EMPLOYMENT TRIBUNALS

Claimant: Mr W Ladyman

Respondent: Maritime and Coastguard Agency

Heard at: Cardiff in person (but with Ms Wiles attending by video)

On: 14 (reading day), 15, 16, 17, 18, 21, 22, 23 and 24 October

Before: Employment Judge R Harfield
Ms L Thomas
Ms E Wiles

Representation
Claimant: Mr Ladyman represented himself
Respondent: Mr Probert (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The complaints of protected detriment and protected disclosure dismissal are not well founded and are dismissed;
2. The Claimant was a disabled person at the material time;
3. The complaint of failure to make reasonable adjustments is not well founded and is dismissed;
4. The complaint of unfavourable treatment because of something arising in consequence of disability is well founded and is upheld;
5. The complaint of "ordinary" unfair dismissal is well founded and is upheld;
6. The successful complaints will be listed for a remedy hearing.

REASONS

1. Introduction

1.1 This is a case involving complaints of protected disclosure detriment and dismissal, disability discrimination, and "ordinary" unfair dismissal. The Claimant had been legally represented in the earlier stages of the proceedings, including at case management stage, but on 10 October 2024 notified the Tribunal that he had become self-represented.

1.2 The first day of the hearing was a pre-arranged reading day (which had been arranged at the time the Claimant had representation). On the morning of the second day the Claimant applied to rely upon his own supplementary bundle, which was made up of 3 parts. The first section, made up of 10 pages of correspondence from 2017 through to 2020 the Respondent did not consider relevant but from a pragmatic perspective did not object to its addition. The second section was labelled by the Claimant as being a public disclosure evidence file. The third section was a supplementary witness statement for the Claimant. The second section was lengthy and was, in effect (albeit not termed as such by the Claimant) further witness evidence by him. Both section two and section three contained new information and new allegations. The Claimant's position set out in those disputed items was that he considered Katy Ware [KW], Director of UK Maritime Services, potentially working in conjunction with others, had ultimate responsibility for his dismissal due to protected disclosures he had made. The Claimant's section 2 and section 3 evidence was seeking to draw threads together in relation to that premise. The Claimant said it had always been the basis of his case, but not one that his trade union had permitted him to bring. We did not allow the Claimant to rely on his section 2 and section 3 evidence on the basis of the substantial prejudice that would be caused to the Respondent by its late admission, having to answer a substantially changed case. Witness statements had been exchanged on 22 August 2024 and if the Claimant and his professional advisors were not aligned as to how the Claimant's case was to proceed, such matters should have been brought to a head much earlier than the start of the final hearing. The Claimant also confirmed he was not seeking a postponement of the final hearing.

1.3 On the afternoon of the second day we therefore started to hear the evidence. We had witness statements from and heard oral evidence from the Claimant and Ben Middleton [BM] (National Secretary at the Prospect trade union and at the time the full time officer for members in the Maritime & Coastguard Agency). We also had a witness statement from a witness for the Claimant who was not called; Mr Duncan. For the Respondent we had witness statements from and heard oral evidence from: Mr Shivakumar Balasubramanian [SB], (Grade 7 Technical Manager, responsible for the South Wales and West of England region based in Cardiff and who dismissed the Claimant); and Gwilym Stone [GS] (Deputy Director of Regulations and Standards, and who heard the Claimant's appeal).

1.4 We also had a main hearing file (page numbers refer to this in brackets [ ]), a supplemental hearing file (page numbers refer to this as [SB]), the Claimant's additional 10 pages of documents, a reading list, a schedule of loss, a counter schedule of loss and an agreed List of Issues. In closing we had written submissions from both parties and also heard oral submissions. We were unable to complete our deliberations in time to deliver an oral Judgment on the afternoon of the last day of the listing, 24 October 2024. We the reserved the Judgment to be delivered in writing. During the hearing we regularly ensured that the Claimant had the breaks he needed to mobilise his back. Employment Judge Harfield apologies for the delay in delivering this Judgment which was caused by the pressure of other judicial work.

2. Background and Findings of fact

Introduction

2.1 The Maritime and Coastguard Agency is a governmental body: it is an executive agency falling under the Department for Transport. It produces legislation and guidance, and provides certification to ships and seafarers. Part of that is a survey and inspection regime to enforce standards for ship safety and also for environmental factors such as pollution.

2.2 The Claimant joined the Respondent in 2016 with considerable experience in the private sector. The Claimant was initially the Surveyor in Charge in the Aberdeen Marine Office.

2.3 It is the Claimant's case that during his employment he made a series of protected disclosures between February 2015[1] and December 2019 that are set out in the List of Issues appended to this Judgment and also set out in more detail in the Claimant's further particulars found at page [77] and in the Claimant's witness statement. We summarise them in brief because they are contained in those documents and because the Respondent did not dispute the Claimant made at least some protected disclosures; preferring instead to focus their case on the question of causation. But we did in our decision making pay full regard to what the Claimant says about the disclosures he says he made. On our reading day we also read the documents we had been directed to about the disclosures.

