're not fit*" or words to that effect. The claimant said "*who are you to judge?*" or words to that effect. The claimant's view was that his fitness to work was a matter only for the captain of the vessel, and not for Mr Kerr.

The claimant left the vessel. He was unhappy at not being permitted to work. He telephoned Mr Puczynski. The claimant understood that Mr Puczynski then called Mr Smith whose position was to support that of Mr Kerr.

66. On Friday 21 October (09.41) Laura O'Neill within the respondent's crew services emailed "*Human Resources*" and others including Mr Smith (**page 158**). Ms O'Neill said, "*I've just had a call from John on the Cale Isles to say that he is not accepting George Allan on as part of his phased return. He has sent him home. He has said that George's limitations are not suitable for a busy boat and that they cannot accept anyone who has been deemed as only capable of light duties. Please advise where you think we should go from here*." It appears that that email was forwarded on and seen by Ms Kerr by 13.52 that day. At that time she emailed Mr Smith (**page 157**) to say, "*John Kerr, Leading Steward, called Caroline and advised George couldn't even walk up the Gangway. He also said George had to stop 3 times walking to the office because he was in that much pain. John said he didn't think George would manage a 12 hour shift and they both agreed he wouldn't be capable. Let's catch up next week*."

67. At 15.12 on 21 October, an email was sent copied to the master of the MV Argyle (**page 212**). The sender and recipient's email addresses are redacted. It does not contain a sign off block or a signature. It says, "*As you know I've just come back to the vessel, so I'm not really sure what has been happening with George. That said as George is local then we would be happy for him to join and continue his phased return*."

68. At 15.27 on 21 October Ms O'Neill emailed Ms Kerr (**page 153**). She said, "*I've just called George to ask him about the possibility of him joining the Argyle this weekend as part of his phased return. I didn't want him to think I had forgotten about him and didn't have a plan. He mentioned that you had been in touch and told him to stay at home at the moment. From an HR perspective, would you rather I just left him until Gordon* [Smith] *returns on Monday?*" Ms Kerr replied at 15.30. She said, "*Sorry I should have emailed you after I called him. I called George from a welfare perspective as I knew he would have been disappointed after today. I told George that Gordon and I would have a discussion on Monday and get back in touch*

with him. I don't believe he is fit to be at work from what information the Leading Steward on the Cale Isles has provided us with. Options I am going to discuss with Gordon is the possibility of doubling him up on the Argyle/Bute to see how he gets on – he keeps saying he won't know until he tries. If not successful I would recommend he is medically stood down/back on to sickness as he is still technically unfit. I will keep you posted on Monday."

69. The claimant noted that on 21 October the Master of the MV Argyle said that he was happy to sign him on the boat to continue his phased return (**page 221**).

70. On 24 October Mr Smith replied to Ms Kerr (**page 157**). He had been on holiday the previous week. He suggested that they speak "*quickly*".

71. On Wednesday 26 October the respondent wrote to the claimant **(pages 159 to 161**). By virtue of the letter he was medically suspended on full pay. The letter set out the background to that decision. That background was; the occupational health report of 15 August; the meeting on 8 September; the work on the MV Isle of Arran; his period of leave; and a future meeting to take place on or about 28 October. The letter said that he had been stood down on 21 October because of concerns about his fitness. It said that the respondent had received similar concerns from his time on the Isle of Arran. It said " *…we cannot accommodate the ENG1 restrictions within your current role on a permanent basis. This is due to the manning structure on the Clyde vessels, mv Argyle & mv Bute, which form part of the Clyde Collective Bargaining Agreement*." The letter asked the claimant not to "*enter any company premises, make any contact with your colleagues (unless from a support perspective) or customers or attend any company funded training courses. The only exception will be if you are invited to attend a meeting*." It ended, "*You are therefore medically suspended pending a review from your ENG1 Medical Doctor. We would therefore ask that you now make an appointment with your ENG1 doctor and update Gordon Smith on the date of this appointment. After your ENG1 has been reviewed, a meeting will be arranged with Gordon Smith, Retail Development Manager, with support from Natasha Kerr, HR Business Partner to discuss next steps. I must advise you that if you are*

unable to obtain an unrestricted ENG1 medical certificate that will allow you to carry out your role as Cook on the Clyde, you will be invited to a Contractual Review Meeting. A possible outcome of the Contractual Review Meeting may be dismissal on capability grounds but please be assured all other reasonable options will be considered and re-explored."

27 October to 30 November

72. On 28 October the claimant emailed Ms Kerr (**page 162**). He said that he had an ENG1 appointment for 3 November and would let her know how it went.

73. The ENG1 certificate issued on 3 November contained the same restrictions as per the certificate from 7 September. Its life was also one year.

74. On 11 November the claimant attended a meeting with Mr Smith. He was again represented by Mr Puczynski. Mr Smith was again accompanied by Ms Kerr. A typed note was prepared from it on a pro forma (**pages 165 to 170**). The note recorded; the fact that the claimant's latest ENG1 contained the same restrictions and was again for one year; Mr Puczynski's request that the claimant be permitted the phased return recommended by occupational health and Mr Smith's reply that the respondent was "*not willing to double people up - we couldn't accommodate the phased return/the restrictions without doing this because George would be the lone position as cook*"; the claimant's view that on his work on the MV Isle of Arran he felt he needed more and was not in the galley; Mr Smith's comment that the work on Arran was to accommodate the restrictions on the ENG1; a difference of opinion (Mr Puczynski and Mr Smith) on what constituted a phased return to work; a discussion on what had occurred on the MV Caledonian Isles; a discussion on what had occurred by way of phased return compared with what had been agreed; an exchange about the possible period of life of an ENG1; and Mr Puczynski's discomfort about the meeting and "*the way proceedings have been undertaken*" to the point of suggesting the raising of a grievance against Mr Smith.

75. On the question of the claimant's phased return, Mr Puczynski said "*my definition of a phased return is different from this table's definition of a*

phased return. It is also not the definition I am getting from other departments. My definition is someone returning to the job they are employed to do – you put someone as a phased return and they get shadowed, that's always how it's been"; "*there have been previous phased returns involving shadowing, tell me why other people aren't afforded the same. There are people in your department that have been afforded it a double up phased return*"; and the claimant's "*whole future is on the line and it is based on a phased return. Give him the chance to see if he can get on to Argyle and Bute and do this job. It is not a big ask considering his whole future is based on this. This man could lose his job because of this*." On the question Mr Smith said, "*we said we would be unable to accommodate the phased return recommendations as it would encompass another crew member on board which is double the cost. We said at the last meeting unable to accommodate that as a business*"; "*unfortunately our position is we are not willing to accommodate a shadowing phased return*"; "*I am not denying it has been afforded in the past but the circumstances were different and the position has changed with regards to the cost and the increase in absence. I know it's happened and I know the person you are referring to*".

