EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111053/2019 Hearing by Cloud Video Platform on 7, 8, 9 and 10 December 2021, 7 and 8 February 2022; and Members' Meetings on 9 February, 23 March and 14 April 2022

Employment Judge: M A Macleod
Tribunal Member: R Dearle
Tribunal Member: A Atkinson

A MacNab	**Claimant** **Represented by** **Ms S Shiels** **Solicitor**
Stena Drilling	**Respondent** **Represented by** **Mr S Jones** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims all fail, and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 19 September 2019, in which he complained that the respondent had unfairly constructively dismissed him from employment with them, discriminated against him on the grounds of disability, and unlawfully deprived him of holiday pay.

2. The respondent submitted an ET3 in which they resisted all claims made by the claimant.

3. Further particulars and responses were submitted by the parties thereafter under the supervision of the Tribunal, and the issues to be addressed by the Tribunal were derived from these pleadings.

4. A Hearing was listed to take place on 7 December 2021 and a number of following days, by way of Cloud Video Platform (CVP). The Hearing took place on 7 to 10 December 2021, and 7 and 8 February 2022.

5. It was agreed by the Tribunal that the Hearing would address the issue of liability only in the initial diet, and then that submissions on liability would be heard on 7 February 2022. Further, evidence on remedy was then heard by the Tribunal on 8 February 2022, together with submissions on remedy.

6. The Tribunal subsequently convened on two separate dates in order to complete the complex task of deliberating upon the evidence and submissions, on 9 February and 23 March 2022.

7. The claimant was represented by Ms S Shiels, solicitor, and the respondent by Mr S Jones, solicitor.

8. The parties prepared a Joint Bundle of Documents which was relied upon in the course of the Hearing.

9. Evidence in chief from each witness was taken by way of witness statement, with each statement being taken as read and the witness, having been placed on oath or affirmation, then being opened to cross-examination, questioning by the Tribunal and re-examination.

10. In respect of liability, the following witnesses were called by the claimant:

- Alexander MacNab, the claimant; and
- Katrina MacNab, the claimant's wife

11. The following witnesses were called by the respondent:

- Craig Ross Miller, formerly Barge Master, and now Offshore Installation Manager;
- Amy Louise Slessor or Boston, formerly HR Consultant and now Assistant HR Manager; and
- Susan Wilson, Personnel Logistics Supervisor.

12. In respect of remedy, the following witnesses were called by the claimant;

- Alexander MacNab, the claimant; and
- Katrina MacNab, the claimant's wife

13. The following witnesses were called by the respondent:

- Christina Gordon, Recruitment and Training Supervisor; and
- Susan Wilson, Personnel Logistics Supervisor

14. The Hearing proceeded with occasional interruptions due to internet difficulties experienced by one participant or another, but generally each participant was able to attend at the Hearing, see and hear all others and be seen and heard by all others. Accordingly the Tribunal was content that the Hearing proceeded in a satisfactory manner and that the interests of justice were served by the Hearing being conducted remotely.

15. It should be recorded that while the claimant was giving evidence, it became apparent that he found it very difficult to navigate the Joint Bundle of Documents alongside answering questions and handling his witness statement. As a result, the Tribunal agreed (with the helpful consent of Mr Jones) that the claimant's son could assist him by directing him to the appropriate document or part of his witness statement. The Tribunal observed that the claimant's son complied with our instruction not to go beyond that assistance, and we record our gratitude to him for his willingness to help.

16. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

17. The claimant, whose date of birth is 21 May 1965, commenced employment with the respondent on 21 June 2007 as a Barge Engineer, having been offered employment by letter dated 11 June 2007 (115). He received and signed a Statement of Terms of Employment (116ff) on 20 June 2007.

18. The claimant was subsequently sent a further Letter of Appointment dated 25 November 2015 (118), in which it was stated that *"The Letter of Appointment, which includes the Core terms of Employment, constitutes a contract between the employee and the Company, recognised as a 'Seafarers' Employment Agreement'. This Letter of Appointment and documents referred to are in substitution for all previous understandings and contracts of employment."*

19. The claimant's place of work was noted to be Stena Carron, a drilling ship owned and operated by the respondent, registered in the United Kingdom with a home port of Aberdeen.

20. The claimant signed the agreement in confirmation that he freely entered into it, and that he accepted and fully understood the terms and conditions of his employment as offered, on 21 December 2015.

21. The Letter of Appointment provided (119), under "LEAVE": *"All statutory entitlement to leave and all leave provided for in the Maritime Labour Convention will be incorporated within normal equal time off leave arrangements. Rotations are explained further in the Employee Handbook."*

22. An Appendix was attached to the letter in which certain salary and benefits were set out. Under "Sick Pay", the Appendix stated that where an employee's length of service was more than 5 years, their sick pay entitlement was 26 weeks.

23. The Employee Handbook was emailed to the claimant on 14 December 2017 by Grant Stevenson, Safety Officer (375). The Handbook itself was produced to the Tribunal at 163ff, and set out the Terms and Conditions of Employment which were effective as at 1 August 2007 (166). It set out the following statement:

"The Company is committed to the principal (sic) of equal opportunities and all terms and conditions of this Agreement apply to all employees irrespective of sex, marital status, sexual orientation, race, ethnic origin, nationality, religious belief or age."

24. The Handbook went on to make provision as to the Disciplinary and Grievance Procedures operated by the respondent, at paragraph 19 (179):

"The Company has established policies with regard to Discipline and Grievance handling. These policies seek to ensure that matters are resolved quickly and equitably. Details of these Procedures are attached in Appendix 8 & 9.

The disciplinary procedure in Appendix 8 is specifically non contractual and the Company reserves the right at all times, to terminate employment by giving the appropriate period of notice specified below, without the necessity of invoking the disciplinary procedure at its discretion."

25. At Appendix 5 of the Handbook (196ff), the respondent refers to its Appraisal System, which *"provides a method to allow the Company to fully recognise above average work performances, with a view to future promotion."* It went on to say that the purpose of a performance based review system was to analyse what a person had done and was doing in their job to assist them to do better in developing strengths and overcoming weaknesses.

26. The claimant's line manager, at the material time when the events under consideration took place, was Craig Miller, the Barge Master of the Stena

Carron at that time. Since these events, Mr Miller has been promoted to his current role of Offshore Installation Manager in September 2019.

27. Mr Miller was senior to the claimant, and line managed the claimant alongside Paul Hogan, his "back-to-back" (that is, the manager responsible for the shifts when Mr Miller was not on duty). Mr Miller and the claimant worked together for a number of years, but on opposite shifts, in that Mr Miller would work 6am to 6pm, and the claimant would then work the night shift from 6pm to 6am. Although their roles were similar they were not identical, and the Barge Master had responsibilities not shared by the claimant as Barge Engineer. Both were very senior roles on the vessel, and both were highly experienced in their roles.

28. In 2013, an incident took place in the Marine Office when both Mr Miller and the claimant were present. A painter, Dean Nicholas, entered the office and a confrontation ensued. Mr Miller produced a statement (318) in which he maintained that Mr Nicholas was entirely responsible for the confrontation, which arose as a result of his not being included in the helicopter list for disembarkation on that date. The claimant's evidence before us was that he had produced a statement, to Mr Miller, in which he had said that the situation had been caused by Mr Miller's derogatory comments to Mr Nicholas. However, the statement which was ultimately produced, and which bore to be signed by the claimant, did not say this (320). The claimant asserted to the respondent that he had not signed that statement, which was not accurate, and that it had been altered by Mr Miller, who had then forged his signature. Mr Miller denied that he had altered the statement or forged the claimant's signature.

29. We heard some evidence about this, and were invited to compare the different signatures evident on documents which the claimant accepted he had signed to the signature which was on the document at 320. While it is possible that there are some differences in that signature to the claimant's own signature, and indeed it appears to be similar to Mr Miller's signature, the Tribunal is unable to draw any firm conclusion as to the provenance of that document without expert analysis. Mr Kevin

Fiske, the Master at the time, was unable to draw any firm conclusions about this matter (322).

30. What is plain is that this matter remained a source of contention between the two men for some time, up to the point of the Tribunal hearing.

Appraisal

31. Each year, the claimant was subject to an Appraisal by his line manager, Mr Miller. On 13 May 2014, an appraisal was completed by Mr Miller and the claimant (236ff), in which the claimant's marks for his performance (61) were higher than those of Mr Miller (54). Mr Miller described the claimant in his final comments (241) as a very experienced Barge Engineer and relatively long term employee of the respondent who had built up a lot of knowledge across different rigs and was familiar with the high standards in procedures expected by the respondent. He said he was a likeable and sociable person. He described his strengths and weaknesses, and commented that *"Alex could probably do with stepping back and see a way of stopping some situations getting worse. He should concentrate on planning and prioritising as this to me is an area for improvement."*

32. The claimant's comments on the same appraisal confirmed that he enjoyed working for the respondent, and described his personal challenge as *"to maintain a good work ethic for myself and crew and have a good working relation built up with trust and good honest and open dialog (sic) with all of my work Colleges (sic) and to maintain a good safe working environment for all on board the Stena Carron."*

33. In the 2017 Appraisal, completed on 15 March 2017 (245), Mr Miller scored the claimant at 58, while the claimant maintained a score of 60. He was given an "Above Average" rating. Mr Miller commented under "Communication" that the claimant needed to make himself available to all personnel throughout his whole shift if his attention was required. The claimant's comments referred to his disagreement with the comment

about organising and forward planning (which appeared to suggest that improvements had been noted).

34. Mr Miller repeated the comment about the claimant being sometimes hard to contact during the night shift (252), as the focal point on nights. The claimant noted on the form that *"I am always available unless I am working in a noisy area or an area with poor radio reception".* The claimant's comments indicated that he did not accept this criticism by Mr Miller.

35. On 18 April 2017, the claimant was on night shift and there was an issue with a cement job, in that the cement discharge valve would not close, in the presence of a representative from the client. The claimant assessed the situation and decided to close the air off to depressurise the tank, which, he said, prevented a disaster.

36. At the 0700 meeting later that morning, at which the claimant was not in attendance, the client complimented the claimant on his handling of this matter to Mr Miller. Mr Miller sent the claimant a text message later that day (321), in which he said *"I saw your true colours this morning. You're a fucking hero, thankfully you were there as I would've fucked it up."*

37. The claimant read this as sarcastic and critical. Mr Miller accepted that he should not have sent a message in such terms and maintained that he apologised to the claimant when he came on shift later and saw him (although the claimant did not confirm this in his evidence).

38. It is not entirely clear why Mr Miller adopted such a tone in his text message at that time, though it demonstrates that over time a degree of tension entered the relationship between himself and the claimant.

39. On 17 March 2018, shortly after the claimant embarked upon the Stena Carron for what turned out to be his final trip, he found on Mr Miller's desktop computer a list of issues which he was compiling about the claimant's performance. The claimant said that he and Mr Miller used the same computer and were able to access each other's log in details,

having each other's passwords, in order to ensure that they had up to date information about various matters. While on the computer, he found a file relating to himself.

40. On it, the list of issues were:

- *"Blew PRV Surge Can – Feb 2018*
- *Overfilled Surge Can – Feb 2018*
- *Poor Tag info*
- *Timekeeping – RGC Downtime 18.25 on deck"*

41. He raised this with Mr Miller but found him unwilling to discuss the matter at that time. The claimant was concerned that these issues had not been raised and dealt with when they arose. Mr Miller felt that matters were being raised with him about the claimant's performance, which he had to record in order to raise properly with him. He felt that the claimant's performance was not as good as it first appeared, and that he "talked a good game but that what he was delivering did not match what he was telling me" (Miller Witness Statement paragraph 3.10).

42. The claimant's next appraisal meeting was scheduled to take place on 1 April 2018. In advance of that meeting, the claimant completed his section of the appraisal form and sent it to Mr Miller (379).

43. On 28 March 2018, Mr Miller, having completed his part of the form, emailed it to Amy Boston, of the respondent's Human Resources department, together with a draft Performance Improvement Plan (PIP) (382). Mr Miller had decided that a PIP was necessary in order to address the ongoing performance concerns he had in relation to the claimant, and that it was appropriate to present this to the claimant at his appraisal meeting.

44. Mr Miller said that he found it very difficult to address criticisms with the claimant, whom he found not to react well to constructive criticism. He became suspicious of his truthfulness and said that he had learned to

pick up from the claimant's mannerisms when he was not telling him the truth.

45. Mr Miller felt that by the 2018 appraisal, the claimant was still failing to provide detail in the shift handover documents, and was not planning his workload as well as other Barge Engineers. He derived his concerns from reports from a number of people that the claimant was not spending his time throughout the shift addressing the tasks which were required. He also felt that there were difficulties in contacting the claimant during his shift when required.

46. Mr Miller decided to place the claimant on what he called, in evidence, an "informal PIP", as opposed to taking formal disciplinary action which was not justified at that stage. Ms Boston described it as informal in the sense that no disciplinary action was being taken against the claimant at that time.

47. Ms Boston (known at that time as Ms Slessor) responded on 28 March by adding some suggestions in red to the document (381). She said she was making the document more general, and asked if there were other behavioural issues which Mr Miller thought should be addressed. She also asked when Mr Miller was planning to do the appraisal and issue the PIP.

48. Ms Boston was, at the relevant time, based in the respondent's Aberdeen office, and had no direct knowledge of the claimant's performance other than what Mr Miller told her.

49. The draft PIP showing the red amendments to the document was produced at 383ff.

50. The document was laid out in the form of a table. The first column was headed "Performance to be improved", and identified areas in which improvement was to be sought. The next column was for completion by the claimant, but that was never achieved. The third column provided a targeted date for improvement; the fourth set out the expected results;

and the fifth column identified the dates when the plan would be reviewed by both the claimant and Mr Miller.

51. Under each of the headings, the targeted date for improvement was noted as "Effective immediately and fully achieved by 24.05.18", and the review was to be carried out during the course of the next trip and at the end of the next trip.

52. Under "Communications", the expected results were:

- *"Ensure always available when required or use DPOs to relay info if in area of high noise/tank entry.*
- *Constantly be making an effort to improve lines of communication with Colleagues and Supervisors [added by Ms Boston]"*

53. Under "Cement Jobs", the expected results were:

- *"Ensure fully concentrating throughout cement job. Comments have been made regarding Alex getting distracted during the transfer.*
- *Demonstrable improvement in focus required throughout all job duties [added by Ms Boston]."*

54. Under Efficiency/Productivity, the expected results were:

- *"1 – Comprehensive list of tasks completed or what is left to do at Handover period.*
- *2 – Status/location of PSV movements and cargo movements at Handover Period.*
- *3 – Best efforts to complete workload given prioritising as required."*

55. Under Timekeeping, the expected results were:

- *"Be in Marine Office in ample time to sign on night shift PTW's and not have personnel waiting.*
- *Improve general timekeeping skills throughout job duties [added by Ms Boston]."*

56. The final two entries on the PIP were entirely the work of Ms Boston.

57. Under Attitude, the expected result was *"Ensure openness to constructive criticism and work on any professional advice/suggestions from colleagues/supervisors to improve where required."* It is important to note that while Mr Miller agreed with this comment, he decided to remove it from the copy which he provided to the claimant.