2.4 There is also considerable history between the parties in terms of the Claimant's employment prior to the events that are directly before us. They are not matters about which we make findings of fact. In particular, the reason why certain earlier things happened is in dispute between the parties but these earlier things are not direct complaints before us (for example they are not complaints before us of protected disclosure detriment). We therefore did not hear the evidence to be the position to fairly make findings of fact. But it is relevant to summarise some of the background.

Background and Protected Disclosures

2.5 The Claimant says that he started to regularly make protected disclosures, both orally and in writing (including in monthly management reports), from May 2016 onwards until December 2019 about matters such as: vessels operating without certificates for months or years; that Spanish fishing vessels under the UK flag were in an appalling state of survey; non-application of the International Convention for the Prevention of Pollution from Ships (MARPOL) relating to vessels in Scotland, Spain and Holland; and that domestic passenger and larger fishing vessels were operating without proper certification. He says that in June 2016 (and onwards until October 2016 and again in December 2019) he made disclosures, including at the management board and in several management reports, about the lack of timely provision of PPE (including safety glasses) and the absence of a safety culture in the Respondent including the lack of fall arrest harnesses for working at height. He says he never received a response. He says that in August 2016 he made a verbal disclosure (made again in writing in December 2019) about the lack of a functional quality system (ISO9001) and a disclosure to the National Management Board that surveyors were signing off surveys based on documents completed by fishermen and meaning that the vessels had not been properly surveyed by surveyors. He followed it up in a management report. He says that in December 2016 (and again at various dates in 2017, early 2018

[1] This appears to pre-date the start of the Claimant's employment but was never explained to us

and December 2019) he made protected disclosures about the lack of a proper authorisation system at the Aberdeen MO and about the general lack of competence of Aberdeen surveying staff and failures to carry out robust surveys and inspections.

2.6 In March 2017 the Claimant went through an interview process and was successfully appointed as Technical Manager of the Aberdeen Office. He continued to provide monthly management reports about functions omitted or improperly implemented. He says that in August 2017 he disclosed some Orkney Ferry vessels were missing certification, vessels were operating with repeated short term certification without stability verification, and operating unlawfully in breach of MARPOL. The Claimant says that in October 2017 he told Jo Bastbohof [JB] from HR and Thomas Elder [TE] Assistant Director North that he had been told some surveys were receiving inappropriate gifts of fish, and he followed this up in a report to Jane Jackson [JJ] in November 2017. He says he also told TE about it again. The Claimant says that towards the end of 2017 he found that Aberdeen surveyors had been operating without powers for detention of Warrant Cards for at least 8 years. He says that he was also finding serious issues about technical and safety failures on vessels such as lack of intermediate surveys, surveys without visits and missing certification for fishing vessels. He says vessels from Spain and Holland were found to be in an appalling standard, which he reported, such as the vessels Brisan and Soli Deo Gloria (about defective oil filtering equipment). The Claimant says he also took to KW a proposal to work in partnership with representatives of the Spanish Parliament to improve matters, but did not get a response. He included this all in a management report. He says he raised concerns with KW and TE and others about such matters in late 2017 /early 2018 and had agreed to have a meeting with TE on 26 January 2018 to discuss things further, but before that happened he was suspended.

2.7 On 23 January 2018 the Claimant was suspended for allegedly sending surveyors out without the correct authority and the bullying and harassment of staff. There had been, between 16-18 January 2018, an audit which was reported on 22 January 2018. The Claimant says he did not see the audit report at the time but that it included concerns about issues he had already been raising such as the competence of surveyors, compliance with health and safety standards, out of date warrant cards, failure to make inspections and PPE issues. The Claimant considers that his suspension was done as a means to conceal the practices he had previously highlighted in protected disclosures. There is a substantial factual dispute between the parties about that. But that factual dispute is not one that that is directly before us, because the Claimant's suspension in January 2018 is not a pleaded protected disclosure detriment in this case. Because of that we did not hear evidence about it from witnesses directly involved, and it is not something we can fairly make express findings of fact about.

2.8 The suspension and disciplinary case led to the Claimant attending an investigation meeting in May 2018 with Mark Rodaway [MR]. He says he told MR about various matters including the possible bribery and corruption relating to gifts of fish, but that he understands that TE and JJ then denied knowing about it. It is the Claimant's belief that the minutes of that meeting were manipulated to hide protected disclosures or information relating to them and he raised further complaints about that. It is the Claimant's belief that from this point in time, if not earlier, it was the Respondent's intention to dismiss him Again, these are contentious issues but are not pleaded

detriments in the case and they are not matters about which we can directly and fairly make findings of fact.

2.9 There was a disciplinary hearing in April 2019. In May 2019 the disciplinary case against the Claimant at first instance, decided by Chris Thomas [CT], was found to be not proven and CT found misconduct had not occurred. CT concluded that the leadership and management skills the Claimant had displayed were poor, but that the Claimant's introduction to the Respondent and how to be an effective leader had been woefully inadequate. CT said there was no evidence the Claimant had acted in a way to cause distress to others or an intent to bully, but that some staff had considered the Claimant had displayed poor leadership and management, including management style. CT said the Claimant was unable to lead and manage those staff at the Aberdeen Marine Office and the relationship had broken down to such an extent that it would be difficult for the Claimant to stay there. CT recommended that the Claimant be transferred out to a non Technical Manager G7 Surveyor Position.