76. On the question of the claimant's time on the MV Caledonian Isles the claimant said; he had not been on the vessel for even 30 minutes; Mr Kerr had "*seen me with a wee limp. He told me what the hours would be and I said that's fine. He said I see you have a limp and I said it doesn't stop me from working. I told him I'm not happy and that I'm capable so you'll need to call the company. I said you need to give me the chance*"; he had to stop on the gangway because of passengers; and questioned Mr Kerr's qualification to do with an ENG1. On the question Mr Smith said; he had spoken to Mr Kerr who had told him about his concerns watching the claimant walking in the car park and stopping "*a couple of times getting up the gangway*" and said that "*he genuinely believed*" the claimant was not fit for duty and having a duty of care for those joining the vessel he "*didn't feel comfortable*".

77. On the question of the actuality of the claimant's phased return, it appears that by 11 November he had worked two 4 day shifts on the MV Isle of Arran (see **page 167**). Ms Kerr reminded the meeting that the respondent

"*could accommodate the restrictions/reduced hours until the end of the summer timetable*" so to 26 October.

78. The precursor to Mr Puczynski's discomfort was Mr Smith's comment "*So you have continued your exercises over a period of over 8 weeks, went back to your ENG1 doctor and you still have the same restrictions/time frame on restrictions. So essentially over that period of 8 weeks you have not gotten any further. You have been unable to carry out your role as Cook since February 2022 and we are now in November 2022. Unfortunately we can't accommodate a phased return involving doubling you up. We are also unable to permanently accommodate the restrictions on your ENG1. Unfortunately there is no sign of you returning to your role in the foreseeable future and we will need to progress down the capability route*."

79. On 22 November the respondent wrote to the claimant (**pages 172 and 173**). Amongst other things it said, "*Since the meeting on 11 November 2022 you have been in contact with your ENG1 doctor who advised they would be able to reassess your fitness after a phased return with the hope to remove restrictions if good progress is made. With the ENG1 doctor's confirmation that restrictions could be removed, instead of the restrictions lasting a year, we have investigated options we would be able to accommodate. As per recent discussions we are still unable to accommodate the recommended phased return from Occupational Health. We are however able to accommodate the restrictions on your ENG1 for a further period of four weeks in the hope that, at the end of this period, you will be able to get a full unrestricted ENG1*." It offered a 4-week roster working on a week on / week off basis on the MV Isle of Lewis. It was selected and offered because it is the respondent's quietest vessel and "*will provide the best opportunity for being able to build up your strength without the pressure of busy, short sailings*". The letter proposed that The first week would be as an SCR "*in the hopes to build up your strength in bending, lifting, and carrying. The second week in the galley to further build up your strength and test your ability for further bending, lifting, and carrying*." The letter continued, "*At the end of your 4 weeks you are required to re visit your ENG1 doctor … If, unfortunately, you do not achieve a full unrestricted ENG1, meaning you are still unable to carry out*

your contracted role as Cook, you will be invited to a Capability Meeting as per recent discussions."

80. In or around the end of November 2022, the claimant carried out a 4 week phased return on the MV Isle of Lewis. It has a crew of about 25. The claimant worked one week on one week off in that four week period.

81. On 6 December Karin MacNair OSM (chief steward) on the Isle of Lewis reported to Mr Smith by email on the claimant (**page 185**). In it she said, "*George has been performing well in Galley & keen to assist in any way he can. The first couple of days adjusting to sea swell & motion of weather last week, were taking their toll. George has been punctual and proactive in looking for tasks. Adjusting to sea state & five hour passage after being on shorter route. Discussed with George progress & recommend he brings steward & galley gear next shift*." It appears from that email that the claimant's first shift was spent in the galley. In that shift he worked as "*third man*" in the galley. Third man worked "*below*" the chief cook and the second cook. The claimant described the role as mainly involving the preparation of vegetables.

Early December to 13 January 2023

82. On 22 December 2022 the claimant attended an ENG1 appointment. An ENG1 was issued that day. It contained the same restrictions. It had an expiry date of 21 December 2023.

83. On 22 December the claimant was medically suspended on full pay.

84. On 5 January the respondent invited the claimant to a "*contractual review meeting*". It was fixed for 12 January at 10.00am. Its purpose was "*to discuss the outcome of your recent ENG1 review and to discuss what options are available*." The letter told the claimant that the respondent was "*keen to provide as much support as we can to get you back to work, however I must advise you as you have been unable to carry out your role since February 2022 and as you have a restricted ENG1 Medical Certificate meaning you have been deemed unfit for your contracted role for the foreseeable future, we may have to consider terminating your employment on ill health grounds. No action will be taken without full*

investigation into the matter and suitable alternative employment will be re-explored."

85. The claimant duly attended the meeting. A typed note of it was prepared (**pages 175 to 181**). Mr Puczynski was the claimant's representative. Mr Smith and Ms Kerr represented the respondent. The note suggests that the meeting; started at 11.00; adjourned at 12.00; and reconvened at 12.20pm. The note records discussion on; feedback from the claimant's work on the Isle of Lewis; the latest ENG1; alternative roles with the ENG1 restrictions; the likely actuality of working on MV Argyle with the restrictions; shore-based alternative work; and the meeting's outcome.

86. On Isle of Lewis feedback, the claimant asked if the respondent had received any. Mr Smith read out Ms Macnair's email from 6 December, confirmed that he had received oral feedback on the second week and agreed that the feedback was positive. The claimant was "*over the moon*" about Ms Macnair's feedback. He believed that it showed that he was capable of doing the job.

87. The latest ENG1 was provided. Mr Smith noted that it showed no change on the restrictions. He noted that the restrictions would apply until 21 December 2023.

88. Mr Puczynski raised the possibility of seafaring roles alternative to that of cook on the Argyle including as an SCR or steward on the Isle of Lewis. Both Mr Smith and Ms Kerr noted that the purpose of the temporary post on the Isle of Lewis was to be in a position to have the restrictions on the ENG1 removed. The discussion included reference to Muster list duties. While Mr Smith expressed the view that they involved heavy lifting he appeared to accept Mr Puczynski's view that "*the master would look at those restrictions and say ok George you are in charge of life jackets or you are in charge or escorting people to their muster stations*". Mr Smith said, "*I take your point on the muster list and the Master making the decision*."

89. On the claimant's role on the MV Argyle, Mr Smith said that; the claimant was alone in the role; "*I know people will help you out because that's the kind of crew they are, but there will be times where maybe someone can't*

help because they're doing their core role"; "*there's stores, bending, lifting, carrying, prolonged standing etc. If we let you back in that role, knowing we can't guarantee those restrictions are accommodated and something happens and you further damage yourself, did we put people first there? Those restrictions are not realistic for us to be able to accommodate. The very nature of your job is 12 hour straight shifts – how would that work with the no prolonged standing? It may not always be the case where you can just take a break. Or there may not always be the option where you don't but is that always the case up sticks and take a break?*"; and "*most of your job is exactly what those restrictions say you shouldn't be doing a lot of*." He recognised that the claimant's condition "*can and it could go away, but it also might not. It might get better and we hope it does, but at present those restrictions are in place for a year*." Mr Smith's view was that by that time all he had to go on was the ENG1 with restrictions of a year to December 2023.