58. Under Consistency in Performance, the expected results were:

- *"Demonstrate consistent and sustained improvement in performance including all of the above mentioned.*
- *Failure to attain or maintain the targets set out above may result in disciplinary action through the Companies Disciplinary Procedure as stated in L2-DOC-HR-4198."*

59. On 1 April 2018, Mr Miller forwarded a copy of the draft PIP to Mr Fiske, the OIM, and asked *"Any comments before I pull the plug tonight?"*. Mr Miller, in his evidence, did not consider this to be an offensive comment. The claimant did not see that email before he resigned.

60. The final version of the PIP was provided to the claimant at the appraisal meeting, and was produced at 395/6.

61. On 1 April 2018, the claimant attended his appraisal meeting with Mr Miller during the course of the night shift. In advance of the meeting, the claimant had seen the draft appraisal document (386ff), and had completed his part of it. At the conclusion, he had given himself the overall score of 60, and Mr Miller had given him 47. Mr Miller said, under Appraiser Comments (391): *"Alex and I had a very full and frank discussion at the beginning of the trip regarding many of the topics*

covered in this appraisal. He disagreed with many of my observations but I feel it was beneficial nonetheless. In my eyes the change since then have been substantial. If this appraisal was based on the last couple of weeks it would look very different. He has been very productive, proactive and I am now getting the most comprehensive handover I have ever got from him.

This appraisal however is a summary of the last year and there are obvious areas for improvement which I am sure Alex recognises although may not admit to. These areas are the same ones that have come up in the last couple of appraisals and now need to be attended to on a consistent basis."

62. The claimant applied his own comments: *"I genuinely believe that I fulfil my role as Barge Engineer on the Stena Carron, as more new crew members arrive from around the fleet, bringing with them new ideas and concepts, it has been a time of learning, and working with others but as a standalone night shift senior supervisor, I have to be able to decipher what ideas that are brought to the table are worthy, and at the same time be able to diplomatically discard the ones I see as less beneficial.*

Carron has enjoyed 10 years on many locations, with different operators, but time, budget cuts and the current location is visibly taking its toll on the vessels appearance, add in the fact that we have a push to change our paint/deck maintenance crews for local labour, the threat of losing our Bosun, then the task of keeping paint surfaces in a corrosion free appearance, and dealing with the increased volume of PMs is becoming a daily challenge to where best to concentrate my time. My main focus remains as always to satisfy the client, whilst maintaining procedural compliance at the work site, we simply cannot afford to have an accident, and I will do everything in my power to achieve this up to, and including, stopping the job.

I fully understand how important this Exxon contract is to Stena, and as such have ensured my service to them shadows the company line of being best in class.

I feel that I would benefit from learning more about Excel as this is a very good tool that we use a lot of on-board."

63. At the outset of the meeting, Mr Miller provided the claimant with a copy of the completed appraisal form, which he read, and then with a copy of the PIP, which the claimant also read. The claimant was very disappointed and upset that a PIP had been decided upon, and was unhappy at the grading in the appraisal. In particular, he noted that he had been graded as below average for his timekeeping, despite, in his view, starting work each day 25 to 30 minutes in advance of his shift in order to complete Permits to Work in the office.

64. When Mr Miller provided him with the PIP, the claimant was concerned that none of the issues which were raised therein had previously been raised with him about his performance. He felt that Mr Miller was laughing at him, and was surprised and shocked when Mr Miller told him that the Rig Manager, Stuart Grier (a very senior manager of the respondent based in Aberdeen) had requested that the claimant be issued with a PIP.

65. Mr Miller knew that it was untrue that Mr Grier had asked for the claimant to be issued with a PIP.

66. The claimant made clear to Mr Miller that he did not agree with the comments in the appraisal, nor with the decision to issue him a PIP. He became upset about the way the meeting was going, and asked to stop it, which Mr Miller, who felt it was making little progress anyway, agreed to.

Following Appraisal Meeting and Disembarkation

67. The claimant returned to his cabin, distressed and feeling unwell. He sought assistance from Howard Neale, the Offshore Medic on board the Stena Carron. Mr Neale is a Registered Nurse. He met with the claimant and submitted a Topside Support Contact Report to International SOS

(256). The report is timed at 0236 hours on 2 April 2018. It should be noted that an unsatisfactory aspect of the evidence in this case is the lack of certainty on the part of the parties as to whether the timings noted on reports and emails were related to British Summer Time or local time in Guyana. The claimant thought it likely that he was seen by Mr Neale prior to midnight on 1 April 2018.

68. Mr Neale noted that the initial offshore working diagnosis was "Mental impairment", and that the main complaint was "Low mood, stress".

69. The report detailed the call from Mr Neale to ISOS:

"Incall from Medic

He has Mr Mcnab, the Night manager on board

1 hour ago medic was called, ongoing stress issues at work, support related

Tonight come to a head as he had an Appraisal,

Was placed on an improvement plan and this has not gone down well taken it very personally, low mood. Working night shift.

Medic concerned about mood doesn't want him to work. Wants him to get sleep this evening. Very poor sleeping recently.

No self harm, no ideation or plan."

70. The recommendation noted was:

"Take off shift this evening

Give him something to sleep and go back to cabin (5mg zoplicione agreed)

Advised to check on member through the night

Re-evaluate in the morning and discuss with LON AC and client pending re-evaluation."

71. It was noted that the initial management and outcome was "Disembarkation recommendation, Unfit for duties", described (257) as a "Non Emergency Disembarkation".

72. A further update, the following afternoon, was provided at 1834 on 2 April 2018. It noted that the claimant had initially presented with low mood, with a number of interpersonal issues and issues with aspects of work; that he had a review the previous day which he did not feel was positive towards him; and that he was "in no fit state to work last night".

73. He noted, further, that the claimant's mood was "a bit better compared to yesterday". The background was noted as follows:

"A few trips ago – sent off 1 week early by OIM due to sciatica

Treated by GP

'Rumors' in Aberdeen office that he went off early to go fishing

Has led to investigation into reason for early disembarkation before.

More 'rumors' and negative comments towards him since which has caused him stress

Has been stressed since coming on this time – intermittent headaches, few episodes of loose stools…

Previously stress but low mood not seen by medic until last night – rapid change in mood…"

74. The claimant told the medic that he wanted to go home to his wife and see his own GP. He was due to disembark from this particular trip on 12 April, and the medic made the plan that he should be disembarked early on 5 April. He recorded that the OIM was aware of this and supported disembarkation. Mr Neale said that he would try to have him travel back to the UK with him, as he was due to leave the vessel himself that day anyway. He did not have immediate concerns about his safety, and felt that review onshore in Guyana would be beneficial, though understood

that it may be necessary to arrange this if it was required to confirm that he was fit to fly.

75. He noted that the claimant had no known psychiatric history, and concluded that his impression was that he was suffering from an Adjustment Disorder, and Stress..

76. Mr Neale set out the plan as follows:

"Usually with medical disembarkation, look at review on shore before deciding on FTF [Fitness to Fly]in these circumstances and with probably limited MH [Mental Health] provision locally, may be better to travel home and see own GP

Medic to continue to monitor patient – contact topside if any red flags with mood

Medic to provide update on 04 April

In interim, we can discuss with MD if suitable to travel directly home to Scotland if remains stable in terms of mood"

77. On 2 April, Mr Neale emailed Kevin Fiske, the OIM (397), to advise that he had spoken to ISOS, and that they had agreed on disembarking the claimant and that he was not fit for duties. He also said that they had agreed that the "ideal scenario" would be that he should travel home on Thursday on the same flight as other crew, preferably with the medic as far as Manchester.

78. Mr Fiske emailed Nicola Marandola to ask her to arrange flights for the claimant (398).

79. On 3 April, a further review (260) confirmed that the claimant remained stable, had not sustained a change in mood and was suffering no suicidal thoughts. It was recorded by ISOS that *"Following internal discussion and discussion with medic > they are proceeding with OIM directed disembarkation – mood related to current circumstances rather than medical issue."*

80. Mr Neale emailed ISOS to advise, on 3 April, that there was no change from the previous day and that the claimant remained low in mood by his usual standard, but better than he had been in the early hours of 2 April. He also emailed Mr Fiske (401) to establish whether the claimant could be disembarked by helicopter to stay the night in a hotel before flying on the Thursday, in order to pre-empt the possibility that ISOS may wish to have him assessed locally for his fitness to fly. He suggested that it was of no benefit to the claimant's health to have him on board at that point.

81. Mr Fiske emailed Ms Boston (402) to say that he was going to ask the claimant to come up for a chat, having not anticipated the email from Mr Neale given that he himself did not consider the claimant to be "in that bad a condition".

82. Ms Boston replied (405) to say that *"Yes it seems that Howard's statement below is disproportionate to the situation. I think we need to be very careful conflating receiving a poor appraisal/PIP (& comments about his performance from others) with the need to be removed from the vessel due to sickness."*

83. Mr Fiske then emailed Ms Boston (428) to advise that *"Howard has advised that the Doctor would not see this as a 'medi-vac'."*

84. Ms Boston replied (427) to say that the claimant was not being medically evacuated for any treatment or assessment, and that this would be treated as a leave of absence.

85. The updated topside contact report reported that ISOS had advised, at 2.44pm (263) that *"sounds like there is not a definite medical reason for him to go home early – needs to be d/w his manager and OIM to decide if best for him to go home from admin point of view…if no medical reason for disembarkation then need to advise medic that needs to discuss internally for disembarkation on admin grounds, not medical grounds".* It was further noted, on 3 April 2018 at 6.50pm, that, having received advice from Mr Neale, ISOS had advised (262):

"Discussed internally.

Agreed no value to be seen in Guyana.

Given situation, perhaps more appropriate as OIM directed disembarkation rather than medevac.

Please give us an update tomorrow > unless any changes to his mood then we continue with plan as above. Can given zopiclone 10mg nocte tonight."

86. Later that evening, Mr Miller emailed "Paul" (understood to be Paul Hogan) (403):

"Hey Paul

Hope all good with you, quick 4 weeks!!!!

See email below, major dramas with Macnab and he's off on Thursday.

Down one man till next Thursday, probably.

He's been in his cabin since Sunday night, that was the last time I actually saw him.

If you get a chance tomorrow, drop me a msg and I can phone you till give you the sorry saga. It's like a bad episode of Dawsons Creek."

87. Mr Fiske advised Ms Boston (405) that evening that the claimant would depart on Thursday 5 April, and expressed his desire to ensure that the departure was correctly documented.

88. On 4 April 2018, Mr Neale saw the claimant again, and described him (261) as in much better spirits. He confirmed that they had managed to obtain flights for him with Mr Neale on 5 April, as far as Manchester on 6 April. He went on: *"He will then fly up to Inverness to be met by his wife. I have no further concerns about him at present, although I remain in absolutely no doubt that he needs to leave the rig in order to be seen by his GP for further assessment. He has asked his wife to arrange an*

appointment with his GP. Should any deterioration occur in the next 24 hours I will of course be in touch."

89. Mr Neale reported this to ISOS that day by email (418).

90. There were some discussions about whether the claimant should be flown back to Inverness or to Wick following his initial transfer to Manchester. Jackie Hickman, Personnel Logistics Officer, emailed Mr Fiske to ask if the claimant required a hire car from Inverness or whether his wife would be collecting him from there. Mr Fiske replied that there was no need for a hire car as his wife would be picking him up (419).

Claimant's Return to Scotland

91. Accordingly, the claimant flew to Manchester on the same flight as Mr Neale, arriving there on 6 April 2018. He then took a flight to Inverness, where he was collected by his brother-in-law, who drove him home to Wick.

92. Ms Boston wrote to the claimant on 6 April 2018 by email (430) to request his attendance at an informal meeting in Aberdeen. She went on:

"Please be assured that this casual meeting is not anything to be concerned about. The purpose of the meeting is to discuss recent events on the Carron, and any potential proposals which we have to assist with the situation."

93. She proposed that the meeting take place on 9 April at Ullevi House, Greenbank Crescent, Aberdeen, with herself and Trish Craig, HR Manager. She confirmed that either she or Susan Wilson would be in touch with him to discuss his preferred travel arrangements, and offered to arrange flights if that would be easier for him.

94. Ms Wilson telephoned the claimant on 6 April to confirm the arrangements for the meeting (which she described in her witness statement as "an absence meeting" (paragraph 3.4). She had been

informed by Ms Boston that the claimant had left the Stena Carron about a week early, and that he had not been at work since a disagreement that he had had with his line manager at his annual appraisal meeting. She had also been told that the claimant's departure from the vessel was not a medical evacuation.

95. When she spoke to the claimant, he was very unhappy at being asked to go to Aberdeen for a meeting on 9 April, and refused to do so, insisting that he wanted to see his GP first. The claimant was distressed at being asked to attend such a meeting prior to seeing his GP, and was adamant that he was not prepared to do so.

96. The claimant's wife, Mrs Katrina MacNab, was upset and concerned about this turn of events, and wrote to Ms Boston and Ms Wilson by email on 6 April (431):

"Hi Susan and Amy,

I am writing in reference to the letter that you send Alex today asking him to attend a meeting on Monday in Aberdeen. As you are aware Alex has been sent home under the instructions of the Stena medic and the Stena GP that the medic phoned due to the stress he has been under at work. He was signed unfit to work on the Stena Carron due to Work related stress.

He had to wait 4 days before Stena managed to get him off the rig and cover was found and he is not even home yet and he is being phoned and emailed requesting him down to Aberdeen for a meeting, setting off his IBS again, while he is still travelling home!!

Alex will not be attending a meeting on Monday, he is stressed due to the work pressures, which brings on his IBS and migraine headaches. He has the GP on Tuesday and after he had seen his own GP he will be in touch.

I am concerned the impact of the last 21 days has had on his health. We will be in contact with you once he has seen his GP on Tuesday and he has been assessed. In the meantime please respect he is unfit to work

(the reason he was sent home) and should at the very least be allowed to get home, rested from jet lag and see his GP before attending any meetings.

Should you require any clarity on this matter please feel free to contact me."

97. The meeting of 9 April was cancelled by the respondent following receipt of this email.

98. The claimant arranged an appointment with his GP on 10 April 2018. The notes of that consultation (286) state:

"Consultation long chat re quite severe stress reaction – arising from colleagues at work office - ?bullying – with verbal statements. He feels worn out, stressed, had to be sent home a week early (Offshore oil platform S America) does 5 week rota. Med3 – time out, is awaiting meeting with employer in Aberdeen, no medn, has support from wife at home, no thoughts DSH, no medn needed currently, rev 10 days please – re assessment and work position."

99. On 20 April 2018, the GP reviewed the claimant and provided a statement of fitness for work (268) advising that he was not fit for work for 28 days.

100. Ms Boston asked Mr Miller and Mr Fiske for statements as to their perspectives on the claimant's last few days on board before departure.

101. Mr Miller's statement (432) asserted that the claimant's reaction to the appraisal form at the meeting was one of disappointment rather than anger, and that when the PIP was presented to him, there was "no great reaction, more a resigned shrug". He did note that the claimant had commented on the reference to potential disciplinary procedures. He said that he observed the claimant during the days prior to departure and saw no reason for concern.

102. Mr Fiske's statement (433) observed that in his conversations with the claimant following the appraisal meeting, the claimant was not

comfortable with having been issued with a PIP, and was conscious of a rumour which he had heard within a few days of having joined the vessel on that trip. Mr Fiske sought to reassure the claimant by telling him that there was nothing in the story.