2.10 The Claimant appealed. The appeal was heard by John Morphew [JM], with the decision issued in July 2019. JM said in his opinion the allegation that the Claimant had failed to adopt MSDS should have been found to be proven. JM substituted a finding of minor misconduct. He said that whilst that would ordinarily lead to a recommendation of reinstatement as Technical Manager in Aberdeen with other measures in place, taking account of the relationship between the Claimant and staff at Aberdeen he supported the recommendation the Claimant be offered the opportunity for relocation at Grade 7 Surveyor level and that the Claimant be prevented from being in a management position.

2.11As we understand it, the Claimant's belief is that these things were all happening to him because of his protected disclosures and a consequential desire on the part of the Respondent to force him out. But again, they are not allegations of protected disclosure detriment in this case and because of that we have not heard direct evidence about them to be in a position to make such findings.

2.12 The Claimant was told the only available G7 Surveyor vacancy was at the Cardiff Marine Office and that he otherwise risked being considered for dismissal. He ultimately decided to take it up.

2.13 The Claimant first started in Cardiff as a Consultant Surveyor in October 2019. He says that on his arrival his line manager was Anthony Heslop [AH], then Assistant Director South. The Claimant says that AH was aggressive towards him and placed him under undue pressure to complete questionnaires needed for certain eligibilities (i.e. what the Claimant was certified to survey and inspect). The Claimant lodged a grievance about it, saying he felt he was being set up to fail. The Claimant was signed off sick.

2.14 During his sickness absence the Claimant sent a letter to JJ, the Chief Finance Officer, and who he understood to be the responsible officer for disclosures, headed "Public Interest Disclosures." The Claimant outlined in detail 11 matters of concern which he said relating to two main themes: the use of public funds and the conduct of officers; and endangering lives and the environment through failures of compliance with maritime safety and merchant shipping law. The 11 matters were: non-application of MARPOL conventions for vessels in Scotland, Spain and Holland; the operation of

domestic passenger and larger fishing vessels without proper certification; the lack of a proper authorisation system in place at the Aberdeen Marine office; the lack of timely provision of PPE and the lack of a safety culture in the organisation; an allegation that AH had provided the password for the questionnaire answer site to staff to facilitate cheating on questionnaires and that subsequently some staff had been dismissed for this cheating when no action was taken against others known to have done so; the acceptance of gifts by surveyors; the general lack of competence of Aberdeen Marine Office surveying staff and failure to carry out robust survey and inspection; the absence of powers of detention for warrant cards for Aberdeen surveyors for a period of at least 8 years; the wilful manipulation of recruitment outcomes to falsely create a recruitment and retention problem to justify a business case for significant salary increases on order to breach the Treasury pay cap remit regime; the provision of deliberately inflated salary figures within the business case presented to DfT/Treasury/Cabinet Office to secure the monies for the Survey and Inspection Transformation Programme (SITP) called "Buoyant Futures"; and the lack of co-operation with Marine Accident Investigation Branch, file tampering and loss of security files. He also sent some samples of evidence relating to specific vessels.

2.15 On 2 February 2020 JJ said she needed to commission the Government Internal Audit Agency [GIAA] to do a fact find. Covid then had an impact and in May 2020 the Claimant was placed on a period of paid special leave.

2.16 The GIAA ultimate report can be found at [289]. On 15 March 2021 the Claimant was only sent an abridged summary found at [387] because of expressed concerns relating to confidentiality. One disclosure the Claimant had made related to an allegation, (which we simplify here) that in essence there had been a deliberate strategy widespread in the Respondent to drive down the recruitment and retention of staff to create a false business case to the Government for significant salary increases in the Respondent. The GIAA concluded that the business case was sound. The GIAA did find potential procedural errors in relation to the earlier investigation and disciplinary case against the Claimant. The GIAA said that failures in MCA policy had occurred in the treatment and investigation of the Claimant and given the current status of his employment, scrutiny of those processes would be likely to receive criticism at an employment tribunal. But the GIAA considered the outcome from the decisions at first stage and appeal stage in terms of moving the Claimant to Cardiff was reasonable in the circumstances. The GIAA had also looked into the complaint about the alleged sharing of SCAS questionnaires and said no evidence was found that the confidential password for SCAS questionnaires had been shared, but evidence did show the copying of questionnaires and procedural weakness in the investigation and discipline procedures. An allegation regarding certification and surveying competence was postponed because it was said it could not be dealt with adequately due to remote working under Covid restrictions.

2.17 The Claimant in general considers that the investigated issues were misdirected and that other protected disclosures he had raised were not investigated. Again, these are not matters directly before us to make finding of fact about. But the GIAA findings reinforced the Claimant's view that the earlier disciplinary case against him and his suspension had been done to supress matters he was disclosing. The Claimant's paid special leave came to an end on 25 April 2021. By that time the Claimant had had significant periods of absence not through his own fault due to suspension, sickness absence and paid special leave.

April 2021 to October 2021

2.18 These are not matters about which we received direct witness evidence, but we note the performance management (ie appraisal) document found at SB312 from June 2021 says that the Claimant had been tasked with completing his initial training (MSDS) carried out remotely at home because the Marine Offices remained closed due to Covid. It was said that by June 2021 the Claimant was making good progress with MSDS training and gaining eligibilities for survey and inspection tasks. He had completed the majority of the required questionnaires and training courses and plans were being put in place for the Claimant to attend the Hull Marine Office for on the job training aspects.