90. The claimant advised that two Masters (on the Isle of Lewis and Ian Beaton, a relief Master on the Argyle and the Bute) would not have an issue signing him on (**page 177**).

91. There was a discussion about alternative shore-based work. The claimant described it as impossible.

92. After the adjournment, Mr Smith said that his recommendation to Guernsey that the employment be terminated on grounds of capability.

93. On 13 January the respondent wrote to the claimant (**pages 183 and 184**). After setting out the history from the start of the claimant's period of absence in February 2022 it said, "*After careful consideration of the above, the decision has been taken to terminate your employment on the grounds of capability due to your long-term incapacity and due to the unlikelihood of your return in the foreseeable future*." It advised that "*final monies will include full pay up until 12 January 2023, any outstanding leave you may have accrued, 12 weeks compensation for loss of earnings (non-taxable) and 7 weeks payment in lieu of notice (taxable)*." The letter noted that "*At the capability review meeting on 12 January 2023, it was re-iterated to you that the Company would be unable to support the ENG1 restrictions on a*

permanent basis, either within your current role, or within another role i.e. SCR, due to the nature and requirements of the role."

94. It advised of a right of appeal.

14 January to 20 March 2023

95. By email on 21 January, the claimant sought to appeal the decision to terminate his employment (**page187**). His appeal reasons can be summarised in this way:

    a. His current medical condition was not taken into consideration; it was not terminal and would improve

    b. the work he did with ENG1 restrictions indicated his capability in that he was given full duties including on a muster list

    c. the reports from the vessels of his work indicated that he was *"fully competent*" and able to complete all tasks.

96. He indicated that he believed the decision was biased and he was confused as to why, in light of his appeal reasons, he should have been dismissed.

97. On 21 February an appeal meeting is held with the claimant, Gerry Puczynski, Finlay MacRae, Head of Operations, Brigit Hume, HR Business Partner, and Samantha Tapp, Guernsey Manager – Marine Services. A note of it was prepared (**pages 191 and 192**). It recorded the location as Gourock. It does not record Ms Tapp as attending. She joined the meeting remotely. Mr Puczynski spoke on the claimant's behalf in setting out the grounds of appeal. The claimant explained that; he "*worked fine*" in the galley as third man; and alternative shore-based work was considered but not suitable. Mr Puczynski explained the reasons why an SCR role would be suitable.

98. On 23 February in a redacted email (**pages 218 and 219**) the respondent discussed the claimant. It referred to the pros and cons of his case. It is clear that the pros were factors which favoured his retention as an employee. Within the pros the email noted "*George's case is slightly*

different, George has no sick leave to take, so if he does go off within the next 12 months, the company will not need to pay him."

99. It also said, "*We are fast approaching the summer season, so we will have lots of extra bodies employed within the western isles fleet, George could easily be slipped into a position where he could be monitored if necessary*" and "*You haye will have an experienced Cook! steward who is trying to prove to the company, that he is still capable of doing his job , in the capacity required of him ,so you would get 100% commitment out of him*."

100. On 8 March Ms Hume emailed Ms Kerr and Mr Smith (**page 196**). It says "*What's 'reasonable' will depend on each situation. Think about the following things*" There then followed 7 bullet points. The first bullet is, "*will it remove or reduce the disadvantage for the person with the disability*?" Reference to "*it*" occurs in bullets two and three. It is not clear what "*it*" is.

101. On 13 March Mr Smith replied (**pages 193 to 196**). He provided answers for both the claimant's substantive role and the SCR role.

102. On 14 March Ms Hume emailed Craig Ramsay the respondent's Head of Marine (**page 197**). The heading is ENG1 restrictions. It appeared to attach the claimant's latest ENG1. After setting out the context she said, "*one of the points of their appeal is they believe these can be reasonably accommodated **and** they would be able to part of the muster list, as the Captains can tweak duties as needed, for example the employee could assemble life jackets etc*." The bold text is as per the email. She then sought "*some guidance on whether they could reasonably be part of the muster list and/or if we could make reasonable adjustments to the muster list (as they have suggested above) and still be compliant*."

103. Later that day Mr Ramsay replied (**page 197**). He said, "*If I'm reading correctly the restrictions are no heavy lifting and no prolonged standing. Depending on the exact nature of their medical condition, and their training status, it is possible that they could take up certain muster list positions on some vessels. However, the restrictions would have a negative impact on their ability to undertake most other roles onboard*."

104. On 20 March Mr MacRae wrote to the claimant with his appeal outcome (**pages 199 to 201**). He summarised the claimant's grounds of appeal in 6 bullets. He made reference to "*up to date*" medical information and advice, specifically the occupational health report of August 2022 and the latest ENG1. The letter noted that "*to be legally compliant to work on a CalMac ship, either in the role of Cook or SCR, these restrictions must be adhered to and would be in place until at least December 2023 and we had no indication as to when or if they may be lifted*." In relation to his role as cook it said, "*prolonged standing, heavy lifting, and bending were a significant part of the role. This is due to this being a lone worker role, whereby the majority if not all duties could only be done standing up, there is a constant requirement for heavy lifting/carrying in that the Cook is required to move goods around the vessel and galley and finally there is a constant requirement for the Cook to bend, to access the fridge, oven and wash dishes*." The letter referenced adjustments. It said, "*the only way this would be feasible, given everything that is expected of the Cooks role, in terms of service levels, safety requirements and so on, would be to have an additional head count working in the galley. Given the operation of the vessel, and that it would not be feasible for any colleagues (currently included in head count) to give the required support and assistance the only way this would be viable would be to recruit additional head count*." For cost reasons Mr MacRae's view was that the adjustment was not reasonable. The letter noted the permanent Port Assistant role at Gourock and the reasons why the claimant did not apply for it. It referenced an alternative SCR role the duties expected of it and what might be done to accommodate the claimant in it. On that issue Mr MacRae concluded that "*the only way this would be viable would be to recruit additional head count for the high season*" and decided that for cost reasons "*we … do not think we could reasonably make these adjustments to the role of SCR*." In the context of "*process*" Mr MacRae focussed on the phased return to work exercise. He said, "*you were not afforded a phased return as recommended by Occupational Health. We believe you were afforded this, albeit in the role of SCR. It was also discussed that it was not practical or reasonable for your phased return to be carried out in your substantive role as Cook, but could be offered in the role of SCR. It was discussed at the outset that the purpose of the phased return in the SCR role was a*

temporary measure to allow you time to build up your strength, have the restrictions removed from your medical and return to your substantive role of Cook. It was not the case that this would become a permanent arrangement, particularly with the restrictions still on your medical for the reasons stated above." The appeal was not upheld.