103. Mr Fiske asserted that the claimant had told him that he did not intend to seek further medical consultation following his departure from the vessel, and that his main aim was in fact to spend time at home with his family and gather his thoughts, something that he would benefit from given his feelings at the time.

104. Ms Boston wrote to the claimant again on 17 April 2018 to attempt to arrange an informal meeting (434). She stated that based on the information provided by the OIM and ISOS prior to departure, he was not medically evacuated from the vessel, which was why they were able to schedule a meeting with him on Monday 9 April, which he refused to attend. She continued: *"As you have not been medically evacuated and are not on sick leave, we now kindly request your attendance at an informal meeting in Aberdeen this week to discuss your recent performance management, early departure from the rig and any proposals which we have to assist the situation going forwards. Again, please be assured this meeting is nothing to be concerned about.*

We understand you had a successful trip until your appraisal and PIP meeting took place on Sunday 1st April. It is important we are able to discuss this performance management situation and how/why it has led to a leave of absence. Having a meeting in person will provide the best opportunity for discussion and allow a plan to be made on how to proceed from here."

105. The meeting was proposed to take place on 19 April 2018, again in Aberdeen.

106. Mrs MacNab replied to this invitation by email dated 17 April 2018 (437). She said that she thought that she had sent in the claimant's medical certificate on the previous Wednesday, but informed the respondent that

the claimant had seen his GP and was now signed off work with work related stress.

107. She went on:

"You say he was not sent home because of stress, can you please provide further information from the OIM and ISOS relating to the reason they told you he was sent off, and did not have to attend work for the last 4 days.

Whoever informed you it was a successful trip until his staff appraisal wrongly advised you. That was the final straw of a very stressful trip, which started from his first shift on board. The unprofessional staff appraisal, and a PIP that Craig laughed about and claimed was issued by Stewart Greer was the final straw, and Alex asked for the meeting to end at that stage. To say it was a successful trip is not the case.

Alex has not had a successful trip working under Craig Miller since the cement job some 12 months ago, when he was upset that Alex was praised by the Company man for his quick thinking and expertise at a hand over meeting. Craig took that as undermining his role as Alex's senior. They have not had a good working relationship since then and as his senior it has been strained at times, although he continued to get on with the rest of the crew.

For the moment Alex is not in a position to deal with this stressful situation, he is not sleeping well, eating and his IBS is affected by the stress. He is not fit to attend any meeting this week. I will keep in touch with you on his progress, but his health is more important than dealing with this situation at the moment."

108. The respondent decided to cancel the proposed meeting with the claimant on receipt of this email. They wrote to the claimant on 20 April 2018 (441):

"As per previous correspondence, you were not medically evacuated from the Stena Carron on 5th April. Medical Evacuation is where an individual

must leave the vessel for further emergency assessment or treatment onshore. The OIM confirms you stated prior to departure that you had no intention to seek medical attention upon returning ashore, rather you needed time with your family to gather your thoughts. The Medic has confirmed the ISOS Company Doctor did not categorise your situation as a medical evacuation. Your early departure from the vessel was therefore classed as a leave of absence.

We have subsequently received sick lines from you and your absence is now classed as sick leave. As per normal procedure please be advised you will receive Company Sick Pay from the date your accrued leave exhausts.

After receiving an appraisal and the issuance of a PIP on Sunday 1st April, your reaction meant there was no working with the issue constructively despite receiving subsequent support and encouragement. We need to be able to discuss with you why such a reaction took place and how to proceed from here. Please be assured we have experience in working with performance management scenarios such as this, and only wish to assist you going forwards.

We appreciate you did not feel able to attend any informal meetings with us this week (please note we only invited you to an informal meeting this week as we had not received your sick line at that point in time).”

109. Ms Boston therefore confirmed that the claimant was now required to attend an Occupational Health assessment in the following week, to provide the respondent with a full assessment of his current state of health. The appointment was arranged at 9.10am on Wednesday 25 April 2018, at the Iqarus Aberdeen clinic. She confirmed that the respondent would be further in touch in order to make the travel arrangements.

110. The claimant was concerned at the terms of this email, and replied on 23 April 2018 (448). He asked for a copy of the respondent’s “sick policy”, and explained that he could not attend an assessment in Aberdeen. He said that his symptoms would make travelling difficult, that he was

exhausted but could not sleep, and that he was not physically or mentally up to stay overnight for the appointment. He pointed out that being absent with stress this would add additional stress to him.

111. He went on to say that if the respondent insisted on his attending an OH appointment so early in his absence, he was not refusing to do so, but would be prepared to attend an "OT" (understood to be a reference to an Occupational Health practitioner rather than an Occupational Therapist) in Caithness, preferably Wick. He gave consent to the respondent to maintain primary contact with his wife on his behalf, in order to try to take stress from him.

112. On 25 April, the respondent sent a further letter to the claimant seeking to rearrange the OH appointment for 3 May 2018 (450). In that letter, it was stated:

"We appreciate that your GP has signed you off as unfit to work. Your sick line states 'stress at work' as the reason for your absence. Whilst the sick line states you are not fit for work, it gives little by way of detail and it is not clear from the sick line whether you are so incapacitated that you would be unable to travel, unable to participate in meetings and/or unfit to discuss events which occurred in the lead up to you being signed off work. You left the vessel a week earlier than scheduled on the 5th April (3 weeks ago) and we are keen to discuss matters with you as soon as possible. In that regard, we require you to attend an appointment with our Occupational Health advisors so that we can better understand the nature and severity of your condition, whether you are well enough to attend meetings onshore, whether you are taking any medication (and what the effect of that might be) and the likely total duration of your absence."

113. They explained that it was necessary for the claimant to be seen by an industry OH specialist in Aberdeen, and therefore that it would not be possible for the appointment to take place in Caithness. They pointed out that they had no medical information indicating that he was so unwell as to be unable to travel to Aberdeen for such an appointment, but

suggested as an alternative that if he were unable to cope with a journey to Aberdeen, he should ask his GP to contact the OH doctor direct so that his diagnosis, symptoms and other matters could be explained.

First Grievance

114. The claimant responded on 29 April 2018 (454). He provided further information as to his illness and the background to the current period of absence. He explained, at some length, the events which had led to his absence, and said that since he had come home his health had worsened due to thinking about the matter, dealing with correspondence and the physical issues being caused in relation to sleeping and his IBS. He reiterated that he was unable to cope with travel to Aberdeen for an appointment at that time.

115. In his grievance, he set out a number of issues which had arisen between himself and Mr Miller: the alleged fabrication of his witness statement by Mr Miller in relation to the Dean Nicholas incident; the text message in April 2017 following the claimant's intervention on a cement job; his disembarkation on a previous trip due to sciatica, when he was sent home by Mr Fiske a week early; Allan Matheson having said in handover notes at the end of his previous trip that the claimant was underperforming, despite the fact that the claimant had not worked with Mr Matheson; and the implication by Mr Matheson that he had left the ship early to work on his father's fishing boat, which the claimant said was completely untrue speculation.

116. He then went on to refer to his unhappiness with the process followed by Mr Miller in the appraisal process, and in applying a PIP to him, and also his conduct in the appraisal meeting.

117. The respondent considered this letter to amount to a grievance about his treatment by them, and confirmed to the claimant by letter dated 4 May 2018 (458) that they would be conducting an initial investigation into the matters raised, several of which they said they were unaware of. They also confirmed that once he was well enough to do so, they would require

to meet with him to discuss matters. This would permit the respondent to investigate matters and seek to resolve the situation.

118. They also proposed that arrangements be put in place to allow the claimant's GP to speak to the OH doctor. That call took place on 15 May 2018, and the Iqarus Regional Clinician, Dr Allan Prentice, provided a report to the respondent on 21 May 2018 (269).

119. Dr Prentice spoke to a Dr Orr, a locum GP in the claimant's medical practice. He noted that *"Dr Orr confirmed that Mr MacNab does have a significant health condition and as a result he is finding it difficult to engage with work at present because of the negative feelings that he has at this time. Dr Orr was of the opinion that Mr MacNab would benefit from additional treatment and he has prescribed him this and hopefully this will help improve the situation. He has a separate medical complaint also being investigated and this is also causing difficulties for hi and problems travelling."*

120. Dr Prentice went on to answer a number of questions which had been put to him, on the basis of the information provided in the call with Dr Orr.

121. He said that the claimant was unable to face travelling to Aberdeen, and that his symptoms were stress related, his condition having deteriorated since his disembarkation from the vessel. He expressed the view that his ability to carry out day-to-day activities was significantly impaired at that time, and that he would not be able to return to work "for at least another few weeks". Dr Prentice said that the claimant has, as far as could be established, no previous significant condition and once the situation had resolved, he would hopefully be able to return to good health, and achieve a regular pattern of attendance once he had done so.

122. On 16 May 2018, following the call between Dr Orr and Dr Prentice but prior to its receipt by the respondent, Ms Boston emailed Mrs MacNab (464) to advise that they were awaiting the report from the OH doctor, but, she said, *"In the meantime I am conducting an initial investigation into Alex's previous letter. I am currently trying to organise interviewing those*

involved. At the appropriate time, once Alex is well enough, I will then need to have a meeting with him in Aberdeen to go through the points within his letter. This will allow an opportunity for us both to put forward suggestions to resolve the situation going forwards."

123. On 25 May 2018, Mrs MacNab emailed Ms Boston (471) to query why he was not receiving full sick pay during his absence. Ms Boston investigated the matter and replied on 30 May 2018. She explained:

"For everyday worked offshore an employee would also accrue a leave day at home. Under a normal 28 day rotation an employee would work 28 days and accrue 28 days leave. Where an employee works less than their normal rota they would accrue leave for everyday that they have worked. For example, if an employee were to work 21 days then they would accrue 21 days leave.

In Alex's case he worked 21 days from 15th March to 4th April (last working day) and accrued 21 days leave from 5th to 25th April. Payment for April days worked and accrued was processed in his April pay…

With reference to sick payment, our medical advisors and the medic confirmed to us that Alex's situation did not constitute a medical evacuation (when an employee departs the vessel early due to sickness & has a requirement for medical attention onshore). When there is no medical evacuation, following normal procedure, early departures are initially classed as a leave of absence (until any sick lines are subsequently received). Based on the information provided to us as above, Company Sick Payment was correctly applied to the situation. In all circumstances, where there is no medical evacuation, this process would be applied until receipt of further medical evidence. After a delay in organising and receiving this medical evidence, I am now in receipt of additional information regarding his condition. On the basis of this evaluation we are now fully satisfied that MLC sick payment is applicable to Alex and I have instructed payroll accordingly (payroll was already run

by the time the evaluation was received & the decision made, however I have requested an adjustment to be paid by the end of this week).

I have also attached a copy of Alex's contract with appendix as requested."

124. "MLC sick pay" is a reference to the statutory entitlement of individuals working on Stena vessels to 16 weeks' full sick pay in certain circumstances, governed by Regulation 50 of The Merchant Shipping (Maritime Labour Convention)(Minimum Requirements for Seafarers etc) Regulations 2014. Initially, the respondent interpreted the claimant's circumstances as demonstrating that he only became unfit for work due to illness following departure from the vessel, and therefore that the Regulations did not entitle the claimant to MLC sick pay. Having reflected on it, Ms Boston decided that while she was not sure that the claimant was definitely entitled to MLC sick pay, they would make payment to him.

125. The contract of employment which was forwarded by Ms Boston to the claimant's wife was that found at 118ff, from 2015. The appendix attached to that contract was produced at 125, and contained the sick pay provisions set out above.

126. On 18 December 2015, the respondent produced a "Memo" entitled "Compensation and Benefit Changes for 2016" (127), addressed, on its face, to "All Employees of Stena Drilling PTE LTD and Austen Maritime Services".

127. The Memo opened by stating:

"Following the recent memo regarding changes to the Compensation & Benefits package, the company would also like to make you aware of some changes it will implement to its current policies with effect from January 1st 2016

- ***Company sick pay***

The number of weeks you are entitled to sick pay which is linked to your length of service will remain unchanged, however the rates at which you are paid sick pay during this time will be as follows:

…

5 years + (60+ [months]) – zero pay 3 days – SSP Equivalent 11 days – 50% Company Sick Pay 24 weeks"

128. The claimant gave evidence to the effect that he had never received nor seen this Memo. The respondent produced a "mail merge" spreadsheet (129ff) which, at 132, included the claimant's name among the recipients of the Memo. The email which, it was said, attached that Memo was no longer available to the respondent to produce to the Tribunal.

129. The respondent's position is that the claimant's entitlement to sick pay included, and was not additional to, the MLC sick pay which he received from the respondent; and that he was therefore entitled to be paid full salary up until 25 April 2018, when his accrued leave period came to an end, and his company sick pay period began on 26 April 2018. In total, the claimant was paid 24 weeks and one day of company sick pay at the rate of 50% of his normal salary (increased to full pay during the MLC sick pay period).

130. Ms Boston wrote to the claimant, at his wife's email address, on 13 July 2018 (474) to explain the calculation of the claimant's sick pay, including MLC sick pay. The claimant did not raise this matter again prior to or at his resignation.

131. On 30 July 2018, Mrs MacNab wrote to Ms Boston to propose that the claimant meet with her in Aberdeen on the following Monday (3 August 2018) (476). Ms Boston replied the following day (475) to express the view that that was an "excellent suggestion". She observed that since the last medical report they had received said that the claimant would not be fit to attend meetings, it would not be appropriate to hold a formal

grievance meeting with him at that point, and indeed that before holding such a meeting it would be necessary for the claimant to be reviewed by OH. As a result, it was said to be an "informal catch up".

132. The meeting took place between Ms Boston and the claimant. No others were present. It was generally a constructive discussion. Ms Boston did suggest to the claimant that if he were able to return to work and did not wish to return to the Stena Carron, there may be an opportunity on the Stena Clyde, a vessel based in Australia. That matter was not taken further but was raised as a possible option for further discussion at a later time.

133. Following this meeting, the claimant continued to submit sick lines confirming that he remained unfit for work. There were some exchanges in December 2018 about whether or not the claimant might be fit to participate in a grievance hearing, but on 10 December Mrs MacNab emailed Ms Boston to confirm that he was not ready to do so (480).

134. On 1 February 2019, Mrs MacNab wrote again to Ms Boston (481) to provide another sick note and to update her about the claimant's condition. She said that *"I think we need to progress the issues with Stena around his last trip and in particular the issues from the medical advice to him getting home the phone call from Trish, being dumped in Inverness to drive home etc, I want that addressed. I realise he neds to be fit to start doing this, and I know that if we don't get all this sorted and he can think ahead and have a forward plan he is never going to sort out the mental health issues he is suffering from. He is stuck in limbo. So I am wondering if the medical can be organised so he is fit to start going through the process, and what happens if the doctor says he is unfit, we will be coming to a year soon. What are the options? This has been the worst year ever, and we do need to be able to draw a line under it in someway and move forward."*

135. Ms Boston emailed Mrs MacNab on 12 February 2019 in order to clarify whether or not the claimant now wished to proceed with the grievance

process (483), and if so, that the claimant should confirm this himself. She also said that the claimant should now be reviewed by OH.