2.19 The quarterly conversation at 5 October 2021 states that the Claimant continued to make good progress with his initial MSDS training, all required questionnaires were complete, and he had gained eligibility for Port State Control (i.e. foreign vessels in UK ports). It is said the Claimant was actively seeking opportunities to complete other on the job aspects of initial training in particular Domestic Passenger Vessels, ISM, ISPS, MLC and Fishing Vessels and had been working with the Glasgow Marine Office on this. It states the Claimant had compiled his training records and had submitted them to his line manager for review with a view to gaining eligibilities for a number of Survey and Inspection activities. All surveyors are also required to revalidate eligibilities every 5 years and it is noted it had been agreed the Claimant would make a proposal to Surveyor Training to extend his revalidation period into the following year to allow time for the required surveys, audits and inspections to be completed. It was noted that with Covid restrictions easing discussions were taking place about the Claimant's relocation to Cardiff where he was due to start on 4 October 2021 and when line management would transfer to SB. As we understand it from those contemporaneous appraisal documents the Claimant was then granted a 1 year extension to his revalidation process by Surveyor Training due to expire on 31 December 2022.

Initial management by SB

2.20 The Claimant complains about SB's line management of him from October 2021 onwards. The Claimant alleges that SB gave him few opportunities to conduct surveys when he was under pressure to do surveys for revalidation in circumstances where he was left with only a year to get it all done. The Claimant alleges that SB also in April 2022 placed him unfairly on an action plan with spurious targets and unachievable timeframes. It is not in the Claimant's own witness statement but BM's witness statement alleges the Claimant felt that SB was acting under instruction rather than highlighting legitimate concerns and that SB had indicated the plan was not SB's idea and had come from other people elsewhere and pressure from elsewhere. The Claimant also says that responsibility for arranging an Activity Monitoring that was needed lay with SB and that SB failed to do so over the period of a year.

2.21This was a set of allegations the Respondent was somewhat ambushed with because again these complaints are not there as pleaded protected disclosure detriment complaints. Making findings of fact has also been hampered by the repeated error (but genuine error) in SB's witness statement where he records taking over line management of the Claimant in October 2022, and not the correct date of October 2021, which then throws out of sync other dates in the witness statement.

2.22 The best contemporaneous record we have appears to be the appraisal documents found at [SB314] where SB noted on 20 January 2022 that the Claimant continued to develop his technical competence in accordance with MSIS and the Cardiff Marine Office business needs and had done well to get his Port State Control qualification. Some outstanding items from the previous quarter were carried forward with a completion date of 31 March 2022. SB recorded there a concern about the quality of some of the information held about a Domestic Passenger Vessel qualification due to be sent to Surveyor Training and which the Claimant was to have another look at. For example, there was an unsigned inspection report with wording "PP". It was recorded that the Claimant had completed the questionnaire for Fishing Vessels under 15 metres but was to complete the full training for the vessels because of regulations changing during and after his absence. He was to witness 3 inspections and carry out two inspections under observation. It was noted that the extension had been granted for revalidation for existing qualifications and the Claimant would need to provide evidence to Surveyor Training where necessary to do the requisite numbers and training for revalidation.

2.23 The next quarterly conversation is recorded as 12 April 2022 [SB315] where the Claimant's rating had dropped from "developing" to "supporting. " It is said there had been a lack of progress in the Claimant's training with outstanding items from quarter 3 and "*As advised by HR, Action plan to be developed and agreed."* The action plan is at [SB330] (which also incorporates subsequent amendments made in July 2022).

2.24 There is a quarterly conversation recorded on 19 July 2022 with a rating of "achieving", saying the Claimant had done well to complete the tasks in the action plan and had contributed to the business with Port State Control inspections and fishing vessel inspections, and supporting HQ as part of the role as consultant surveyor.

2.25 The action plan shows the Claimant being given a task of submitting his completed training record to SB for his application for qualification for Domestic Passenger Vessels by 22 April 2022 so that SB could review it and submit to Surveyor Training. SB said in evidence this was a matter of tidying up queries he had raised about the quality of some of the records the Claimant had used, and which appeared that the Claimant could easily do. It is marked as completed on 19 July 2022. For Fishing Vessels under 15 metres the Claimant was to undertake sufficient inspections (liaising with the Business Manager about arranging them) and then submit his training record by 31 May 2022. It is marked as closed on 19 July 2022. These were two new qualifications that SB was keen for the Claimant to obtain to support the work at the Cardiff Marine Office.

2.26 There were initially tasks set to obtain other qualifications for Code Vessels under 24 metres, and PSCC Class II surveys which are marked in July 2022 as in effect withdrawn on the basis the Cardiff Marine Office had at that time sufficiently trained surveyors for the tasks and the requirement for the Claimant to be qualified for these would be periodically reassessed. There was a task initially set about achieving revalidation for existing qualifications which is crossed through in July 2022 with the statement it was part of revalidation training and arrangements with HQ. There are then some entries about more soft skills such as collaborative working.