105. Mr MacRae believed that he had seen a risk assessment which had been done relating to the claimant returning to his role as cook on the Argyle with ENG1 restrictions. No risk assessment was produced or referred to anywhere else in the evidence. Mr Smith believed that no such assessment had been carried out. It is more likely than not that no such risk assessment was done.

106. The claimant's effective date of termination was 3 March 2023.

107. The claimant's mental health was detrimentally impacted by his dismissal. It caused financial concerns for him. They in turn resulted in arguments with his wife. He was prescribed Amitriptyline by his doctor. It is ordinarily prescribed to treat low mood and depression.

After 3 March 2023

108. By 3 March 2023 his gross weekly wage from the respondent was £728.48. His net weekly pay was £586.88. The claimant was paid 12 weeks compensation for loss of earnings (non-taxable) (see **page 184**). He received Job Seekers Allowance (of £763.21) in the period between 11 July and 18 September.

109. On 20 July 2023 the claimant was examined by an MCA approved doctor (**pages 202 and 203**). She issued an ENG1 that day. Its expiry date is 19 July 2025. It certifies the claimant as fit but subject to the restriction of working in UK Near Coastal waters only.

110. On 18 September he began employment in the Care at Home service of the charity Carr Gomm. In that employment, his average weekly net earnings are £477.45.

111. His evidence (in cross examination) was that between 3 March and 11 July he was looking and applying for work. He accepted that those attempts were not vouched by any material in the bundle.

Comment on the evidence

112. Both parties argued that on the question of credibility and reliability their evidence should be preferred over the other where there were disputes. But using (i) the agreed issues as the framework for identifying relevant evidence and (ii) the contemporaneous documents as a primary point of reference, very little relevant oral evidence was in dispute. Of course there were discrepancies. But not to the extent of influencing our views on how to answer the issues.

113. Three points from the evidence are worth commenting on here albeit they were not material to our decision. First was Mr Smith's evidence that to "*double up*" the claimant with another cook on the MV Argyle in a phased return to work period would increase costs to the respondent. We found that difficult to reconcile with the position after 26 October when the claimant was suspended on full pay. By that time the respondent was already paying both the claimant and for a colleague to "*cover*" his work. On our analysis there would have been no additional cost; the claimant would have been working (and being paid) instead of being suspended (on full pay). Second, we had misgivings as to Mr MacRae's role as appeal hearer. He accepted that the emailed answers to questions (**pages 193 to 196**) was akin to Mr Smith "*marking his own homework*". Mr Smith's decision was the subject of the appeal. He knew that the information which he provided was being considered in that context. It appears that Mr MacRae accepted what was being said without further engagement or enquiry. Third (and as the claimant ultimately accepted on 30 April) he was clearly mistaken in his belief that an ENG1 could not have a "*life*" of less than a year when account is taken of Regulation 9 of the Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010 which provides that for the claimant an ENG1 had a maximum life of two years "*or such shorter period as is specified*" in it.

Submissions

114. As per the amended timetable, the parties exchanged and lodged written submissions and lists of authorities prior to an oral hearing on 30 April. There was some overlap of the authorities. We mean no disservice to either party or their representatives in not repeating or summarising their

submissions. To the extent necessary, we have referred to aspects of them below. We record our thanks to both for their work in preparing and presenting them.

The legal framework

115. We have set out here what we consider to be the significant legal framework in the context of the issues which we had to decide. We have referred to other caselaw as necessary below.

116. Section 98(1) of the Employment Rights Act 1996 provides that "*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 the dismissal, and(b) that it is either a reason falling within subsection (2) or*" "*some other substantial reason*". One reason with subsection (2) is at (a) and "*relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do*." Subsection (3) then provides that "In subsection (2)(a) "*capability" …. means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality*." Section 98(4) provides that "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case*."

117. An employment tribunal requires (in a claim of unfair dismissal where the dismissal was on capability grounds) "*to address three questions, namely whether the Respondent genuinely believed in their stated reason, whether it was a reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did*" (***Schenker Rail (UK) Ltd v Doolan*** UKEATS/0053/09/BI).

118. At paragraph 23 of its judgment in the case of ***BS v Dundee City Council*** 2014 S.C. 254 the Inner House of the Court of Session said "*We intend first to examine the two main authorities, **Spencer v Paragon Wallpapers Ltd*** [[1977] ICR 301] *and East Lindsey **District Council v Daubney***, [[1977] ICR 566] *and then to consider how the principles established in those cases were applied to the present case*." At paragraph 27 it notes, "*Three important themes emerge from the decisions in **Spencer** and **Daubney**. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasise, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered*." And at paragraph 34 it said, "*the judgment of the ET was lacking in four respects. First, the tribunal did not expressly address the balancing exercise that the decision in **Spencer v Paragon Wallpapers Ltd** requires; in particular, they did not directly address the question of whether in all the circumstances of the case any reasonable employer would have waited longer before dismissing the appellant. … Secondly, the tribunal did not in our opinion give adequate weight to the appellant's own views about his ability to return to work. As we have indicated, these are important, and the opinion expressed in* [the doctor's] *report should have been weighed against them in deciding whether the respondent's decision to dismiss was one that no reasonable employer could have reached. Thirdly, we are of opinion that the tribunal attached too much importance to the need to obtain a further medical opinion. In this respect they overlooked the fact that the obligation on a reasonable employer is only to carry out such medical investigations as are sensible*

in all the circumstances. They should accordingly have considered what, if anything, any further medical examination might reveal, and they should have considered whether a reasonable employer, having Dr Spencer's report, the continuing note from the GP and the appellant's own views, might have concluded on 23 September that the appellant was unlikely to return to work in the foreseeable future and might therefore reasonably be dismissed on account of ill-health. This issue is obviously closely related to the first issue that we have mentioned in this paragraph. Fourthly, the tribunal should have considered whether the appellant's length of service was in fact relevant to the decision that the respondents had to make on 23 September and again at the appeal hearing on 28 October. In relation to all four of these issues, the discussion at paras 26 to 33 above is clearly relevant. We would emphasise that the critical question is ultimately the first, namely whether any reasonable employer would have waited longer before dismissing the appellant."

119. Section 15(1) of the Equality Act 2010 provides "*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.*"

120. "*To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so*." (paragraph 22 of the judgment of Lady Hale in the case of Chief ***Constable of West Yorkshire Police and another v Homer*** [2012] I.C.R. 704.

121. "*The tribunal had adopted the "no more than necessary" test of proportionality from the **Homer** case [2012] ICR 704 and can scarcely be criticised by this court for doing so*" (paragraph 47 of judgment of the Supreme Court in the case of ***Essop and others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice*** [2017] I.C.R. 640).