Second Grievance

136. On 6 March 2019, Mrs MacNab submitted a second grievance on behalf of the claimant (485). The grievance raised complaints about the manner in which the respondent decided upon and effected the claimant's disembarkation from the vessel. They suggested that the claimant had had to deal with harassment and discrimination from the staff of the respondent, and asserted that the way he was sent home was "unforgiveable on every level". They indicated that they believed that it was clear that the reason why his disembarkation was handled in that way was because the non-medical professionals had decided that there was nothing wrong with him.

137. Mrs MacNab reassured Ms Boston that she did not intend this to be taken personally by her as she herself had been very professional and helpful, and she thanked her for that.

138. Finally, it was confirmed that the claimant did not have any particular option which he wanted to put forward, other than a phased and supported return to work; nor did he consider himself to be fit enough to travel back and forward to Australia in the foreseeable future.

139. The claimant was reviewed by OH on 6 March 2019, and a report was provided by Dr Adeleke, Consultant Occupational Physician, on 8 March 2019 (278). Dr Adeleke advised that any statement to be made on the likelihood of his return to work would be dependent on obtaining a report from his treating doctors. Dr Adeleke also suggested that the claimant's symptoms were very severe at that time and related to a very strong reaction to what the claimant considered to be an injustice. In order to find an exit strategy for all concerned, a case conference in a neutral location was proposed.

140. On 7 May 2019, Mrs MacNab wrote to Ms Boston (493) enclosing a fit note dated 6 May 2019. The fit note (281) confirmed that the claimant was not fit for work, but stated: *"I anticipate that at the end of this 3 weeks period Mr MacNab will be fit for a phased return to work – shorter shifts initially and no long haul travel."* The note indicated that he was signed off for 21 more days.

141. In her email, Mrs MacNab stated that going back to work was the next step in the claimant's road to full recovery. She referred to the terms of the fit note, and said *"He will also be fit to progress his grievance in the next couple of months, and getting that out the way will put to rest another issue he has had hanging over him and help with the final stages of his recovery… I know we had a sticky start to our correspondence, but the last 10 months or so have been fine, and I thank you for working with me as his contact while he recovered, which I realise isn't normal procedure."*

142. Dr Adeleke met with the claimant on 30 May 2019, and provided a report dated the same date (282). He said that he considered the claimant to be a lot better than when he was initially seen, and opined that *"All the indications from his assessment would suggest that he is fit to engage with the both the full grievance process and investigatory meetings as well as the performance assessment. I would only suggest that he is given ample time to prepare for the meeting and I would suggest that the meeting is organised in a neutral location if possible."*

143. Ms Boston spoke to the claimant on 10 June 2019 by telephone, having emailed him (497ff) to arrange to do so in order to talk things through. She explained the grievance process and told him the likely timescale, advising him that before she set up a grievance hearing with him, she would need to investigate fully all of the allegations he had made, which she thought would take between 2 and 3 weeks.

144. The claimant confirmed that his GP had considered that he would be fit to return to work, and would not be providing any further fit notes. He

requested that he be returned to full pay as he was now fit to return to work.

145. She emailed the claimant after speaking with him (497):

"Hi Alex,

Thanks for your time earlier today, it was good to speak with you and go through the grievance procedure together.

I was just thinking, when you asked about payment I forgot to confirm that the Company will use the Occupational Health report as medical certification that you are not currently fit for work offshore. As per Dr Adeleke's statements in his report, he will only review fitness to return to your BE role offshore after you have been through the grievance process (and performance management review).

As we discussed today, Stena can only use the Occupational Health Doctor's confirmation for fitness to work in an offshore environment as they are the Oil and Gas specialists. No GP lines are therefore necessary at this time given the circumstances and the above.

As you are not currently fit to attend work offshore, you remain on sick leave and its terms and conditions of sick payment. Just for future reference also, when employees are passed fit to work offshore, they will only return to normal salary upon their actual return to work/a vessel…"

146. On 12 June 2019, Ms Boston emailed the claimant to advise him that the respondent's procedure is that employees may only be sent on training courses when they are fully fit for offshore duty. She told him that she had asked the training department if the claimant could complete the online training courses.

147. Paula Madden, the Personnel Training Officer, emailed the claimant on 25 June 2019 (501) to confirm that he could attend the Online High Pressure Training and Oilennium – Gas Tester, PUWER, COSHH, Red

Zones, Spatial Awareness & Stena Code of Conduct courses, and provided him with login and password details.

148. On 19 June 2019, Stephanie Mair, Ms Boston's assistant, emailed the claimant at 9.48am (502):

"Morning Alex,

I hope you are well.

As discussed with Amy, I just wanted to provide you with an update on the progress of our investigation into your concerns. At this time we do not have any additional questions for you. I am waiting for some replies from those involved to be returned and we will be in touch with a more substantive update and formal invite once investigations are concluded.

As Amy mentioned last week, all employees who raise a grievance are asked to provide the Company with any/all suggestions you may have to resolve your issues raised. We ask in advance so this information can be carefully put together and passed to the chair (chair identity not confirmed at this time). This is simply to allow for better and productive discussion at the meeting. Please can you review and confirm any/all suggestions you may have to resolve the issues you have raised, and return to me in due course?

Appreciate your assistance.

Kind regards,

Stephanie Mair"

149. On 28 June 2019, Ms Boston emailed the claimant (502) at 11.13am:

"Hi Alex,

I hope you are well. Steph is out of office this week, but I just wanted to update you briefly.

The investigation is almost 100% complete now and we will be able to send through the formal invitation to the hearing, the investigation documentation and confirmation of the chair etc asap next week. Steph or I will give you a call then too, just to make sure everything makes sense.

Have you had a chance to think about putting together the below? We appreciate your assistance on that.

Have a nice weekend and speak soon.

Kind regards

Amy Boston (Slessor)"

Grievance Investigations

150. Following the submission of the claimant's first grievance, the respondent conducted an investigation into the complaints made therein. The investigation was coordinated by Ms Boston.

151. Statements were taken from a number of staff in the form of questions put and answers provided. The staff from whom the statements were taken, and the dates upon which the statements were provided, were as follows:

- Kevin Fiske – 1 June 2018 (323)
- Allan Matheson – 27 June 2018 (327)
- Andrew Combden – 27 June 2018 (330)
- Stuart Wallace – 27 June 2018 (332)
- Alexey Vishnyakov – 27 June 2018 (335)
- John Watt – 29 June 2018 (336)
- Cian O'Donovan – 30 June 2018 (340)
- Matthew Knight – 30 June 2018 (341)

- Christian Kidd – 8 July 2018 (343)
- Ian Sim – 9 July 2018 (346)
- Chris Cormack – 9 July 2018 (348)
- Scott Small – 9 July 2018 (351)
- Craig Miller – 10 July 2018 (353)
- Paul Hogan – 10 July 2018 (357)
- Craig Miller – 19 June 2019 (367)
- Howard Neale – 19 June 2019 (369)
- Susan Wilson – 20 June 2019 (370)
- Chris Hutton – 24 June 2019 (372)

152. In addition, the investigation produced text messages from Mr Miller to the claimant on 18 April 2017 (374).

153. The statements taken in 2019 related to the second grievance presented by the claimant.

154. The investigation papers and the statements taken by the respondent were not provided to the claimant in advance of his resignation, though he had seen them by the date of the Employment Tribunal hearing.

155. In his statement, Mr Miller addressed a number of points raised with him, including the allegation that he had falsified the claimant's statement in relation to Dean Nicholas. He said that initially he had an amiable relationship with the claimant, but that over time he started to see him in a different light, and went on: *"For the last couple of years I didn't trust him, knew he was inefficient and substantially weaker than his back to back. I knew he was a liar, but didn't think he would accuse me of some of the things he is, so in some respects I misjudged his character. I may be wrong, but I feel he always knew this day was coming when someone*

would call him out on his short comings, and he would try and squeeze as much money out of it as possible."

156. In his statement, his explanation for having sent the text messages on 18 April 2017 was that *"Something had happened during the cement job and the way he spun it was, he saved the day and intimated it was just as well it happened on his shift and not mine as I would've made a mess of it – something along those lines. I knew as the words came out of his mouth that this was unlikely the way that it panned out but that was the norm. It was unlike me to send a text so he must've pushed my buttons harder than normal that morning. It wasn't an aggressive text and it wasn't my intention. I just wanted him to know I didn't like what he was intimating in respect of my ability, which as far as I know has never been questioned. In hindsight it was unprofessional when it's all aired in a forum like this and I am extremely embarrassed having to justify it. We had a chat about it that night at handover, both apologised and nothing more was said about it. It was a 'pretty minor' issue that I really haven't thought about till now."*

157. He explained that it was not his normal practice to keep performance issues on his computer, and that this was the first time he had done that. He assumed that the Barge Master's PC would be for his own use only, though he said he made a mistake in having the password visible. He felt he should have known better than to trust the claimant.

158. Paul Hogan, Mr Miller's back to back, made some critical comments of the claimant's performance in his statement, relating to his attention to detail when closing out tasks, self-motivation and leadership, in that he had heard that he was difficult to contact while he was on shift.

159. Mr Fiske, OIM, made comment in his statement that he had been hearing rumours for a while from "various sources" that the claimant was adept at looking busy but that the night company men were not taken in by him. He was supportive of Mr Miller's decision to apply a PIP to the claimant at the appraisal and considered him to be a careful and fair manager.

Resignation

160. By 1 July 2019, the claimant considered that the respondent had been aware since the end of April 2019 that he was fit to deal with the grievance, but that he had still not seen any information or documentation about the grievance investigation or meeting. The claimant had had no income for some time and was not entitled to any state benefits while he remained the respondent's employment.

161. The claimant felt that the delay was unfair and decided that he should resign. He wrote to the respondent on 1 July 2019 (503):

"Dear Amy

Letter of Resignation

I am writing to lodge my letter of resignation from Stena Drilling after over 12 years working for the company.

I do not feel I have been left with any other option. Despite being advised in late April I would be ready to go back to work by late May, the HR department have yet to 'put together' my grievance claim and set a date. In the meantime the company is unwilling to pay me, yet I cannot work until the grievance has been progressed therefore I am stuck in limbo at the mercy of Stena HR Department.

In the Stena handbook it states that a Grievance should be dealt with within a week. The grievance was raised last April some 14 months ago, and I am assuming that statements should and would have been taken at that time.

If there was still things to prepare, Stena HR had plenty of prior notice when they received the note from the GP at the end of April stating I would be fit to work by the end of May. At that point they should have started pulling things together if they felt anything was outstanding. In my opinion the stalling is merely to starve me into leaving Stena.

I am now deemed fit to work, I have a family and bills to pay and it is unreasonable some 8 weeks after knowing I was coming back to work to not have progressed this matter, have me on the payroll yet not pay anything I have come a long way in recent months in regards to my mental health, and was feeling good and positive but the 'waiting game' is filling me with anxiety and having an impact on my health.

It is unreasonable to expect me to continue to wait with no pay. I have been forced to seek other employment to earn a living and improve my well being.

I will be seeking constructive dismissal on the grounds of a serious breach of your own procedures and dealing with a grievance in a timely manner.

I will also be claiming discrimination on the grounds of disability as raised as part of my grievance procedure and unpaid holiday pay.

I would be grateful if you could send my P45 at your earliest so I can seek and secure employment and an income elsewhere.

Kind regards

Alex MacNab"

162. The claimant felt that the respondent was not actively seeking to return him to work, or make any progress with the grievance.

163. Christopher Cher, Director, wrote to the claimant on 3 July 2019 to acknowledge receipt of his resignation (504). He confirmed that in the circumstances the respondent did not see any merit in proposing that the claimant attend the forthcoming hearing which was to be scheduled to deal with his two substantive grievances.

164. Mr Cher subsequently wrote again to provide a longer response to the claimant's letter of resignation (506ff).

165. He pointed out that for a significant part of his absence, the claimant was unable to engage with the respondent; that he had submitted two separate grievances in April 2018 and March 2019; that OH had said categorically in March 2019 that the claimant was not fit to participate in a grievance process; and that although he had confirmed, through his wife, that he felt able to return to work on 7 May 2019, there had been no prior indication that his medical condition had changed and there remained a further requirement for the claimant to be assessed by OH.

166. He went on to say that following receipt of Dr Adeleke's follow up report on 30 May 2019, *"…the Company kept in regular contact with you and explained in full how the grievance procedure would be conducted, the investigations which were still required and likely timescales. You were also advised that you would be kept updated on a regular basis. You were clearly informed that until an Occupational Health Doctor deems you fit to return to work, you remained on sick leave and sick pay…"* He went on to point out that although he had been told on 28 June 2019 that the grievance investigations were getting close to a final conclusion that he would receive during the following week an invitation to the grievance hearing with the appropriate documentation and the identity of the chair, he resigned without any prior warning or complaint.

167. Mr Cher confirmed that the respondent did not accept that there had been any unreasonable delay in dealing with both grievances, and pointed out that the grievance policy did not say that grievances would be dealt with within a week; rather, it stated that the grievance hearing would be fixed as soon as possible.

Following Resignation

168. The claimant presented his claim to the Employment Tribunal on 19 September 2019.

169. Had he not ended his employment with the respondent, the claimant's intention was to continue working until retirement at the age of 65. He

was a member of the respondent's occupational pension scheme, into which he contributed 5% and the respondent contributed 10%.

170. Following the termination of his employment, the claimant sought to obtain alternative employment by phoning agencies such as Atlas and AGR. He carried out training in survival and STC, and was passed fit to return to work offshore by a medical carried out. He was unable to remember when this was done.

171. The claimant registered with Atlas on 23 July 2019 (534). On 30 July 2019, Atlas contacted the claimant to offer him a 3 week trip on the Noble Lloyd Noble (Offshore Aberdeen) starting on 1 August 2019 (538), for which he was paid a daily rate of £350 (539), earning at total of £4,504.78 (570-573). In October 2019, he was engaged by Atlas again, and earned £1,465.42 (574). On 28 February 2020, the claimant commenced a contract with Energy Endeavour, again in United Kingdom waters, for 3 weeks, for which he was paid a daily rate of £441.85 (542), and earned a total of £3,820.91..

172. On 20 May 2020, the claimant signed a contract with Advance Global Recruitment Ltd (552ff) on board the Maersk Discoverer off Egypt, for 4 to 6 weeks at the daily rate of £595. He was paid a total of £16,993.91 for this assignment (578-584). In August 2020, the claimant provided services to Drillmar Resources Limited on oil rigs, and was paid £1,378.60 (585).

173. The claimant was offered a job by Seacat Services Ltd servicing offshore wind farms in the North Sea, and was paid £2,409.24 (586). He also took work with Drillmar Resources Ltd again in December 2020, and earned £2,225.59 (587).

Submissions

174. Each party presented written submissions, to which the Tribunal had reference in the course of our deliberations, and to which the representative spoke.

175. For the claimant, Ms Shiels submitted that the claimant was unfairly dismissed in terms of section 95(1)(a) of the Employment Rights Act 1996 (ERA), on the basis that he resigned in response to a series of repudiatory breaches of his contract, both express and implied, by the respondent, their employees and agents.

176. She set out the alleged breaches, and argued that they were an effective or material contributing cause of the claimant's decision to resign. The "principal reason" test is not appropriate, but the Tribunal must consider whether the breach played a part in the dismissal, and means that if the claimant resigned in response to several complaints about the conduct of the respondent, even if some were not contractual breaches, it is not necessary for the Tribunal to consider which was the principal reason for leaving.