2.27 On 6 October 2022 Christian Olsen [CO], Assistant Director and SB's line manager, emailed SB and Paul Hughes [PH], the business manager for the Cardiff Marine Office, saying there were several consultant surveyor work packages that required focused attention. CO asked if either the Claimant or another unidentified individual would be available for 3 months, working for Roger Gee [RG] for 4 weeks in every 5 week period. The fifth week would be spent on the Port State Control roster. SB replied on 10 October to say the Claimant would be best placed to assist and was available subject to completing outstanding work the Claimant had already taken on [SB346]. On 11 October 2022, CO emailed SB, RG, and the Claimant to say the Claimant had volunteered to assist and a start date was to be arranged. After 3 months they were to review the outstanding work and possible solutions [392]. During 2022 the Claimant had been suffering from increasing difficulties with his back. We set out our findings of fact in relation to that history in the Disability analysis below. But note here that the Claimant said in evidence, which we accept, that he discussed his difficulties with his back with RG who said, in effect, that as long as the work was done he did not mind what time of day it was done by the Claimant.

2.28 There was revalidation meeting between the Claimant and SB on 26 October 2022 but we appear to have no real reliable information about what was said.

2.29 On 15 November 2022 RG emailed CO, SB and Prasad Panicker [PP] (RG's line manager) [396] thanking them for the extra resource in hopefully reducing the backlog. RG said however he had not been able to utilise the Claimant yet due to other commitments and it seemed the first availability was probably in about 4 weeks' time. RG asked for a discussion and also a discussion about whether the Claimant could have a recent survey of a steel suction dredger taken into account for Activity Monitoring with remote activity monitoring of the survey. SB replied to say the Claimant had been released from Cardiff Marine Office work since it was agreed. SB said they did not carry out remote Activity Monitoring [396]. RG responded to say the Claimant was with SB the following week for Port State Control and had said something about fishing vessels and asked if the Claimant could be released to start in earnest on Consultant Surveyor work.

2.30 On 25 November 2022 the Claimant emailed SB saying the revalidation evidence had been reviewed and there was one Domestic Passenger Vessel and one Dangerous Goods Survey outstanding with all others being accepted. The Claimant said to SB that Domestic Passenger Vessel authorisation was not possible to achieve due it being seasonal work with the surveys stopping in May 2022. The Claimant asked for an extension of 6 months to get this sorted while or after working with RG for 3 months. The Claimant said the Dangerous Goods one was one short and he had tried but they were not available in the Cardiff area. The Claimant said he had tried to attend at Glasgow but was not able to secure a vessel at the right time. He sought a similar 6 month extension to get it arranged in Plymouth or Glasgow [399]. SB forwarded the request on to CO and Surveyors Courses saying he had not seen the Claimant's submission for revalidation.

2.31 RG replied saying the Claimant had recently attended the Revalidation Course and there had been reminders issued about that and Activity Monitoring. RG said the Claimant required an additional Activity Monitoring. RG also said the Claimant had one Domestic Passenger Vessel (which we note was one of the eligibilities SB had raised concerns about in terms of the quality of the paperwork) and one Dangerous Goods

outstanding and they had requested the Claimant speak to SB to gain line management approval for a possible extension. RG said if no extension had been received by 31 December and insufficient evidence provided, the Claimant would lose relevant eligibilities and may lead to the Claimant not being able to undertake key parts of the role [398]. As we understand it the Activity Monitoring was particularly critical because its absence would affect nearly every eligibility in the revalidation process and not just, for example, Domestic Passenger Vessels or Dangerous Goods.

2.32 On 30 November 2022 the Claimant was signed off work with severe lower back pain from 28 November 2022 to 27 December 2022 [394]. The Claimant's back had locked completely on the night of 28 November. He was in acute pain and was unable to get out of bed for 3 days, until he was able to see the doctor on 30 November and was given codeine.

2.33 On 1 December the Claimant emailed SB and PH with his sicknote and said on the Monday he had found he was unable to stand up and his left leg seemed to be restricted in use with possible sciatic nerve issue. He said he was currently on strong pain killers until he could see a specialist hopefully later the following week, and he would update when he had a better understanding of how to repair the issue from the consultant [409]. SB replied to say to get well soon and to take care and he would inform RG that the Claimant would not be available for RG's work [409]. SB also informed CO.

2.34 On 2 December SB emailed Surveyors Courses and RG noting the outstanding revalidation requirements and identifying the Claimant was currently off sick for 1 month. SB sought an extension of 6 months for completing the tasks so the Claimant did not lose his eligibilities [402]. RG replied to say he was content to extend the relevant eligibilities for a period of 6 months and they would discuss this at Surveyors Training Group on Tuesday and confirm the acceptance of the postponement of the Activity Monitoring requirement, and they would also explain to the STG that the Claimant was off sick. RG said there was to be no further extension without Assistant Director approval [401]. On 16 December a temporary statement of eligibility was issued until 30 June 2023 [416-419]. The eligibilities listed all state they are pending completion of Activity Monitoring.