122. Section 20(1) of the 2010 Act provides, "*Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A*." The duty comprises the following three requirements.(subsection (2). The first requirement (of that

three) "*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*." Section 21(2) provides "*A discriminates against a disabled person if A fails to comply with that duty in relation to that person*" that duty being (in this case) a failure to comply with the first requirement.

Discussion and decision

123. It is a matter of agreement that the reason or principal reason for the claimant's dismissal was capability (see the claimant's submission at paragraph 3). That is consistent with the relevant contemporaneous evidence (dismissal letter of 13 January 2023 **pages 183 and 184** and appeal outcome letter of 20 March 2023 **pages 199 to 201**). The respondent has shown that the reason for the claimant's dismissal was capability within section 98(2)(b) of the 1996 Act. The respondent via the actings of those making recommendations to it (Mr Smith and Mr MacRae) genuinely believed that capability was the reason for the dismissal. We say that on the basis that there was no challenge by the claimant that the reason for dismissal (and on the appeal) of his employer was as per those recommendations. We answer the first issue "*yes*."

124. We found the dismissal to be unfair. It was not in accordance with the principles summarised by the Inner House of the Court of Session in the case of ***BS v Dundee City Council***. One theme identified in it from the two earlier (named) main authorities was the need to take steps to discover the employee's medical condition and his likely prognosis. The Court noted that that need "*merely*" required the obtaining of proper medical advice. What is required is to ensure that the correct question is asked and answered. What is not required is for the employer to pursue a detailed medical examination.

125. In this case the respondent relied on the ENG1 form. In its written submission the respondent said that from September 2022 it was "*the key medical evidence under consideration*." That is borne out by the evidence from mid-August 2022 until the appeal outcome. On 18 August 2022 at a capability review meeting Mr Smith said "*We can't sit and talk about*

phased returns etc when you don't have an ENG1 – an ENG1 is the starting point of those discussions" (**page 125**). At the meeting he advised the claimant that not getting an ENG1 form was an example of circumstances in which the claimant's employment may be terminated (**page 126**). At the meeting the claimant said that he believed that he would get his ENG1 (**page 124**). By that time the claimant did not have an ENG1 with restrictions on it. The stated aim of the claimant's work on the Isle of Lewis vessel was that after it he "*would revisit your ENG1 doctor who would remove the current restrictions on your ENG1*" (**page 177**). In its letter of 5 January inviting him to the meeting on 12 January (**page 174**) the respondent said, "*as you have a restricted ENG1 Medical Certificate meaning you have been deemed unfit for your contracted role for the foreseeable future*." Towards the end of the meeting on 12 January and in a discussion about the ENG1 Mr Smith said, "*The reality we are talking about is whether we can accommodate the restrictions*" on the certificate (**page 180**). The dismissal letter noted ""*At the capability review meeting on 12 January 2023, it was re-iterated to you that the Company would be unable to support the ENG1 restrictions on a permanent basis, either within your current role, or within another role i.e. SCR, due to the nature and requirements of the role*." Mr MacRae's letter of 20 March (**pages 199 to 201**) says, "*Your ENG 1 doctor put the following restrictions on your medical until at least December 2023, no heavy lifting, no prolonged standing, and regular breaks. As you are aware, for you to be legally compliant to work on a CalMac ship, either in the role of Cook or SCR, these restrictions must be adhered to and would be in place until at least December 2023 and we had no indication as to when or if they may be lifted*." That letter referenced what Mr MacRae called "*the available medical information*". That included, he said, the occupational health report from August 2022 and the ENG1 certificates.

126. In its written submission, the respondent asserts that the Claimant's ENG1 certificate indicated he was not fit to return to work without restrictions (paragraph 76). That is, strictly speaking, incorrect. It certified that he was fit with restrictions. The difference is subtle but important. The respondent appears to have assumed that the claimant was unfit to work unless and until the restrictions were removed. In fact the ENG1 says he is fit with the

three restrictions accommodated. It is important to keep in mind the purpose of the ENG1. It is limited to recording the doctor's opinion on the effect of "*any medical condition*" on one (or more than one) of three things. They are; is any medical condition (1) likely to be aggravated by service at sea (2) rendering him unfit for such service (i.e. service at sea) or (3) liable to endanger the health of other persons on board (see **pages 139 and 202**). It is not a means of discovering the claimant's medical condition or his likely prognosis. The obligation on a reasonable employer is only to carry out such medical investigations as are sensible in all the circumstances. In our view a reasonable employer would have sought and obtained a report from its occupational health provider (or other medical advice) about the claimant's medical condition and prognosis in January 2023 before any decision to dismiss him. Both previous occupational health reports indicated the probability of (or at least optimism about) an improvement in his condition. The report in April 2022 indicated that his condition in most cases were treated successfully and did not recur. The August report did not detract from that opinion. The claimant reported an improvement to Mr Smith in their meetings. His performance on the Isle of Lewis in November indicated an improvement in his health. The respondent knew that it was possible for the restrictions to be removed at any time during the life of any ENG1 and earlier than December 2023.

127. Looked at in the context of section 98(2)(a) and (3) of the 1996 Act, the respondent did not have a reasonable basis on which to conclude that "*by reference to skill, aptitude, health or any other physical or mental quality*" the claimant was not capable of performing work of the kind which he was employed by the respondent to do. The ENG1 did not address those issues. A reasonable employer, having previously engaged occupational health professionals to advise on the claimant, would have sought advice from them before dismissing him. Given the improvements in the claimant's condition and the fact that he had performed well in the galley of the Isle of Lewis in November, a further medical examination might have revealed that his prognosis for a recovery to the duties of his role in the foreseeable future and was probable much sooner than December 2023.

128. Separately, no reasonable employer would have refused the claimant the opportunity of a phased return to work to his own role on the basis of the

suggestions from its occupational health advisor. We considered issues 3i, 3 ii, and 3iii together. Our preliminary comments are; there was no evidence that the ENG1 doctor advised of a phased return; the core of the criticism of the respondent in the issues is that it did not afford a phased return to the role of cook on the MV Arygle; the reference in 3 ii is a reference to a phased return; and the respondent did not dispute that that type of phased return had been afforded in the past (see **page 168**).

129. The first discussion about a phased return involving adjusted duties was on 18 August. The discussion took account of the opinion of the OH advisor's suggestions. It thus took place before the ENG1 restrictions which were first made on 7 September. In the meeting on 18 August, the claimant said that he believed that he would "*get an ENG1*". It is clear from the OH report and Mr Smith's comments on 18 August that the phased return would involve the OH suggested adjustments being effected on a temporary basis. The OH report says the advisor was "*hopeful that these adjustments will be temporary and only be required to help him manage his symptoms*." The exchange between Mr Smith and the claimant tends to suggest that the claimant could work with the adjustments but that Mr Smith did not agree. Mr Smith's view was that on the claimant's shift pattern (not 2 weeks on and 2 weeks off as OH believed) accommodating a phased return was more difficult. His position at that time was to ask crewing if it could be accommodated. It appears (from an email on 20 August **page 208**) that the respondent's rationale for not accommodating the phased return recommended by occupational health was due to (i) cost and (ii) the additional workload that this would place on the crewing officer/other Clyde retail crew. That rationale was further explained in the email. The vessel has a small amount of retail crew onboard; and there is "*no slack*" to accommodate the potential amount of regular rest breaks likely to be required.