177. She went on to submit that the repudiatory conduct consisted of a series of acts and incidents, which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence, even if individual incidents did not do so. She pointed out that the last act which led to the claimant resigning need not, of itself, be a breach of contract, but it must contribute something to the breach, even if insignificant.

178. The claimant relies upon previously unaccepted repudiatory breaches which taken cumulatively have led to a breach of the implied term of trust and confidence.

179. No real investigation was carried out in relation to the grievance. Ms Shiels noted that Ms Boston had said that they were entitled to suspend the investigation until the claimant was fit but it is crucial, she submitted, that investigations are carried out while matters are fresh in people's minds, and this was the fundamental flaw in the respondent's handling of the grievance. From 21 April 2018, it cannot be said that the claimant has affirmed any breaches, as he has set out his grievances very clearly.

180. She submitted that the claimant was directly discriminated against on the grounds of disability under section 13 of the Equality Act 2010 (the 2010

Act). She argued, firstly, that the claimant suffers from a physical and mental impairment which affected his ability to carry out normal day-to-day activities, the effects of which were substantial and long-term. It had lasted more than 12 months and was likely to last for the rest of his life.

181. The claimant was treated less favourably than a non-disabled person who, having a physical injury, was unfit for duties and required medical assessment and treatment which could not be provided aboard ship.

182. The claimant could have been advised of his right to take annual leave while on sick leave, in order to secure pay in respect of that annual leave, as an alternative to the nil pay he was receiving while on sick leave. The respondent acted unreasonably by failing to do this.

183. Ms Shiels invited the Tribunal to find in favour of the claimant.

184. She made separate submissions, as did the respondent, on the remedy to be awarded in the event of the claimant's success, which were taken fully into consideration by the Tribunal to the extent that remedy was relevant.

185. For the respondent, Mr Jones presented a very detailed and lengthy written submission, to which he also spoke.

186. He observed that the claimant's submissions went beyond the terms of the written pleadings, and argued that the claimant cannot expand the claims without an application to amend having been made and granted by the Tribunal.

187. He argued that there is no pleaded breach of the MLC Regulations in the claim, and in any event the respondent's witnesses were not given the opportunity to respond to questions on this point.

188. The claim relating to sick pay is made (95) purely on a contractual footing, seeking 26 days' pay on the basis that the sick pay period was backdated, but makes no reference to any breach of the MLC Regulations.

189. He addressed a number of the points made by Ms Shiels in her submissions. He pointed out that the respondent is not arguing that the Tribunal should consider the sole or principal reason for the claimant's resignation, but that the Tribunal has to make findings as to the factors which caused the claimant to resign and only those factors can contribute to the constructive dismissal claim.

190. On the constructive dismissal claim, he noted that Ms Shiels had taken issue with the manner in which Ms Boston had conducted the grievance investigation, but since the details of that investigation were unknown to the claimant until after his resignation, that aspect of the matter cannot have played any part in his decision to resign. He submitted that the claimant's issue with the grievance process was the time it was taking and not the details of how it was carried out.

191. He submitted that the clear reasons for the claimant's resignation were set out in the resignation letter, and repeated at paragraph 68 of the claimant's witness statement. He argued that the reasons set out in the letter are only relevant insofar as forming part of the pleaded case: for example, the comments about the claimant being deemed fit to work do not form part of the case, and there is no challenge to Dr Adeleki's statement that the claimant would not be fit for offshore work until the grievance was concluded. There is no basis for a cumulative breach on the evidence heard.

192. The respondent's position, he said, is that the claimant resigned because the grievance was taking so long, and because his return to work was taking so long. The claimant's view was influenced by his belief that the grievance should have been concluded within a week, but that was a misreading of the process and an unrealistic expectation given the claimant's own absence from work.

193. The Tribunal should not, he submitted, lose sight of the 2 grievances which were lodged by the claimant, the second of which (in March 2019) made reference to matters arising 11 months prior. The respondent did

not ignore the grievances, but actively engaged with Mrs MacNab and OH to establish his fitness to return to work and to deal with the grievance. In August 2019, Mrs MacNab made clear to the respondent that the claimant was not able to engage with the grievance process at that time. That remained his position for some time.

194. The first realistic indication of the claimant's ability to engage with the grievance process came when Mrs MacNab emailed Ms Boston on 7 May attaching the final fit note and confirming that he would be fit to progress the grievance. It was, he submitted, reasonable and appropriate to refer him to OH to establish his fitness to participate in the grievance given the previous OH report and Mrs MacNab's emails, which did not present an optimistic view of the claimant's health. Although the respondent did try to get the claimant assessed for fitness to work before the expiry of the fit note on 28 May his wife emailed them to confirm that he was not fit to attend an OH assessment while he remained off sick (495).

195. The earliest possible time for the grievance to have taken place was June 2019, but Mr Jones submitted that there was no evidence from the claimant that he would be fit to attend a grievance hearing in that month. He told the respondent that he needed ample time to prepare for such a hearing.

196. Ms Boston contacted the claimant on 10 June to tell him that the grievance hearing would be arranged in two to three weeks, a timescale to which he did not object. A further update was provided on 19 June and no concerns were raised.

197. In Mr Jones's submission, when the claimant was informed on 28 June that the investigation was almost 100% complete, and that all materials would be sent to the claimant in the week commencing 1 July 2019, he decided to resign without any prior warning or complaint about how his grievance had been handled. There is therefore, he submitted, no reasonable objective basis for the claimant's contention that the respondent was not making reasonable progress with the grievance. He

resigned without giving the respondent the opportunity to discuss the grievance with him at all. The timing of his resignation was bizarre, and suggested that he did not intend to attend a grievance hearing at all.

198. The respondent could not conclude its grievance process without hearing from the claimant, and could only meet with him once he had been able to confirm that he was fit enough to attend a hearing. He was signed off sick until 28 June 2019. Any delay in arranging the hearing was not attributable to the respondent, but was solely due to the claimant's ill health.

199. Mr Jones submitted that the claimant's proposition, that a 4 week period for concluding an investigation into 2 complex grievances amounted to a repudiatory breach of contract, standing the claimant's prior unfitness, cannot be a correct proposition of contract law. The fact that the claimant was not being paid was because he had run out of sick pay, which is not relevant to a breach of contract. It just shows how long he had been off sick. The claimant made assumptions about timescales which he never raised with the respondent, and Ms Boston firmly rebutted those assumptions when she gave evidence.

200. There were extensive investigations carried out in relation to the grievance, and there was no reason for Ms Boston to conclude those investigations until the claimant was certified fit to work.

201. The respondent's position is that they did not demonstrate an intention no longer to be bound by the fundamental terms of the contract of employment. Whether there was a cumulative breach turns on the evidence. The claimant had clearly affirmed any breaches prior to June 2018 – he wanted to return to work, which clearly affirmed those breaches.

202. Mr Jones submitted that it would not be appropriate for the Tribunal to conduct its own inquires into whether or not the claimant was underperforming. The only issue is whether the decision to issue the PIP was taken in good faith – did Mr Miller genuinely believe that it was

appropriate to do so. The evidence does not bear out the suggestion that Mr Miller was motivated by dislike, as the appraisals all demonstrate that there were many positive comments made about the claimant's performance. The criticisms of Ms Boston's involvement in the appraisal and PIP processes were unfair. It is appropriate for HR to assist with the generation of appraisal documents. It is not for the Tribunal to apply a strict level of scrutiny to the decision-making processes. The PIP was reasonable and can in no way be regarded as a fundamental breach of contract.

203. Mr Jones submitted that Mr Miller genuinely regretted making the comment about Mr Grier, but indicated that there was no malicious intent behind it, more that he was trying deflect responsibility for the PIP. That comment caused no change in the claimant's demeanour, according to Mr Miller, whose evidence should be accepted. There is no evidence, he argued, that that comment caused some kind of medical flare-up.

204. He went on to address the issues relating to the claimant's disembarkation from the vessel, and denied that the respondent had been guilty of any breaches of contract in this regard.

205. With regard to the discrimination claim, Mr Jones pointed to the terms of his written submissions and indicated that he intended to add nothing thereto. This claim was not positively advanced by the claimant.

206. Like Ms Shiels, Mr Jones made separate submissions on the question of remedy, which were fully considered by the Tribunal and are addressed in the decision below, to the extent that they are required.

The Relevant Law

207. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, inter alia

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

208. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for claims of constructive dismissal is **Western Excavating -v- Sharp [1978] ICR 221**.

209. In considering the issues the Tribunal had regard to the guidance given in **Western Excavating** and in particular to the speech of Lord Denning which gives the "classic" definition:

"An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."

210. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

"…whether the employer's conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that

the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably, if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."

211. What the Tribunal required to consider was whether or not there was evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

212. The Tribunal also took account of, the well-known decision in **Malik v Bank of Credit & Commerce International SA [1997] IRLR 462**, in which Lord Steyn stated that "The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

213. It is also helpful to consider the judgment of the High Court in **BCCI v Ali (No 3) [1999] IRLR 508 HC**, in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is "whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice."

214. A breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer that cumulatively amount to a repudiation of the contract, in circumstances where the employee resigns in response to what he regards as "the last straw". The last straw does not, of itself, have to amount to a breach of contract, still less be a fundamental breach in its own right — **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA**. In that case the Court of Appeal stressed that it is immaterial that one of the events in the course of

conduct was serious enough in itself to amount to a repudiatory breach and that the employee did not treat the breach as such by resigning.

215. The Court of Appeal in **Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA**, confirmed that, to constitute a breach of trust and confidence based on a series of acts (or omissions), the act constituting the last straw does not have to be of the same character as the earlier acts, and nor does it necessarily have to constitute unreasonable or blameworthy conduct, although in most cases it will do so. However, the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. As always, the test of whether the employee's trust and confidence has been undermined in this context is an objective one.

The Issues for Determination

216. No formal List of Issues was presented to the Tribunal in this case. Accordingly, it is necessary to extract from the claims made the particular Issues which the Tribunal must determine in this case.

217. We note, in passing, that in relation to the constructive unfair dismissal claim, the claimant's representative set out the breaches relied upon in the further and better particulars presented following the Preliminary Hearing before Employment Judge Hosie in March 2021 (77ff), at 92, in paragraphs (a) to (n). However, in her submissions at the conclusion of the evidence, the claimant's representative presented the alleged breaches slightly differently, in 21 numbered paragraphs.

218. We have sought to identify the breaches relied upon from the further and better particulars, rather than the submissions. While we mean no disrespect to the claimant's representative in doing this, it is important, in

the interests of justice, to consider only those claims of which the respondent has had notice.

219. Accordingly, we have identified the following issues for determination in this case:

1. Did the respondent commit a series of repudiatory breaches of the claimant's contract of employment, both express and implied, which then entitled the claimant to terminate the contract without notice by reason of the respondent's conduct?

2. In particular, did the respondent commit any of the following acts, and if so, did they amount to repudiatory breaches of contract?

a. Mr Miller's list of performance issues never raised with the claimant;

b. Mr Miller's pre-determined decision to put the claimant through a PIP before any appraisal meeting;

c. Ms Boston considerably adding substantive performance issues to the PIP;

d. Ms Boston seeking to elicit further performance issues from Mr Miller for adding to the PIP;

e. Ms Boston failing to advise Mr Miller that he should not pre-judge issuing a PIP or its content of such a plan before having a fair and objective appraisal process giving the claimant an opportunity to contribute and respond;

f. Mr Miller's decision to conduct the claimant's appraisal himself and to do so in the manner that he did;

g. The respondent's failure to disembark the claimant as recommended by the ship's medic and to retain him on board without treatment for a further 3 days;

h. Ms Boston's comment on the medic's professional advice;

i. The decision not to return the claimant home to Wick when that option was available;

j. The HR telephone call requiring the claimant to fly to Aberdeen to attend an absence meeting prior to his receiving medical treatment;

k. Failure to investigate promptly the claimant's grievances of 29 April 2018 and 6 March 2019 in breach of the contractual grievance policy, the ACAS Code and the implied duty to promptly address grievances;

l. Failure to pay promptly the correct sick pay entitlement to the claimant until the claimant's wife raised the matter;

m. The respondent's refusal to permit any phased return to onshore work or training;

n. The respondent's refusal to permit the claimant to take paid annual leave.

3. Was the claim of disability discrimination presented out of time, and if so, was it presented within such time as the Tribunal considers just and equitable?

4. Was the claimant, at the material time, a person disabled within the meaning of section 6 of the Equality Act 2010?

5. Did the respondent discriminate against the claimant directly contrary to section 13 of the Equality Act 2010?

6. In particular, did the respondent treat the claimant less favourably than an employee not suffering from a disability, but whose ability to work is impaired due to a physical injury or illness requiring medical assessment and training which is not available on board or nearby, by:

a. failing to evacuate him urgently to his home safely, and

b. by evacuating him 3 days later to a place more than 100 miles from his home

c. by calling him, even before he had arrived home, to attend an absence management meeting with HR more than 200 miles from home before he had received the necessary medical assessment and treatment.

7. Did the respondent unlawfully deprive the claimant of pay in relation to annual leave accrued but untaken in terms of his entitlement under the Maritime Labour Convention and Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 (MLC)?

8. Did the respondent unlawfully deprive the claimant of sick pay in terms of his contract of employment, MLC and the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014?

9. In the event that the claimant is successful in respect of any or all of the above claims, what award should be made to him by the Tribunal?

Discussion and Decision

220. We addressed each of the issues in turn.

1. Did the respondent commit a series of repudiatory breaches of the claimant's contract of employment, both express and implied, which then entitled the claimant to terminate the contract without notice by reason of the respondent's conduct?

2. In particular, did the respondent commit any of the following acts, and if so, did they amount to repudiatory breaches of contract?

a. Mr Miller's list of performance issues never raised with the claimant;

b. Mr Miller's pre-determined decision to put the claimant through a PIP before any appraisal meeting;

c. Ms Boston considerably adding substantive performance issues to the PIP;

d. Ms Boston seeking to elicit further performance issues from Mr Miller for adding to the PIP;

e. Ms Boston failing to advise Mr Miller that he should not pre-judge issuing a PIP or its content of such a plan before having a fair and objective appraisal process giving the claimant an opportunity to contribute and respond;

f. Mr Miller's decision to conduct the claimant's appraisal himself and to do so in the manner that he did;

g. The respondent's failure to disembark the claimant as recommended by the ship's medic and to retain him on board without treatment for a further 3 days;

h. Ms Boston's comment on the medic's professional advice;

i. The decision not to return the claimant home to Wick when that option was available;

j. The HR telephone call requiring the claimant to fly to Aberdeen to attend an absence meeting prior to his receiving medical treatment;

k. Failure to investigate promptly the claimant's grievances of 29 April 2018 and 6 March 2019 in breach of the contractual grievance policy, the ACAS Code and the implied duty to promptly address grievances;

l. Failure to pay promptly the correct sick pay entitlement to the claimant until the claimant's wife raised the matter;

m. The respondent's refusal to permit any phased return to onshore work or training;

n. The respondent's refusal to permit the claimant to take paid annual leave.

221. We took these issues together, on the basis that it was necessary to assess the acts relied upon in leading to the claimant's resignation, as well as those acts pled in support of the claimant's claim of constructive unfair dismissal.

222. It is important, before analysing the details of these allegations, to consider the terms, firstly, of the letter of resignation itself, as being a direct source of evidence of what was in the claimant's mind at the time he resigned.