2.35 SB said in evidence that he held genuine concerns about the Claimant's progress when he placed the Claimant in the "supporting" category. He said he felt there was hesitation from the Claimant, for example in providing the missing data in the Continuous Training Record. SB said the advice from HR had been that SB needed to issue an action plan as a way to set targets for the Claimant and support him to move out of the "supporting" category. SB denied any other influence or pressure. SB said the Claimant then reacted badly, believing there was something sinister about it. SB said that by the July the Claimant had achieved the things that were important to the Cardiff Marine Office which were: Port State Control, Domestic Passenger Vessels and Fishing Vessels under 15 metres. SB said, in effect, that he decided at that point to back off, given the Claimant's reaction and he dropped in the action plan some additional qualifications where he had originally set targets for the Claimant to obtain, such as Code Vessels. SB said that because of the Claimant's reaction and because SB thought at the time he had sufficient trained surveyors for those specific tasks. SB said the Claimant was dealing directly with Surveyor Training over revalidation, including whether there were prospects of keeping older qualifications valid gained by

way of APL(advanced prior learning) without necessarily having undertaken all the survey requirements. SB said he decided to leave the Claimant to take that further with Surveyor Training and so again SB deleted it as a specific target in the action plan. SB said he was also trying, in difficult circumstances, to respect the Claimant's experience, seniority and give the Claimant some personal autonomy. SB said he likewise understood the Claimant was dealing directly with RG about the outstanding Activity Monitoring, and which RG and CO had suggested may be a way of covering off some outstanding surveys, and again he was trying to respect the Claimant's personal autonomy in doing so.

2.36 In our judgement, we accept this reflected the position from SB's perspective. We do not think it likely SB had been placed under some pressure or direction to cause harm to the Claimant's revalidation process or place the Claimant on an unnecessary action plan. We think it likely SB held genuine concerns and was simply advised by HR that an action plan should be given for a "supporting" grading. But then the Claimant, with his personal background and ongoing feeling that the Respondent was "out to get him", subjectively saw sinister motivations behind it, and also felt that he was being micro managed. We think it likely and find that SB did then decide to back off, and in particular, once he thought the Claimant had secured the new qualifications that were important to the Cardiff Marine Office. SB also thought he would in the particular circumstances leave the Claimant to liaise with RG (who the Claimant evidently had a good relationship with) and Surveyor Training about everything else. Of course, no one knew what was going to happen in relation to the Claimant's back at that point in time.

2.37 We think it likely, and find, there were developing and related communication difficulties between the Claimant and SB. It was not helped by the fact that at one point, years previously, SB had briefly been line managed by the Claimant in Aberdeen and now the line management relationship was the other way round. The communication difficulties are shown, for example, by the Claimant submitting his revalidation application without SB knowing about it; the Claimant only contacting SB about the need for an extension as line manager when Surveyor Training told the Claimant he had to; and the Claimant in his email not mentioning to SB the outstanding Activity Monitoring that RG then directly contacted SB about. The Claimant says it was SB's responsibility to arrange Activity Monitoring and it was not difficult for SB to do. SB in evidence acknowledged that, but said he was in the particular circumstances leaving it to the Claimant to sort with Surveyor Training given the Claimant seemed to resent SB's involvement and later on because it was being used as a means to cover some outstanding surveys. We accept that evidence and do not consider that SB was in some way trying to jeopardise the Claimant's eligibilities or set him up to fail. SB did not know the Claimant was going to go on sick leave and indeed when the Claimant did so SB make the application for the extension to allow the Claimant time to get well and complete the outstanding tasks.

<u>Claimant's continued sickness absence</u>

2.38 On 6 December the Claimant said he was waiting to see a specialist to get a solution, was on a stack of drugs until that happened, and it was appearing difficult to see any medical practitioners face to face. The Claimant said he hoped to be fighting fit by the New Year. On 11 December the Claimant emailed SB to say he was unable to see a

specialist consultant at that time and the medication had been strengthened in the interim until an appointment was available. He said he would let them know progress when he knew more. SB thanked the Claimant for the update, and again said he hoped the Claimant felt better soon and to take care [412].

2.39 On 28 December 2022 the Claimant was signed off until 27 January 2023 [422]. The Claimant sent the sick note in on 30 December. On 20 January 2023 SB asked the Claimant for an update on his progress with recovery [423]. At this point in time SB did not think the Claimant's problem and absence was going to be long term and on 25 January 2023 SB emailed the Claimant about the expiry of the fit note and arranging a return to work conversation [427]. SB had thought the Claimant would return to work after a short period of sickness absence and so had not commenced a formal sickness absence process.

2.40 On 27 January 2023 the Claimant was signed off work until 3 March 2023 [428]. The Claimant emailed SB to say he was struggling to be seen by the NHS and understood another sick note would be issued that day. He said was due to meet the musculoskeletal department the following week and would get a better idea after that time. He said he would update after going to the hospital. He also forwarded on the sick note [429].

2.41 At that point SB thought the Claimant's condition and ongoing absence could be more concerning than SB originally thought. SB contacted Kirsten Bevan, [KB], in HR for advice. On 30 January 2023 SB updated KB saying he was conscious the Claimant needed to be invited for a formal conversation. KB replied to say she had sent information about the formal sickness absence procedure, and it would be acceptable to hold a meeting with the Claimant over Teams and they should also consider an Occupational Health [OH] referral [432]. On 31 January KB emailed SB saying a formal health and attendance review meeting was required after 28 days absence with further formal attendance review meetings at month 3 and month 6 if the individual remains absent from work [436]. It was said that during a formal attendance review meeting the manager should undertake the same actions as in an informal review meeting, and also review whether the business can continue to support the absence. She provided model letters. She said she would review draft letters and support SB through the process and was happy to attend meetings.