130. Ms Todd accepted (correctly in our view) that on the question of fairness of the claimant's dismissal it was relevant for us to take into account whether the respondent's commitment to the claimant on 10 August to explore all options including reasonable adjustments (**page 119**) had been met. We acknowledge that (as EJ Kearns decided) prior to mid-January 2023 the claimant was not "*disabled*". Accordingly there could be no

section 21 failure to comply with a section 20 duty prior to that point in time. Nonetheless the respondent made that commitment. The question in the context of issue 3 (i, ii, and iii) then becomes was it reasonable for the respondent not to afford the phased return to his duties on the MV Argyle as recommended by occupational health? Or was its decision outside the range of reasonable responses? By 20 August 2022, the respondent obviously had employed alternative cook cover on the MV Argyle. On 8 August the claimant's GP (**page 100**) recommended a phased return on amended duties and altered hours.

131. From 26 October the claimant was medically suspended on full pay. The question of a phased return was revisited at the meeting on 11 November. If the claimant returned on a phased basis as per the recommendations on his rota his work over 10 weeks would have been as follows:

1. (on) 50% = 6 hours of 12
2. (off)
3. (on) 50% =6 hours of 12
4. (off)
5. (on) 75% = 9 hours of 12
6. (off)
7. (on) 75% = 9 hours of 12
8. (off)
9. (on) 100% = 12 hours of 12
10. (off)

132. On 21 October (see **page 153**) Ms Kerr planned to discuss with Mr Smith the possibility of doubling the claimant up on the Argyle/Bute to see how he got on. She referred to the claimant's position being that he would not know if it would work unless it was tried.

133. Mr Smith's view was that "*another crew member on board would be double the cost*." On any analysis that does not make sense in the circumstances.

The respondent was already paying a cook on the MV Argyle covering the claimant's role. The claimant as the "*other*" crew member on board would not double the cost. Indeed if he were paid per hour on the phased basis there would be a saving for part of the time compared with his full pay on suspension. Mr Smith said that the respondent "*wouldn't be able to accommodate doubling up*." The note does not record any further explanation of his view. But that does not stand up to scrutiny either. There was no reason why the claimant could not have gone on as "*spare*" (for his phased return hours). He had previously suggested it. It was, from that exchange, something which was possible. His unchallenged evidence was that the MV Argyle had a spare man.There was no reason why the claimant could not have worked the phased return (above) and done so as "*spare*" within the crew. We agree that the claimant's dismissal was unfair taking account of issue 3 i, ii and iii.

134. In its written submission, the respondent said, "*The Claimant had been medically assessed in person by his ENG1 doctor who is a specialist in seagoing medical referrals and best placed to analyse his fitness for work*." Leaving aside the absence of any evidence as to the specialist nature of the doctor, that doctor is in our view not best placed to analyse the claimant's fitness for his particular role. There is no evidence that the ENG1 doctor was aware of the claimant's role other than the fact that he was in "*catering*". In his letter (**page 199**) Mr MacRae said "*for you to be legally compliant to work on a CalMac ship, either in the role of Cook or SCR, these restrictions must be adhered to*." This tends to suggest that the respondent's focus was predominantly on legal compliance and less to do with the claimant's medical condition and his likely prognosis. Indeed, its written submission quotes Regulation 6(6) of the Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010 which provides that "*No person may work as a seafarer on a ship to which these Regulations apply in breach of a condition of that person's medical fitness certificate*" and refers to Regulation 18 which states that a breach of Regulation 6 is an offence. Legal compliance and avoiding the possibility of a criminal prosecution were clearly relevant to the respondent, a matter quite different from the claimant's health and ability to perform his role. Indeed the respondent relied on Mr Smith being "*clear*

in his evidence that the legal ramifications of ignoring ENG1 restrictions can be significant for the business. It is a criminal offence to have employed someone in a way that breaches their ENG1's conditions."

135. Related to the claimant's medical condition and his likely prognosis is the need (from ***BS v Dundee City Council***) to consult with him and take his views into account. Those views include his ability to return to work. Throughout his period of absence the claimant consistently indicated his willingness to do so. In March 2022 he said that he did not want his sick line extended. In April he said he hoped his latest physiotherapy session would be his last before returning to work. His intention in arranging (and paying for) osteopath appointments was to speed up his recuperation. In late June he said that he was *"trying to do everything to get fitter.*" He sought a phased return to work on his own vessel. He undertook the work which was (i) asked of him and (ii) permitted by the respondent. He believed that the feedback from the Isle of Lewis was positive and indicated that his condition was improving and he was capable of doing his job. The respondent does not appear to have taken the claimant's views into account. In particular, it did not take into account the claimant's enthusiasm to return to his role or his view on his (improving) health and abilities. In ***BS v Dundee City Council*** the Inner House emphasised that a critical question is whether any reasonable employer would have waited longer before dismissing the claimant. In our view a reasonable employer who had taken account of the claimant's improving health, his performance on the Isle of Lewis, and his enthusiasm to return to his role and would have delayed his dismissal at least to the extent of obtaining a medical opinion on his health and prognosis. Two of the claimant's appeal grounds were (i) he did not feel his current medical condition was taken into full consideration and (ii) his condition is not terminal and would improve, and he believed it is "*already getting better*" (**page 187**). Mr MacRae repeats them and looked at "*the available medical information*" being the OH report from August 2022 and the latest (December) ENG1 certificate (**page 199**). He did not take any steps to ascertain the claimant's medical condition (by 20 March 2023). He did not expressly take account of the claimant's opinion that his health was improving. In our view a reasonable employer, prompted by the grounds of appeal, would have sought a professional

opinion on the claimant's prevailing medical condition, prognosis, whether it was improving, and on the possibility of a recovery to his duties in the foreseeable future. By 23 February the respondent had recognised that any future absence would be on nil pay and the claimant could "*easily*" be found a position in the summer season. We therefore answer issue 3 v "*yes*". The dismissal was unfair. It was premature.

136. It is unnecessary for us to answer issues 2 i, 2 ii, or 3 iv.

137. We answer issue 2 iii (was the dismissal within the band of reasonable responses?) "*no*" for the reasons set out above.

138. Issue 4 is predicated on a finding that the dismissal was unfair on procedural grounds. The respondent sought a 100% reduction in any compensatory award (or such other reduction as we thought fit). It did so on the basis that the claimant would have been dismissed had a fair procedure been followed.