223. The substance of the claimant's resignation letter is set out here, extracted from the full letter produced at 503:

"I am writing to lodge my letter of resignation from Stena Drilling after over 12 years working for the company.

I do not feel I have been left with any other option. Despite being advised in late April I would be ready to go back to work by late May, the HR department have yet to 'put together' my grievance claim and set a date. In the meantime the company is unwilling to pay me, yet I cannot work until the grievance has been progressed therefore I am stuck in limbo at the mercy of Stena HR Department.

In the Stena handbook it states that a Grievance should be dealt with within a week. The grievance was raised last April some 14 months ago, and I am assuming that statements should and would have been taken at that time.

If there was still things to prepare, Stena HR had plenty of prior notice when they received the note from the GP at the end of April stating I would be fit to work by the end of May. At that point they should have

started pulling things together if they felt anything was outstanding. In my opinion the stalling is merely to starve me into leaving Stena.

I am now deemed fit to work, I have a family and bills to pay and it is unreasonable some 8 weeks after knowing I was coming back to work to not have progressed this matter, have me on the payroll yet not pay anything I have come a long way in recent months in regards to my mental health, and was feeling good and positive but the 'waiting game' is filling me with anxiety and having an impact on my health.

It is unreasonable to expect me to continue to wait with no pay. I have been forced to seek other employment to earn a living and improve my well being.

I will be seeking constructive dismissal on the grounds of a serious breach of your own procedures and dealing with a grievance in a timely manner.

I will also be claiming discrimination on the grounds of disability as raised as part of my grievance procedure and unpaid holiday pay.

I would be grateful if you could send my P45 at your earliest so I can seek and secure employment and an income elsewhere."

224. From this, there are a number of points which may be extracted, in our judgment:

1. There was still no date for the grievance hearing;

2. The claimant was unpaid during his grievance due to the respondent's unwillingness to do so;

3. The Stena Handbook provided that a grievance should be dealt with within a week, but his grievance was raised in April 2018, some 14 months before;

4. The respondent was guilty of "stalling" the grievance, in order to "starve me into leaving Stena";

5. The respondent acted unreasonably by failing to progress this matter, some 8 weeks after being informed that he was able to return to work in May, when he was not being paid and unable to make a living.

225. It is plain from the terms of that letter that the primary conviction carried by the claimant at that time was that he required to resign because the respondent had delayed the grievance process, unreasonably and in his view deliberately, in order to place him in such a difficult position, financially and health-wise, that he was left with no option but to resign.

226. At this stage, we seek to analyse the terms of the letter of resignation before moving on to the wider claims which are presented to us in the context of the constructive dismissal claim. These are initial observations which will require to be developed when considering the terms of the pleadings in light of the letter of resignation.

227. It is correct that on the date of the claimant's resignation, no date had yet been allocated to the claimant's grievance hearing, no papers had been passed to the claimant in respect of that hearing, and the respondent had not told the claimant the identity of the chair to be appointed to hear the grievance.

228. The claimant was unpaid during his grievance process, for a considerable period of time. The respondent's argument is simply that he was unpaid because his contractual entitlement to sick pay had expired, and that this was unrelated to the grievance procedure.

229. The respondent's Company Handbook, produced at 161ff, sets out in Appendix 8 the "Employees Grievance Procedure". We were unable to find a commitment within that procedure to investigate all grievances within 7 days of their production.

230. The Procedure does state (210) that *"If a grievance contains allegations which are lacking in detail, the particular Manager dealing with the grievance shall have the discretion to request that the employee provide*

further particulars of the complaint within a period of 7 days as a condition to proceeding further with the matter. If the employee does not provide sufficient specification of the grievance to the satisfaction of the Manager dealing with the matter, the grievance may, at his discretion, be dismissed."

231. These circumstances did not apply in the claimant's case. There was no suggestion by either party that the claimant's grievances lacked specification or needed further detail.

232. There is a separate "Grievance Procedure Onshore & Offshore" (144ff), in which it is stated (145) that *"We aim to investigate any formal grievance you raise, hold a meeting to discuss it with you, inform you in writing of the outcome, and give you a right of appeal if you are not satisfied."*

233. In paragraph 5.0 (146), the policy provides that the amount of any investigation required will depend on the nature of the allegations and will vary from case to case; and in paragraph 7.0 (147) that they would arrange a grievance meeting as soon as reasonably practicable after receiving the grievance.

234. There is no reference to which we were directed in either policy to a time limit of 7 days within which the investigation must be conducted and concluded.

235. It is also noted that there were in fact two grievances, one presented in April 2018 and the other in March 2019, and that context must be accounted for in reviewing the respondent's handling of the grievances.

236. The claimant was of the view that the respondent was stalling his grievance, though it is not entirely clear when he came to that view.

237. It is essential to consider the sequence of events leading to the claimant's resignation in order to determine whether it is correct for the claimant to assert that the respondent delayed the grievance process by 8 weeks prior to his resignation.

238. The claimant's resignation was submitted on 1 July 2019. It is understood that in his reference to 8 weeks prior to that date, the claimant was referring to the point when he advised the respondent that he was fit for work.

239. The critical findings on this are as follows. On 7 May 2019, Mrs MacNab wrote to Ms Boston (493) enclosing a fit note dated 6 May 2019. The fit note (281) confirmed that the claimant was not fit for work, but stated: *"I anticipate that at the end of this 3 weeks period Mr MacNab will be fit for a phased return to work – shorter shifts initially and no long haul travel."* The note indicated that he was signed off for 21 more days.

240. The claimant did not return to work following the expiry of those 21 days (on 27 May 2019). Mrs MacNab did say in her email of 7 May that *"He will also be fit to progress his grievance in the next couple of months".*

241. 0n 30 May, Dr Adeleke's report advised that he was fit to engage with the grievance process and the investigatory meetings, though he required to be given ample time to prepare for the meeting, and that it should be organised in a neutral location.

242. Ms Boston spoke to the claimant on 10 June to discuss the grievance process, and on 19 June advised him that some replies were awaited from requests for statements. On 28 June she emailed to confirm that the investigation was almost 100% complete, and that he would be sent the documents in relation to the investigation during the course of the following week.

243. It is important to set out this sequence of events at this stage, but we address the matters arising in relation to the constructive dismissal claim below in more detail.

244. It is the claimant's case that the resignation followed a "final straw", and that the delay in reaching the grievance hearing represented that final straw. There were, in his case, a number of breaches of contract which

cumulatively led to the point where he resigned, and these are set out at paragraphs (a) to (n) in the issues.

245. The Tribunal must determine whether or not the claimant has proved that the events occurred in the way he asserted, before reaching a view as to whether or not they amount to a series of breaches accumulated towards the final straw, justifying his resignation.

- **Mr Miller's list of performance issues never raised with the claimant.**

246. This is a reference to the notes which were maintained by Mr Miller on his computer in preparation for the appraisal, but which identified a number of criticisms with the claimant's performance. The claimant was upset when he discovered this list on the computer, which he logged into shortly before the appraisal.

247. It is frankly difficult to know what to make of this episode. Mr Miller's position was that he was simply maintaining a note so that he could raise these concerns with the claimant, which he said were genuine and which were supported by Paul Hogan, his back to back manager. We were never entirely clear, on the evidence, as to how the claimant came to log in as Mr Miller, albeit that Mr Miller was apparently quite carefree with his password, and then found the file with his name attached containing these notes.

248. The claimant's position appears to be that this was completely unjustified on the part of his manager. Mr Jones' submission is that it was not unusual to do this and that since the manager was not seeking to impose any disciplinary sanction or formal action of any kind, there was no requirement for these matters to have been raised prior to the meeting.

249. In our judgment, while it may not represent best practice for a manager to reserve a number of criticisms for an appraisal meeting, it does not amount to such egregious conduct as to damage seriously the relationship of trust and confidence necessary between employee and

employer. Mr Miller did not seem to anticipate that the claimant would see these notes, and had certainly not taken time with the claimant over the course of the previous months to address these performance issues on an ongoing basis, but it was our impression that Mr Miller found it difficult to confront the claimant with criticisms in person. Indeed, he found it so awkward that he tried to deflect responsibility for doing so on to Mr Grier, when Mr Grier was entirely innocent of any involvement in the matter. However, of itself, it does not strike the Tribunal as repudiatory conduct to have maintained this record, just not particularly helpful practice.

250. The claimant was plainly upset about this, which was understandable since the criticisms did come as something of a bolt from the blue for him, and this confirms the view that it was not well handled by the respondent in the person of Mr Miller.

251. However, we were presented with no evidence which demonstrated that the respondent were required to consult with the claimant prior to the institution of a PIP, which could have been imposed at any time during the year. There was no evidence to suggest that any notice should have been given to the claimant that they intended to do so.

- **Mr Miller's pre-determined decision to put the claimant through a PIP before any appraisal meeting;**
- **Ms Boston considerably adding substantive performance issues to the PIP;**
- **Ms Boston seeking to elicit further performance issues from Mr Miller for adding to the PIP;**

252. We take these points together. There is no doubt that Mr Miller decided in advance of the appraisal meeting to impose a PIP on the claimant. He had prepared his note of concerns prior to the meeting, and had discussed the drafting of the PIP with HR in the person of Ms Boston prior to the meeting. We did not form the impression that Mr Miller intended to discuss the individual issues arising in the PIP or in his note

of concern before deciding to impose the PIP, but considered that the appraisal meeting was the appropriate time at which to raise such a matter.

253. The appraisal system set out in Appendix 5 of the respondent's Handbook (196) is described in a notably concise manner, but states that *"The scheme provides a method to allow the Company to fully recognise above average work performances, with a view to future promotion."*

254. Under "Conclusion", with very little other detail provided, the Handbook states: *"The purpose of a performance based review system is to analyse what a person has done and what he is doing in his job in order to assist him to do better in developing his strengths and overcoming his weaknesses."*

255. The premise upon which the claimant's complaint was based was that the appraisal meeting was no place for the PIP to be raised. On the basis of the (perhaps rather sparse) appraisal system described in the Handbook, it is not possible to reach the conclusion that employees are entitled to expect that a performance improvement process would not be brought into the appraisal process. It is described, rather, as a performance review system, and suggests assisting an employee to do better in developing strengths and overcoming weaknesses.

256. Whether rightly or wrongly, (and we accept Mr Jones' contention that it is not for us, in these circumstances, to carry out an analysis of whether the criticisms were completely justified) Mr Miller was, in our judgment, entitled to raise critical comments and set out a PIP during the appraisal meeting. While it may have been better to have given the claimant some notice that he intended to do this, it is difficult, in the circumstances and on the evidence, to believe that the claimant would have reacted any differently no matter when he was told of the PIP. It may have been clumsy but we are unable to conclude that the respondent was acting unreasonably or in breach of contract by doing this.

257. Mr Miller did consult with Human Resources prior to imposing the PIP, which was not an unreasonable step.

258. The claimant criticises Ms Boston for adding to the PIP. There is no doubt she did so, and in our view, her additions were unhelpful. The PIP (as amended by Ms Boston) is found at 383ff.

259. For example, under Communications, Mr Miller had inserted that the expected result for the claimant was "Ensure always available when required or use DPOs to relay info if in area of high noise/tank entry". That is reasonably clear and places the claimant in a position of knowing what he is required to do. Ms Boston then added: "Constantly be making an effort to improve lines of communication with Colleagues and Supervisors". In our view, this is much more vague, and it would be difficult for any employee to know whether or not they have succeeded in satisfying such an expected result. It is vague and too general to amount to a clear objective.

260. Ms Boston also added more general results to Cement Jobs and Timekeeping. However, she then added two new categories: Attitude and Consistency in Performance. The expected results included "Ensure openness to constructive criticism" and "Demonstrate consistent and sustained improvement in performance including all of the above mentioned." Again, we are not clear as to how an employee could be taken to have achieved these expected results.

261. We do find that Ms Boston added considerably to the PIP, and included new criticisms not there before. She did not know the claimant's performance personally and it is difficult to understand her purpose in doing so. Her explanation was that she wanted to frame the PIP properly, but in our judgment, the effect of her intervention was to make it more difficult for the claimant (and his manager) to know when the expected results or objectives of the PIP had been achieved.

262. With regard to Ms Boston eliciting further performance issues from Mr Miller, we note that to be a reference to the email of 28 March 2018

(381) in which Ms Boston asked Mr Miller "Are there any other behavioural issues that you think should be addressed/noted?" Leaving aside the peculiarity of asking about behavioural (or, to put it another way, conduct) issues in the drafting of a performance improvement plan, we do not consider it unusual or necessarily inappropriate for an HR manager to check that there were no other issues to be included, in order to ensure that she had provided Mr Miller with the necessary advice to address the matter.

- **Ms Boston failing to advise Mr Miller that he should not pre-judge issuing a PIP or its content of such a plan before having a fair and objective appraisal process giving the claimant an opportunity to contribute and respond;**

263. In our judgment, it did not amount to a breach of contract for Ms Boston to have failed to advise Mr Miller about not pre-judging the matter. Again, we accept the respondent's submission that the Tribunal must bear in mind that this was not a capability dismissal, but is a claim that the respondent committed a series of breaches of contract which cumulatively justified the claimant's resignation. Given the terms of the appraisal process, it does not seem to us to be outwith the expectations of either party that criticisms of weakness in performance should be raised during an appraisal.

- **Mr Miller's decision to conduct the claimant's appraisal himself and to do so in the manner that he did;**

264. There are two aspects to this criticism. Firstly, the claimant appears to be suggesting that Mr Miller should not have conducted the appraisal himself. There is no basis for any criticism of the respondent here. Mr Miller was the claimant's line manager, and was therefore charged with the duty of conducting appraisals for him. Although it is clear that the claimant and Mr Miller had a rather fraught relationship during this particular trip, the claimant made no objection to Mr Miller conducting his

appraisal, nor did he request that any other manager should be given the responsibility to carry out this task.

265. Secondly, the claimant is critical of the manner in which Mr Miller conducted the appraisal meeting, as we understand it.

266. It should be noted, at this point, that the claimant did not know until after he resigned that when Mr Miller told him that Mr Grier had told him to institute the PIP, this was not true. Accordingly, while we thoroughly deprecate Mr Miller's actions in telling what amounted to a lie to the claimant, it cannot form part of the claim of constructive unfair dismissal, since it was not an act of which the claimant was aware when he resigned.

267. It is clear that the claimant considered that Mr Miller was dismissive in his bearing during the meeting, and that the mention of Mr Grier's name caused him considerable anxiety (since he thought at the time that it was true), making him wonder why such a senior manager would be taking an interest in his performance.

268. We were not, largely, impressed by Mr Miller's evidence in this case. Leaving aside the admitted untruthfulness of his reference to Mr Grier during the meeting, there was no doubt that Mr Miller found the claimant to be a difficult colleague, and it was impossible to avoid the conclusion that some resentment flowed from Mr Miller to the claimant. The text message in which he sarcastically described the claimant as a "fucking hero" demonstrated a troubling attitude towards his fellow officer; and the exchange of emails in which Mr Miller said to Paul Hogan that there had been *"major dramas with Macnab"*, and that it was *"like a bad episode of Dawsons Creek"* were dismissive and do Mr Miller no credit at all. We note, however, that these matters are not relevant to the constructive dismissal claim, since the text message is not referred to as one of the alleged breaches of contract, and the email was not known to the claimant until after he resigned.