<u>First Attendance Meeting</u>

2.42 On 31 January SB wrote to the Claimant requesting a meeting under the supporting attendance procedure to take place on 9 February by Teams. The letter said that at the meeting they would discuss any problems which may be affecting attendance, what help and support is available, and how this could help the Claimant maintain his attendance to meet the expected standard. It was said the aim was to help meet the attendance standard expected of the Claimant. The invite also stated: "*However, I must remind you that your employment with the Department could be affected if your sickness absence can no longer be supported. I will let you know what further action will be taken within 5 working days of our meeting. After our meeting I will make a decision on whether or not your absence can be sustained. I will let you know my decision within 5 working days of our meeting."* [435].

2.43 The attendance review meeting took place on 9 February 2023 [439]. The Claimant attended without his TU rep because they thought as a health management meeting the Claimant could attend alone without problem. The notes show the Claimant saying just before Christmas he had been told to switch medication to nerve repair medication for approximately 8 weeks. After Christmas he went to see a physiotherapist who said he should have steroid injections in his back, and he was on a waiting list. Sitting in a car or chair gave him pain down his left leg. He had hoped it would be resolved by then and to be back in work. He had been in the car about 3 times to visit the physio and after 5 – 10 minutes the pain starts. He was happy to see OH. He had been told not to drive on the medication, and it knocked him out for about 12 hours. SB gave an update on work to say the work with RG was no longer available and the Claimant said he had a message from RG to say RG was leaving. A new person was being appointed to RG's post. SB said the Claimant would probably return to the Cardiff Marine Office on a full time basis but the next step was to get the OH referral. SB said: "*we'll get the report then have some thoughts on the work etc on your return, I'll also need to do an outcome assessment and send this to you in 5 days, there is an appeal process to follow should it be needed".* The Claimant said if steroid injections could be done soon he could have an update for them before March, and his intention was to come back to work. He said he did not believe it was a long term thing, it was on the mend, and he was 1 month into the 8 week course of nerve repair medication.

2.44 On 13 February 2023 SB wrote to the Claimant with the outcome of the meeting being the referral to OH [441]. He said: "*I am pleased to confirm that the Agency will still support your sickness absence as you have advised that you are currently in an NHS treatment plan including physiotherapy which is showing positive results. I will review your absence regularly and may reconsider my decision at any time if it becomes unlikely that you will return to work in a reasonable period of time."* The Claimant said he would keep SB advised of progress.

Occupational Health Assessment

2.45 The OH assessment took place on 23 February 2023 with the report being sent on 24 February 2023 [450]. The OH nurse said the Claimant reported suffering from lower back pain for over a year, and the Claimant had continued working but was finding seated duties intolerable as his symptoms got progressively worse. OH said the physiotherapist had escalated a referral to NHS category 3, meaning a referral to a consultant and the Claimant was awaiting an appointment. The physiotherapist had advised it was sciatica and was working on rehabilitative stretches. At the time the Claimant was still finding sitting uncomfortable if seated for more than 10 minutes and he had not able to drive. He could tolerate walking and had started to do this more. He tolerated standing but would need to move to change his position after a while. He could tolerate a horizontal posture and night time pain medication helped him sleep better. The OH nurse noted the physical requirements of the Claimant's role. The OH nurse discussed potential adjustments such as a standing desk for computer based duties when a return to work was feasible. OH said the Claimant sounded positive and hoped his appointment with a specialist came through soon. It was the OH nurse's clinical opinion that the Claimant was currently unfit for work, was undergoing physiotherapy and awaiting an appointment with a Specialist Consultant and a further treatment plan to address the ongoing back pain symptoms. The OH nurse did not give an opinion on a likely return to work saying it was unclear when the Consultant's

appointment would happen, and suggesting an OH review once there had been some progress regarding the medical management plan [451].

2.46 The Claimant sent SB an update on 1 March saying the appointment with the specialist would be mid April, so he expected another sick note would be issued and at the moment he was in the hands of the NHS for timing [447]. The sick note of 3 March signed the Claimant off for back pain under specialists until 5 May 2023 [449]. The Claimant said he would update SB as to prognosis once he had seen the specialist [452]. On 9 March 2023 the Claimant went on to nil pay [485].