139. "*A "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done."* And *"the Tribunal has to consider not a hypothetical fair employer but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand*." ***Hill v Governing Body of Great Tey Primary School*** [2013] ICR 691. "*If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have*

given evidence that he had intended to retire in the near future.)" (see paragraph 54 of the report in the case of ***Software 2000 Ltd v Andrews*** [2007] ICR page 825. On a strict reading of the agreed issue (which is limited to procedural unfairness) the answer is "*no*". But a tribunal should not rule out the making of a "*Polkey*" deduction because it has determined that the dismissal is substantively unfair (***O'Dea v ISC Chemicals Ltd*** [1995] IRLR 599.) The respondent did not identify any evidence to support its proposition that "*Even if the Claimant had not been dismissed when he was, he would have been dismissed in any case*." Applying what was said in ***Hill***, we cannot say with any confidence at all that the respondent would have dismissed fairly. Indeed, in our view had the respondent acted fairly and obtained medical advice (certainly by 20 March as the claimant's appeal sought) it may well have returned him to nil pay pending the removal of the ENG1 restrictions which in fact occurred by 20 July. By that date, the claimant could have returned to his role as cook on the MV Argyle. We are not persuaded that any reduction should be made for "*Polkey*".

140. On the claim of discrimination under section 15, in the case of ***City of York Council v Grosset*** [2018] IRLR 746 the Court of Appeal said, "*On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something"*." "*The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something*"". The respondent accepts that (i) the restrictions on the Claimant's ENG1 certificate and (ii) his inability to have them lifted and demonstrate that he could do his job were consequences of his disability. In our view they arose in consequence of his disability. We therefore answer issue 6 "*yes*". The unfavourable treatment relied on is (i) the dismissal and (ii) the refusal of the appeal. The respondent accepts that the claimant was dismissed and his appeal was refused as a result of his incapability to carry out his role, and this incapability arose in consequence to his disability. In our view, the claimant was treated

unfavourably (dismissed and appeal refused) because of the "t*hings arising*" from his disability. We answer issue 7 "*yes*". We also answer issue 8 "*yes*" albeit there was no evidence as to the respondent's state of knowledge. Neither party made any submission on that question. The battleground on section 15 was therefore on issue 9; had the respondent shown "*that the treatment was nonetheless justified as a proportionate means of achieving a legitimate aim? The legitimate aim relied on by the respondent is maintaining a workforce capable of carrying out their duties*." Focussing that aim on the claimant's situation meant the employment by the respondent of another cook on the MV Argyle performing those duties. The claimant argued that the respondent had failed to establish that there was a legitimate aim. We do not agree. There was no real challenge to the respondent's (understandable) position that it needed a cook on the MV Argyle who in turn formed part of its overall workforce who were capable of carrying out their duties. The battleground then narrowed to the question; was the dismissal of the claimant a proportionate means of achieving it? There was no real dispute between the parties on the relevant law. We considered the question in the context of what was said in ***Homer*** and ***Naeem***. On the respondent's written case there must have been no "*less harsh*" alternative and argued that the only alternatives to dismissing him would have been to have kept him employed until the restrictions on his ENG1 were lifted, or to have moved him into an alternative role. In our view a less harsh alternative would indeed have been to retain him in employment with a view to an improvement in his health and having the restrictions removed from the ENG1. Two days after the claimant's appeal hearing the respondent was aware of the fact that he had no sick leave to take, and thus if he was absent within the following 12 months, the respondent would not need to pay him (**page 218**). Retaining the claimant in employment beyond February 2023 would have not been a salary cost for the respondent. In the circumstances of an improvement in his health and him trying to prove he was still capable of doing his job (issues repeated in the email on **page 218**) a less harsh alternative would have been to do so. In our view therefore dismissal was not a proportionate means of achieving the stated aim. We answer issue 9 "*no*".

141. The first question on the allegation of a failure to make reasonable adjustments (issue 10) is; "*Did the Respondent apply a PCP to the Claimant? The alleged PCP relied on by the Claimant is a requirement for the Claimant to remain in a seafaring role*". In his written submission the claim based on that requirement was withdrawn. The claim which proceeded on that basis is therefore dismissed as per order 3 of the judgment.

142. At paragraph 8 of his written submission the claimant said he "*had identified two PCPs with regard to his complaint in terms of Section 20 and 21 of the Equality Act 2010. (1) not allowing him to do a phased return on his own vessel with the ENG1 restrictions as adjustments (14 September 2022). This head of claim was dismissed by reason of the allegation being dated prior to the point at which she had found him to be disabled*. *(2) the requirement to remain in a seafaring role (found to be ongoing between 22nd September and 20th March 2023). She determined that this claim would depend upon whether and if so, when a duty to make a reasonable adjustment arose and whether it was after mid-January 2023)*." The second was withdrawn (as above). At paragraph 10 he said, "*With regard to the first while the decision and the application of the PCP was found to pre-date the finding of disability, it is submitted that this was an ongoing state of affairs, and that this PCP continued to apply up to the time of dismissal and refusal of the appeal, and thus this claim of a failure to make reasonable adjustments is relevant to the Section 15 claim as set out above in so far had there been an adjustment to this PCP as at the date of dismissal this would have averted the dismissal and as such, goes to both reasonableness in terms of unfair dismissal and the Section 15 claim*." Ms Todd forcefully argued that this first PCP should not be considered and the claim based on it should fail. We agree. Two points are relevant. First, it was previously dismissed by EJ Kearns from which decision no appeal was made. Second, we took account of what was said by the Court of Appeal in the case of **Parekh v The London Borough of Brent** [2012] EWCA Civ 1630. "*A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the*

parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see ***Land Rover v. Short*** *Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence*." In our view the general view prevails in this case. We also took notice of what that Court said in ***Mervyn v BW Controls Ltd*** [2020] IRLR 464. Departure from an agreed list of issues while not exceptional is nonetheless unusual. It held that "*An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing*." What the claimant seeks to do (after this tribunal had heard all of the evidence) is to amend the list of issues to add in a claim which neither the respondent nor the tribunal anticipated or could have reasonably anticipated. To do so would not afford the respondent any opportunity to answer it. That is inherently unfair. The respondent was entitled to assume that (as per EJ Kearns' judgment) the claim had been dismissed. On that analysis, the claim under section 20/21 does not succeed. It is sufficient that it is dismissed on it being withdrawn. It is not necessary for us to answer issues 11 to 14.

143. In summary therefore we have found that the claimant was unfairly dismissed and that the dismissal was unfavourable treatment contrary to section 15 of the 2010 Act. The respondent thus discriminated against him, that discrimination arising from his disability.

Remedy

144. Issues 15 and 16 focus on awards of compensation. Neither a declaration nor a recommendation is sought under section 124(2) of the 2010 Act. We do not make either.