269. However, we have some misgivings about Mr Miller's credibility in relating the terms of the meeting, and preferred the claimant's evidence on this point. Mr Miller did not handle the meeting well, even by his own account. Although he said that he felt that the meeting had gone smoothly, and he did not detect any reaction by the claimant to the mention of either the PIP or Mr Grier's name, he said that his reference to Mr Grier was made in an attempt to defuse a difficult moment in the meeting.

270. The claimant was plainly upset by what was said at the meeting, and by how Mr Miller handled it, and his reaction, supported by the evidence of the notes of the onboard medic, was one of upset and anxiety. We do not accept that it was a smoothly handled meeting, and believe that it came to an end when the claimant asked to leave.

271. There is little doubt that there were tensions in the relationship between Mr Miller and the claimant, albeit that they appeared to be able to function together to the extent that they required to (since they were never actually on shift together), but that Mr Miller did not conduct himself in an appropriate manner during the course of this meeting.

- **The respondent's failure to disembark the claimant as recommended by the ship's medic and to retain him on board without treatment for a further 3 days;**
- **Ms Boston's comment on the medic's professional advice;**
- **The decision not to return the claimant home to Wick when that option was available;**

272. The process whereby the claimant was disembarked by the respondent was the subject of much evidence before the Tribunal, during which there was considerable focus on whether the disembarkation was, or should have been, classified as a medical evacuation.

273. The question for us, in this context, is whether or not the actions of the respondent amounted to repudiatory conduct. The claimant criticises the respondent's failure to disembark the claimant as recommended by the

ship's medic, but of course the respondent did disembark the claimant following the medic's recommendation. The issue was that the respondent did not allow the claimant to be disembarked earlier than 3 days after he first saw the medic, though it is not clear, in our view, exactly when the claimant says he should have been allowed to leave the vessel.

274. In our judgment, the respondent did not act in such a way as to destroy or seriously damage the relationship between employer and employee by retaining the claimant on board until he was able to leave with the medic, 3 days after he reacted to the appraisal meeting. The medic, a nurse, regularly checked upon the claimant in his cabin; he was not required to carry out any work during those days; Mr Miller had no contact with him in that time period; the medic communicated throughout with ISOS, the medical providers to the respondent, and agreed that he was unfit for duties (256); he was administered zoplicone 5mg to help him to sleep; and in the days following the appraisal, it is clear that there was regular communication with the medic in order to decide when would be best to allow him to leave the vessel. Ultimately, the medic came to the view that it would be best to allow him to travel with him back to Manchester, on 5 April, and that he would continue to observe him in the meantime.

275. Given that the claimant's condition did not give rise to particular concern during that time, and that there were no signs of deterioration; and that he was marked unfit for work and that it was known that he would attend his GP when he returned to Scotland; it seems to us that it was entirely reasonable for the claimant to be disembarked with the medic, as suggested by the medic and agreed by ISOS.

276. What the claimant seems to object to is the terms of some of the correspondence which he has now seen between senior managers and HR in which doubt appears to be cast upon the validity of his illness. While we understand his objections, he was not aware of that correspondence when he resigned, and therefore they could not form part of his claim of constructive unfair dismissal. ISOS, the medical

advisers, expressed a similar view on 3 March (263) when they said "*sounds like there is not a definite medical reason for him to go home early"*.

277. The medic continued to express no immediate concerns about the claimant's safety, and did not consider it necessary to have an assessment about the claimant's fitness to fly carried out in Guyana.

278. It appears to us that, whether for a medical reason or not, the respondent agreed to allow the claimant to end his tour early and return home on 5 April with the medic, in a manner which was consistent with the medical advice which was being provided both by the medic and ISOS. There is no evidence that the claimant came to any harm or suffered any deterioration by remaining on board the vessel until that point, and accordingly we are unable to conclude that the decision to disembark the claimant on 5 April amounted to repudiatory conduct by the respondent in breach of the implied term of trust and confidence between employer and employee.

279. Ms Boston's email of 3 April 2018 (405) suggested to Mr Fiske, the OIM of the vessel, that the medic's view was "disproportionate" to the situation. What she was suggesting, however, was that Mr Fiske could have a further discussion with the claimant in order to gauge more fully what the situation was. Following his discussion, Mr Fiske agreed that the claimant could be disembarked. In our judgment, it was not unreasonable nor inappropriate for Ms Boston to suggest that the OIM should have a direct discussion with the claimant. The claimant's evidence before us, in cross-examination, was that he had told Mr Fiske that the appraisal was the reason why he did not feel able to attend his duties. In our view, the claimant meant by that that he was rendered unfit to work by his reaction to the appraisal. That Mr Fiske did not interpret it in that way is understandable, and in any event, we do not consider that Ms Boston's intervention amounted to a breach of the claimant's contract.

280. As to the decision to return the claimant to Inverness rather than Wick, the medic advised on 4 April 2018 (418) that he had no further concerns about him at that time, and that he would fly from Manchester up to Inverness "to be met by his wife". Logistics asked the OIM whether or not a hire car would be required, to be told that his wife would be picking him up from Inverness (419).

281. There is no evidence at all that the claimant complained at the time that it was not appropriate for him to be flown to Inverness, and it was plain to the respondent that arrangements were in place for him to be collected and taken home. As it turned out, it was not his wife but another family member who collected him, but the assurance which the respondent had – that he was not to be left alone when he arrived in Inverness – was borne out in fact. The claimant's assertion in evidence that he was "left to make my own way home from Inverness" is not an accurate or fair description of what happened.

282. In our judgment, there is no basis for finding that this amounted to a breach of contract on the part of the respondent.

- **The HR telephone call requiring the claimant to fly to Aberdeen to attend an absence meeting prior to his receiving medical treatment;**

283. The claimant's evidence before us was that he was telephoned while at Manchester Airport to tell him he was required to attend a meeting in Aberdeen on Monday 9 April. Susan Wilson gave evidence to the effect that she called him to confirm the meeting, but that he was adamant that he would not attend such a meeting. Ms Boston wrote to the claimant on the same date (430) to "request your attendance at an informal meeting in Aberdeen".

284. In the event, the claimant was not required to attend a meeting in Aberdeen on 9 April.

285. However, we found that the actions of the respondent in calling the claimant on 6 April in the airport to advise him that he needed to attend a

meeting in Aberdeen on the following Monday was insensitive and difficult to understand. It was clear, in our judgment, that while the respondent did not consider that the claimant was being medically evacuated from the vessel, they were aware that he had had a strong emotional reaction – the claimant and the medic would describe it as a stress reaction – to the appraisal which caused his disembarkation. They were aware, in our judgment, that he intended to seek medical advice from his GP when he returned home.

286. They said that they stressed to the claimant that it was an informal meeting, and in the letter inviting him to the meeting they said the purpose of the meeting was to discuss recent events on the Carron, and any proposals which they had to assist with the situation.

287. In our view, the invitation left the claimant in a state of some uncertainty as to the purpose of the meeting, and in light of what the respondent knew about those events, there was no good reason to arrange the meeting at such short notice, and in particular before he had had the opportunity to see his own GP. They must have been aware that the GP would provide them with some further information and advice as to the claimant's condition, and it is not clear from the respondent's evidence why they considered it necessary to meet with the claimant prior to that.

288. Of itself, because they did not insist that the claimant attend the meeting, we did not consider that this amounted to a breach of contract, but clearly this is a matter which falls to be considered under the claimant's general complaint that there was a cumulative effect of the respondent's actions upon him, leading to his resignation.

- **Failure to investigate promptly the claimant's grievances of 29 April 2018 and 6 March 2019 in breach of the contractual grievance policy, the ACAS Code and the implied duty to promptly address grievances;**

289. It was clear that this was a highly significant complaint made by the claimant, which is the focus of his letter of resignation.

290. The grievance policy, as we have seen, confirms that the respondent will carry out investigations within a reasonable period of time, but notes that there may be a requirement to carry out further investigations as the matter proceeds.

291. The claimant refers to the ACAS Code of Practice on Disciplinary and Grievance Procedures. At paragraph 33, the Code requires that employers should arrange for a formal meeting to be held without unreasonable delay.

292. In our judgment, the respondent did conduct a very lengthy investigation into the claimant's grievances, and spoke to many witnesses in order to establish the facts based on the complaints made. Essentially, they treated the two grievances together, and conducted the investigation into each concurrently once the second grievance had been presented.

293. Did the respondent unreasonably delay the handling of the grievance or the arrangement of the grievance hearing? It is important to note, in our judgment, that the claimant was not fit to attend a grievance hearing until, at the very earliest, Dr Adeleke confirmed in his report of 30 May that the claimant was now fit to engage with that process and investigatory meetings. He also indicated that the claimant should be given ample time to prepare for the meeting.

294. On 28 June 2019, the respondent wrote to the claimant to confirm that the investigation was almost 100% complete, and that the documents would be sent to him the following week. That was 4 weeks – 28 days – after the claimant had been formally certified as fit to engage with the process.

295. In our judgment, the respondent did not unreasonably delay in the handling of the grievance or the arrangement of the final grievance hearing. While it was clearly frustrating to the claimant that at the end of June he was still unaware of the date of the grievance hearing, he had not previously indicated in his communications with the respondent that he was unhappy with the progress of the matter, during June.

296. The claimant's letter of resignation suggests that the respondent breached their own policy which required them to deal with a grievance within a week. The Tribunal had some difficulty with that statement. Firstly, there is no basis for his assertion in either policy document produced to us; secondly, the claimant had made no previous complaint about the progress of the grievance; thirdly, he was well aware that he was not certified as fit to engage with the grievance process until 30 May 2019; and fourthly, if he had believed that the grievance should have been dealt with in a week, there is no evidence to show that he brought that to the respondent's attention after that week had expired.

297. In any event, we do not consider it reasonable to argue that the respondent should have completed the process of investigation and hearing such a complex grievance within a week. It was not unreasonable for them to take considerable time to investigate the matter. The grievance could not be concluded until the claimant was fit to engage with it, and thus attend a hearing. In order for the claimant to attend a hearing, he would require to be sent the documents gathered in the investigation, and be given ample time to consider them prior to the hearing.

298. The claimant's complaints have varied about the timescales which were followed in this case. He suggested that the respondent was deliberately stalling in order to push him out of the company, though he had no evidence to support that suggestion.

299. In our judgment, the claimant's complaint in his letter of resignation about the grievance was, in fact, two-fold: that the grievance was subject to unreasonable delays, and that he was not being paid during it, which created some difficulties for him. The issue relating to pay is, in our view, unrelated to the grievance. He was not unpaid for that period because he had raised a grievance, but because he was still signed off sick for offshore work until the date of his resignation (a matter to which we will return below).

300. As a result, we are unable to conclude that the respondent's handling of the two grievances lodged by the claimant amounted to repudiatory conduct undermining the fundamental term of trust and confidence between an employer and an employee. We do not accept that the respondent deliberately introduced delays into the grievance process, and consider it understandable that they wished to ensure that the investigation was complete by the time they issued the invitation to the grievance hearing.

- **Failure to pay promptly the correct sick pay entitlement to the claimant until the claimant's wife raised the matter;**
- **The respondent's refusal to permit any phased return to onshore work or training;**
- **The respondent's refusal to permit the claimant to take paid annual leave.**

301. As at the date of the claimant's resignation, the issue of sick pay had been resolved, following his wife's intervention (as the issue implies). The respondent emailed the claimant on 30 May 2018 to advise that he would be paid backdated MLC sick pay (469), he did not raise any further issues about his sick pay with the respondent. This issue did not feature in the second grievance which was presented after May 2018.

302. It may be, however, that the claimant's complaint is intended to mean that he was unimpressed that the respondent declined to make the payment at all, and delayed in doing so until challenged. In the circumstances, we are not persuaded that the respondent acted in breach of contract in dealing with this matter in the way they did. Their position was that they were unsure whether he was entitled to receive MLC sick pay, but decided to pay it anyway.

303. The claimant gave evidence to the effect that he wished to return to onshore work. Dr Adeleke's report of 30 May did not address the question of whether the claimant would have been fit to carry out onshore

work, but stated that "Comments on his fitness to return to his role offshore including long haul flights should be addressed after he has gone through the grievance and the performance review. This is because these processes are stressful by nature and may have a further effect on his fitness."

304. It is not at all clear, on the evidence before us, that the claimant was fit to return to work either onshore or offshore, before he resigned on 1 July 2019. There is no medical evidence expressing a view on his fitness to work onshore.

305. In her email of 7 May 2019, Mrs MacNab refers to the GP wishing a phased return initially with shorter trips and no long haul flights in the first couple of months. She said that a few shorter trips would be preferable so he could build up his confidence and get over his memories of the previous trip, but fully expected to move back into his old position by the end of the summer. There was nothing said in that email about the claimant being returned to work in an onshore role.

306. In Ms Boston's evidence, she stated that there was never a request by the claimant to return to onshore work, and that in any event there were no onshore vacancies which would have suited the claimant's skill set available at that time.

307. In our judgment, the respondent cannot be criticised for not having placed the claimant in an onshore role. They required, on OH advice, to conclude the grievance process before restoring the claimant to his offshore role, which the claimant was confident he could return to by the end of the summer. Given that it is not clear in the claim when the obligation to allow the claimant to return to onshore work is said to have arisen, it appears to us that any onshore role, which would have had to await the outcome of the grievance process (or, at the very least, a further OH assessment), could only have been provided to the claimant for a very short time before he would be in a position to return to his contracted role.

308. Since this is not a matter which was raised at the time, and in light of the evidence presented, the Tribunal is not persuaded that the respondent acted in any way to undermine the employment relationship by not offering the claimant an onshore role at some unspecified time prior to his resignation.

309. On the question of training, the respondent's position was that it was company policy not to allow staff to engage in training unless they were fit to work offshore. However, they did permit the claimant to carry out some online training courses. Ms Boston's email of 12 June 2019 confirmed this to the claimant (499), and Paula Madden of the training department wrote to him to confirm the login details to allow him to complete two online training courses, on 25 June 2019 (501).

310. Again, we are not of the view that the respondent acted unreasonably or in breach of the employment contract by acting as they did. The claimant was not refused the opportunity to carry out training, and indeed was offered the opportunity to complete two online training courses. There is no reason to believe that if the claimant had reached the point where, following the grievance process, he had been certified fit to return to offshore work, he would not have been allowed to take the necessary training courses to be allowed to do so.

311. Given that the issues relating to a phased return to work in an onshore role and to training appear to arise in the period of weeks prior to the claimant's resignation, it is of note that there is no reference to either matter in the letter of resignation itself.

312. Having dealt with the individual breaches alleged by the claimant, we return to the first issue before us, namely: **Did the respondent commit a series of repudiatory breaches of the claimant's contract of employment, both express and implied, which then entitled the claimant to terminate the contract without notice by reason of the respondent's conduct?**

313. In determining this issue, the Tribunal reminds itself that the Court of Appeal in **Omilaju** stated that the act or omission relied upon (as a last straw) need not be unreasonable or blameworthy, but it must, in some way, contribute to the breach of the implied obligation of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets it as hurtful and destructive of their trust and confidence.

314. In this case, the Tribunal did not accept that the respondent was, in its handling of the grievance, in circumstances where the claimant was unpaid, stalling to "starve" the claimant into leaving the respondent's employment. The respondent was completing the process of investigation and preparation for a grievance hearing into the two grievances presented by the claimant, following confirmation, 28 days before, that the claimant was now fit to engage in the grievance process. They told him, on 28 June, that the investigation was almost 100% complete and that he would be sent the papers for the grievance hearing in the following week.

315. In our judgment, these timescales were reasonable, in all of the circumstances. The claimant was made aware that the grievance was nearly complete and that within a week he would be provided with the information arising from it.

316. We do not, therefore, consider that the respondent's handling of the grievance amounted to a final straw justifying the claimant's resignation in this case. It is notable, in our deliberations, that the claimant mentions, more than once, that he was not being paid, since that was a consequence of the expiry of his sick pay entitlement, rather than of the lodging of his grievances. It is clear that the claimant's lack of pay played a significant role in his resignation. We accept, however, that we must be careful not to stray into error by making any finding that the reason given in the letter of resignation was not the main or principal reason for his doing so. However, it is difficult on the evidence not to conclude that had the claimant been receiving pay on 1 July 2019, he would probably not

have resigned at that time. That seemed to us to be the fundamental reason for his resignation – to earn money to support himself and his family. That is unrelated to the alleged delays in relation to his grievance.

317. We do accept that the delays in the grievance did form a part of the reason for his resignation. However, we have not concluded that the respondent's actions amounted to a last straw justifying the claimant's resignation on 1 July 2019.

318. We must consider, in addition, whether the actions of the respondent, cumulatively, amounted to a breach of the implied term of trust and confidence between employer and employee.

319. On the basis of our findings in relation to the individual breaches alleged by the claimant, we do not consider that, taken together (to the extent we have found them to amount to breaches of contract), they were sufficient to amount to repudiatory conduct by the respondent demonstrating that they no longer intended to be bound by the fundamental terms of the contract.

320. There were aspects of the handling of the claimant's circumstances which could, without doubt, have been better. It was unhelpful that Ms Boston sought to bolster the terms of the PIP with rather vague objectives; Mr Miller did not handle the appraisal meeting in a creditable and empathetic manner; and receiving a call at Manchester Airport requesting attendance at a meeting on the following Monday in Aberdeen was not designed to demonstrate a supportive attitude to the claimant after he had just alighted from a very long flight from the Caribbean. However, the respondent was justified in taking steps to address performance issues in the appraisal meeting; the claimant was able to take up the issue of the PIP in a grievance process which was nearing completion when he resigned, and the claimant was not required to attend the meeting in Aberdeen, in the event.

321. Ms Boston subsequently sought, and to some extent succeeded, in restoring relations with the claimant and his wife, over the following months.

322. Ultimately, we were unable to find that the claimant resigned in response to a breach or breaches of contract by the respondent. We were puzzled by the timing of the claimant's resignation, given that the long-awaited grievance hearing was on the point of being arranged.

323. Accordingly, it is our judgment that the claimant's claim for constructive unfair dismissal must fail, and be dismissed.

- **Was the claimant's claim of disability discrimination presented out of time; and if so, was it presented within such time as the Tribunal considered to be just and equitable?**

- **Was the claimant at the material time a person disabled within the meaning of section 6 of the Equality Act 2010?**

- **Did the respondent discriminate against the claimant directly contrary to section 13 of the Equality Act 2010?**

- **In particular, did the respondent treat the claimant less favourably than an employee not suffering from a disability, but whose ability to work is impaired due to a physical injury or illness requiring medical assessment and training which is not available on board or nearby, by:**

  i. **failing to evacuate him urgently to his home safely, and**

  ii. **by evacuating him 3 days later to a place more than 100 miles from his home**

  iii. **by calling him, even before he had arrived home, to attend an absence management meeting with HR more than 200 miles from home before he had received the necessary medical assessment and treatment.**

324. The claimant's complaints of direct discrimination on the grounds of disability related to the events which took place between 2 and 6 April 2018, as can be seen by the three allegedly unlawful acts set out above.

325. The claimant presented his claim to the Employment Tribunal on 19 September 2019 (1). The claimant notified ACAS of his intention to make a claim under the Early Conciliation Scheme on 19 July 2019, and the Early Conciliation Certificate was issued on 19 August 2019 (16).

326. So far as the claim of unfair constructive dismissal was concerned, there was no doubt that the claim was presented within the statutory time limit.

327. However, on the basis that the claimant wished to present a claim of disability discrimination arising from the events concluding on 6 April 2018, it would have been necessary for him to present his claim within three months of that date, namely by 5 July 2018. Since the Early Conciliation process was not commenced until 19 July 2019, more than one year later, the claim of disability discrimination was plainly lodged outwith the statutory time limit.

328. In order to determine whether or not the Tribunal has jurisdiction to hear such a claim, we must consider whether or not it would be just and equitable to allow the claim to proceed though late.

329. In the well known case of **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434**, the court confirmed that it is of importance to note that time limits are exercised strictly in employment and industrial cases. "When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

330. **British Coal Corporation v Keeble [1997] IRLR 336** is authority for the proposition that the Tribunal should consider the prejudice which each party would suffer. Factors which the Tribunal require to consider are set out in that case, including the length and reason for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued had cooperated with any requests for information, the promptness with which the plaintiff had acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

331. The length of the delay in presenting the claim, as noted above, is more than 12 months. The claimant then requires to provide evidence as to the reason for the delay. It is for the claimant, who bears the burden of proof, to demonstrate why the primary time limit has been missed, and why the claim was not presented sooner than it was (**ABM University Local Health Board v Morgan UKEAT/0305/13/LA**).

332. There is no evidence presented on behalf of the claimant in this case as to why the claim of direct discrimination was presented more than 3 months after the final act complained of. No reasons have been advanced by the claimant in order to allow the Tribunal to draw any conclusions in terms of the **Keeble** case.

333. Although the claimant has given evidence which demonstrates that he was absent from work on sick leave for the entirety of the period between 6 April 2018 and 1 July 2019, when he resigned, it is quite clear that he, with the assistance of his wife, was able to compose and submit detailed grievances, and engage in lengthy and complex correspondence, with the respondent. The evidence does not allow the Tribunal to draw any substantive conclusion as to why it was not possible for him to present the claim within the 3 months' time limit set down by statute. There is no suggestion that the respondent failed to comply with any requests for information, or misled the claimant as to his rights in this regard; nor is there any evidence to demonstrate that the claimant took appropriate and

prompt steps to seek advice or carry out research as to his right to make a Tribunal claim, in that period.

334. The written submissions tendered on the claimant's behalf in this case make no reference to the issue of time bar, and nor did the oral submissions made on his behalf.

335. Standing the authorities which bind the Tribunal's approach in determining this issue, it is our conclusion that the claim for disability discrimination has been presented more than a year after the statutory deadline had passed, with no reason for that delay provided to the Tribunal. Accordingly, it cannot, in our judgment, be just and equitable, to allow the claimant's claim of direct discrimination to proceed as it was presented so long after the expiry of the deadline.

336. The Tribunal must consider the issue of potential prejudice to either party, in addition. However, in our judgment, this issue is subsumed by the claimant's failure to provide any reason for the delay in presentation of the claim. It might be suggested that the claimant would suffer much greater prejudice in the event of dismissal of his claim than the respondent would in having to defend that claim, having proceeded with a full merits hearing including the discrimination claim, but in our judgment, that would be unfair to the respondent, and would fail to take proper account of the circumstances in the case. The reality is that this matter was reserved as a preliminary issue to be dealt with at the final hearing. The consequence is that it is inevitable that the respondent would require to present their defence to the discrimination claim as part of that hearing. However, that does not mean that there is therefore no prejudice to them if the matter were allowed to proceed.

337. Further, no submission has been made to us that the claimant would suffer any prejudice by the dismissal of this claim. As a result, the point has not been advanced on his behalf.

338. Accordingly, it is our conclusion that the claimant's claim of direct disability discrimination must be dismissed, on the basis that the Tribunal lacks jurisdiction to hear it.

339. In these circumstances, we do not propose to address the remaining issues arising from this claim.

- **Did the respondent unlawfully deprive the claimant of pay in relation to annual leave accrued but untaken in terms of his entitlement under the Maritime Labour Convention and Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 (MLC)?**

- **Did the respondent unlawfully deprive the claimant of sick pay in terms of his contract of employment, MLC and the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014?**

340. The parties intimated at the outset of the hearing that the respondent admitted liability in respect of the claimant's claim in relation to pay for annual leave accrued but untaken as at the date of termination of employment. No submissions were made in detail about that aspect of the case, other than that Ms Shiels confirmed that the respondent had agreed to make payment to the claimant in respect of all unpaid holiday pay accrued from 27 April 2018 to 1 July 2019, and that that claim was expected to settle.

341. The Tribunal has decided that since this matter has been resolved between the parties it is not necessary to issue any decision in relation to this head of claim.

342. If, however, that is not correct, and the holiday pay claim remains outstanding, it is open to the claimant to seek reconsideration of this aspect of the case, and the Tribunal will then issue a determination of the matter.

343. So far as the sick pay claim is concerned, the claimant seeks payment of 26 days of full pay entitlement from the respondent.

344. The claim is set out in the claimant's further and better particulars (95). It is stated that the respondent backdated the start of the 26 week period of sick pay entitlement to 1 April 2018, despite the claimant not being absent on sick leave at that time. He asserts that he was entitled to receive his full salary for the work performed in the March/April rotation up to 5 April 2018 and also the corresponding field leave to 25 April 2018. This remuneration was already due to the claimant under his contract, and was not affected by the commencement of sickness absence, and as a result, by backdating sick pay to 1 April 2018, the respondent deprived the claimant of 26 days of sick pay.

345. The respondent's position is that this did not amount to a breach of contract, and that this betrays a flawed understanding of the statutory MLC sick pay regime; and that in any event he acquiesced by failing to challenge the calculation of his sick pay until May 2021. He received a full explanation of how his sick pay was calculated in July 2018, and stopped receiving company sick pay in October 2018.

346. The respondent also relied upon the memorandum sent to the claimant on 18 December 2015 (127/8) which, they said, the claimant admitted receiving under cross-examination, altering his position under re-examination.

347. They also argue that there is no evidence that the claimant ever challenged that the December 2015 memo constituted an effective variation of the contract of employment insofar as relating to sick pay entitlement.

348. Whether the claimant was sent, and received, the memo of December 2015 was the subject of some questioning in this case. The email which sent the memo to the claimant himself was not presented, on the basis, as we were advised, that it was no longer available. The claimant stated in evidence that he had not received it or had no recollection that he had

received it; under cross-examination, it is correct to say that he accepted that he had received and seen it, but retreated from that position when asked (quite properly) about it in re-examination.

349. We were not convinced that the claimant did receive the memo, which may explain why he never challenged it thereafter. He certainly did not seem to have any recollection of its terms.

350. Ms Boston had not initially taken the view that the claimant was entitled to MLC Sick Pay at all, as he had not left the vessel for medical reasons. Having reflected upon it and discussed the matter with the HR Manager she decided that since it was not clear that the claimant was definitely not entitled to it, she would arrange for him to receive MLC Sick Pay. She wrote to him on 30 May 2018 to confirm this (469).

351. In an email to the claimant on 13 July 2018, Ms Boston submitted to him the following explanation for the payment of sick pay to him (474):

"As a courtesy, I am writing to inform you that your entitlement to receive enhanced sick pay pursuant to the requirements of the UK MLC Regulations ('MLC Sick Pay') will be ending on 21st July. Whilst you remain unfit for work, your ongoing entitlement is to be paid company sick pay at a rate of 50% of your basic salary for a further period of 11 weeks and 5 days from 22nd July to 11th October inclusive.

I appreciate that the MLC Sick Pay provisions are complicated and I therefore thought that it might be helpful to provide some further explanation regarding the way in which your sick pay entitlements have been calculated. According to the regulations, the entitlement to be paid MLC Sick Pay is for a maximum period of 16 weeks from the first day of your incapacity for work. In your case, this 16 week period therefore comes to an end on 21st July and you will no longer be entitled to receive MLC Sick Pay after that date. As previously noted, your MLC Sick Pay period was backdated from 1st April to ensure that you received your full statutory entitlement in this regard.

During the 16 week MLC Sick Pay period, the company's statutory obligation was to 'top up' any sums which you would otherwise have been entitled to be paid by the company during your period of absence by the amount required to ensure that you were paid full basic wages during this period. This means that the MLC Sick Pay which you have received is inclusive of, and not payable in addition to, any other sums which you would ordinarily have been entitled to be paid under your contract of employment or the company sick pay scheme. As such, there was no obligation on the company to pay any additional sums to you by way of MLC Sick Pay whilst you remained on full pay between 1st April until the end of your accrued leave period on 25th April.

At the end of your accrued leave period your usual entitlement would have been to be paid company sick pay at a rate of 50% of your basic salary for a maximum period of 26 weeks (reduced by 13 weeks due to a previous absence within the last 12 months = 24.1 weeks). As you are aware, the entitlement to MLC Sick Pay is more generous than the entitlements under the company sick pay scheme. As such, between 25th April and 21st July the company 'topped up' your company sick pay entitlement by an additional 50% of your basic salary to ensure that you were paid full basic wages during this period. This means that you will still have a remaining entitlement of 11 weeks and 5 days of company sick pay (last day 11th October)…"

352. As we understand it, the claimant's claim is for 26 days' outstanding pay in respect of the period between 1 and 25 April 2018, and that is the extent of the claim.

353. The respondent's explanation for starting the MLC Sick Pay period at 1 April 2018 was that that was the start of his illness. This was, it appears, a concession only made after the matter was raised with them, but is based on the terms of Regulation 50(2) and (3) of the Merchant Shipping (Maritime Labour Convention)(Minimum Requirements for Seafarers etc) Regulations 2014. The reference period is to begin at the

date of the first day of sickness, which the respondent submits is 1 April 2018.

354. The effect of the MLC Regulations is that the claimant should receive no less than contractual pay for the period of 16 weeks beginning with the start date (1 April 2018).

355. On the basis of the evidence, the claimant received MLC Sick Pay from the respondent until 21 July 2018 (as set out in Ms Boston's email above), a period of 16 weeks from 1 April 2018.

356. Since that is the basis of the claim for sick pay before us, the claimant has not discharged the burden of proof upon him to show that he has been unlawfully deprived of MLC Sick Pay during the appropriate period for which it was payable.

357. Accordingly, in our judgment, the claimant's claim in respect of sick pay must fail.

- **In the event that the claimant is successful in respect of any or all of the above claims, what award should be made to him by the Tribunal?**

358. Since the Tribunal has not upheld any of the claimant's claims, no award is made.

359. We would wish to observe that while the claimant's claims have not succeeded, we were not convinced that the respondent had acted without blemish throughout this case. There were instances of conduct by Mr Miller, for example, which did him no credit, and we were able to understand why the claimant felt that he had been unfairly treated over a period of time, viewing the matter from his perspective. However, we did not consider that this rose to the level of constructive dismissal, and in these circumstances we were unable to uphold any of the claimant's complaints in this and other regards.

360. We are indebted to the representatives in this case, Ms Shiels and Mr Jones, for their courtesy and readiness to assist the Tribunal throughout the hearing, and for the professionalism shown in the way in which they conducted their respective cases.

Employment Judge: M A Macleod

Date of Judgment: 14 April 2022

Date Sent to Parties: 19 April 2022