145. By his effective date of termination (3 March 2023) the claimant had 5 years' continuous service. By that date he was 64 years of age. His agreed gross weekly wage was £728.48. His basic award is thus £4,282.50.

146. Section 124(2)(b) of the 2010 Act provides that the tribunal may order the respondent to pay compensation which (as per subsection (6)) corresponds to the amount that could be awarded by the sheriff under section 119. That section (4) provides that damages may include compensation for injury to feelings.

147. The claimant has lost earnings by virtue of discrimination. Loss of earnings is a relevant claim under section 124 of the 2010 Act. The payment in lieu of notice covered the period to 3 March 2023. His schedule of loss seeks loss of net weekly pay of £586.88. The schedule reflects the fact that the claimant was paid £8717.72. This was (as per **page 184**) compensation for loss of earnings. That amount equates with 14.85 weeks net pay. We have rounded it up to 15 weeks. Accordingly, the claimant has no loss of net pay (and thus no loss) in the period between 3 March and 16 June 2023. In that period (and beyond) he was looking for work. He received Job Seekers' Allowance between 11 July and 18 September. On that latter date he began earning £477.45 per week.

148. In the period 16 June to 18 September his losses were (13 weeks at £586.88 per week) **£7,629.44**. In the period 18 September 10 June 2024 his losses were (38 weeks x £109.43) **£4,158.34**. The claimant sought future loss to 19 July 2025. We consider that an appropriate period is 26 weeks. Future loss is therefore **£2,845.18**.

149. The total award for loss of earnings is therefore **£14,632.96**. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to compensation for discrimination.

150. The respondent argued that the claimant had failed to mitigate his losses in the period between March and July 2023. Two points are relevant. On our analysis he had no loss in the period between 3 March and 16 June. Any period of alleged failure to mitigate is thus minimal. Second, "*The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss*" (***Cooper Contracting Limited v Lindsey*** UKEAT/0184/15/JOJ now reported at [2016] ICR D3 paragraph 16). The respondent has not shown that the claimant has not mitigated loss in that period.

151. On the question of damages for injury to feelings we took account of what was said in ***Vento v Chief Constable of West Yorkshire Police*** [2003] ICR 318 and the relevant Presidential Guidance for claims presented after 6 April 2023. The lower band is £1,100 to £11,200 (less serious cases); the middle band is £11,200 to £33,700 (cases that do not merit an award in the upper band); and upper band is £33,700 to £56,200. The claimant sought an award of £15,000, i.e. within the middle band. We disagree with that analysis. His evidence about the impact of his dismissal was (unsurprisingly) not challenged. But it was in very short compass. While he told us that his doctor had prescribed anti-depressant medication, we do not know when, or for how long. There was no evidence of the impact on him other than as a cause of friction at home. Again, we had no evidence to find the extent (impact or period of time) of that state of affairs. We decided that damages for the injury to feelings based on this evidence should be above the midpoint of the lower band. We award **£8,000**.

152. Interest (at 8%) is due between 3 March 2023 and 14 June 2024 (the date of calculation) on the award for injury to feelings (Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996). That sum is (£1.75 per day over 469 days) **£820.75**.

153. Interest (at 8%) is due between 24 October 2023 (the mid-point of the date of the act of discrimination complained of and the date and 14 June) on damages for lost earnings. That sum is (£3.21 per day over 234 days) **£751.14**.

154. Orders 5 and 6 reflect interest due on the awards.

Employment Judge: **R Bradley**
Date of Judgment: **17 June 2024**
Entered in register: **19 June 2024**
and copied to parties

APPENDIX

AGREED LIST OF ISSUES

UNFAIR DISMISSAL

1. Was the reason, or principal reason, for the dismissal one of the five potentially fair reasons set out in section 98(2) ERA, specifically capability?

2. If so, did the Respondent act reasonably in treating that reason as sufficient to justify dismissal in terms of section 98(4) ERA? In particular:-

    i. Did the Respondent adopt a fair process prior to reaching the decision to dismiss?

    ii. Did the Respondent appropriately consider alternatives to dismissal?

    iii. Was dismissal within the band of reasonable responses?

3. The Claimant alleges his dismissal was unfair for the following reasons:

    i. He was not afforded a phased return despite this being advised by his GP, OH and the ENG1 doctor;

    ii. The Claimant was not permitted to try a return to his substantive role in order to have his ENG1 restrictions removed;

    iii. The Claimant was not afforded the same phased return opportunities as other employees in the company doing the same role

    iv. The Respondent did not appropriately consider alternatives to dismissal i.e. the Claimant was not afforded the opportunity to return as a Chef and/or a Steward to an alternative vessel;

    v. The decision to dismiss was premature.

4. If the Tribunal is minded to find the dismissal unfair for procedural reasons, would compliance with a fair procedure, on the balance of probabilities, have made a difference to whether or not the Claimant was dismissed?

DISABILITY DISCRIMINATION

5. The Claimant was disabled by reason of bursitis from mid-January 2023 onwards.

Discrimination arising from disability (s15 EqA)

6. What was the 'something arising' in consequence of the Claimant's disability? The Claimant says that the restrictions on his ENG1 certificate and his inability to have them lifted and demonstrate to the Respondent that he could do his job were consequences of his disability.

7. Was the Claimant treated unfavourably because of the 'something arising'? The Claimant relies on his dismissal and the refusal of his appeal as acts of unfavourable treatment.

8. If so, did the Respondent know, or could it reasonably have been expected to know, that the Claimant was disabled?

9. If so, can the Respondent show that the treatment was nonetheless justified as a proportionate means of achieving a legitimate aim? The legitimate aim relied on by the Respondent is maintaining a workforce capable of carrying out their duties.

Failure to make reasonable adjustments (ss20 and 21 EqA)

10. Did the Respondent apply a PCP to the Claimant? The alleged PCP relied on by the Claimant is a requirement for the Claimant to remain in a seafaring role.

11. If so, did the Claimant suffer a substantial disadvantage because of the PCP?

12. If so, what adjustments **could** have reduced or removed the substantial disadvantage to the Claimant? **The claimant relies on the following; "*to shadow in the substantive (ship's cook) role to be able to prove that he was able to fulfil the duties of that position***."

13. Would any such adjustment have been reasonable in the circumstances?

14. Did the Respondent make such adjustments as were reasonable to avoid the disadvantage?

REMEDY

15. If the Claimant is successful in whole or in part what level of compensation if any for losses should be awarded to the Claimant?

16. What award for injury to feelings should be made if any?

~~17. Did the Acas Code of Practice on Disciplinary and Grievance Procedures apply to the Claimant's dismissal?~~

~~18. If so, did the Respondent fail to follow the Code in dismissing the Claimant?~~

~~19. Was any such failure unreasonable?~~

~~20. If so, should any uplift of compensation be awarded?~~