Second attendance meeting

2.47 On 12 April 2023 SB sent the Claimant a letter requesting a follow up meeting [453] to take place on 21 April via Teams. It was said "I *would like to meet with you to discuss your progress and what we can do to help you to return to work as soon as you are able."* The letter said the meeting would discuss the Claimant's current status with his health, ongoing treatment, any problems which may be affecting attendance and what help and support was available to help maintain attendance to the expected standard. Under a heading of "after the meeting" it was said that the aim was to help meet the attendance standard and that SB would continue to give the Claimant help and support to enable him to achieve this. It then said: *"However I must remind you that your employment with the Department could be affected if your sickness absence can no longer be supported. I will let you know what further action will be taken within 5 working days of our meeting. After our meeting I will make a decision on whether or not your absence can be sustained. I will let you know my decision within 5 working days of our meeting."*

2.48 The Formal Health and Attendance Review follow up meeting took place on 21 April 2023 [467]. Again the Claimant attended without his TU Rep because they were under the impression it would be a further meeting about the Claimant's current state and medical projection rather than being about dismissal. SB at the start of the meeting said it was a review meeting to discuss any changes on the H&S assessment and to discuss any support for a return to work. According to the minutes, the Claimant reported he had a back seizure about 3-4 weeks previously whilst waiting to see the specialist. He said he had seen the specialist, his back was seized up and was protecting itself and he needed a CT scan to decide the next step which was hopefully taking place in the middle of May. He said there was likely to be one of two options; the first being to fuse parts of the back together to cure it for about 5 – 10 years or to have steroid injections which normally last around 6 weeks and then physio to work on recovering the core strength of the back. He said the consultant seemed confident in fixing it, but they needed to see the CT Scan first and they believed things would return to some normality sometime in July. KB asked if they could have another OH report noting the consultant seemed to be saying that the Claimant could return around mid-July. The Claimant said he was hoping to see the consultant around June and suggested a OH report at that time. The Claimant said he was hoping to be back to normal by August and was out walking daily as the inactivity did not help.

2.49 The notes record KB saying: "*the meeting today is to decide on whether the MCA can keep it going, this is not a reflection on you, also restrictive duties may not be an option for you."* The Claimant said OH had said something similar and that by July they would be talking more about it and by August fighting fit. SB commented that was

all based on appointments and they can keep you hanging around. The Claimant said the local hospital was a small one and they seemed to be dealing with him, but it was outside his control. KB suggested they have a OH review to cross check the information from the medical team. She said the written reply following the meeting may be delayed from the standard 5 days because they would wait for the OH report to be completed. SB said he hoped it would improve for the Claimant soon and they would see him back in work.

Further occupational health report

2.50 On 21 April a further OH referral was sent. The referral said that the Claimant had reported some deterioration since the last assessment and that the Claimant had seen a specialist who had advised a CT scan be carried out in May 2023 and based on the results the specialist, according to the Claimant, would carry out a procedure. It was said the Claimant had said the procedure should take place by July 2023, followed by physiotherapy, with the Claimant expecting a return to work in August 2023 which would take the sickness absence into the 9th month [458]. It was said "*MCA requires to consider if Warren's absence is sustainable and your assessment would help in coming to a decision. The reason for the referral is to assess if the above mentioned time frame by Warren is realistic? In which case how realistic is it? What is the likelihood of Warren returning back to work in August 2023. Are there any potential for delays or complications to be expected, what could they be? And what impact could that have on the time scale? Ie how much further could his return to be after August? If he returns to work in August would Warren be able to carry out the full tasks immediately on return? If reasonable workplace adjustments are required, what could they be and how long could that be for? "*

2.51 On 26 April RG's replacement, Michael Groark [MG], who had replaced RG, emailed the Claimant seeking to give him a piece of consultancy work [470]. PH replied to say the Claimant was on long term sick and at that time they did not expect to see him return for another 2 to 3 months.

2.52 The OH review took place on 2 May 2023 with the report dated 3 May 2023 [471]. The OH nurse said the Claimant had commented his condition had not deteriorated as stated on the referral, but it was a further episode of the back completely locking up but not any worse than before. The Claimant was due to have a CT scan on 15th May, and then be reviewed by the consultant on a definite treatment route. The Claimant was hoping to opt for the steroid injection treatment route. The Claimant was continuing with physiotherapy exercises and the Consultant had given him other specific stretch exercises to release the tension in the back and had been advised to carry on with those exercises for a month. He was trying to wean off the nighttime pain medication. The nurse said: "*I understand he remains optimistic and hopeful for a return to work in some capacity by August."* She said he finds lifting, inactivity such as seated and standing postures to still exacerbate his back. He had done some trips in the car for about 10 miles and his back discomfort gets exacerbated. He was carrying on with walking and the stretches he had been given. The OH nurse said there had been some progress with regards to medical management and the outcome of the CT scan would determine the definitive next step for the Consultant to proceed. She said: "*Mr Ladyman currently remains unfit for work. He is looking forward to the possibility of a return to work in some capacity by August 2023. OH supports that a return on a graded return-to-work pattern in August 2023 could be feasible with the steroid*

injection route. I have advised the outcome of the CT scan and the consultant's decision on the best treatment approach will determine when a return to work can happen. With Mr Ladyman's consent, Occupational Health would be seeking a Specialist Consultant report. This should hopefully address the additional 8 questions in the body of the referral. A consent form has been sent to Mr Ladyman to complete and return to Occupational Health. A further review is recommended in 8 weeks with the hope there would have been progression with Mr Ladyman's treatment and a report would have been received from his Specialist Consultant."

2.53 On 4 May SB emailed the Claimant saying he had the OH report and required a little bit of time to review it because he was on Port State Control cover that week. SB said he would come back to the Claimant with the decision letter by the end of next week [473]. SB sent the OH report to CO [474]. On 5 May the Claimant sent SB a sick note he said was issued to permit the ongoing treatment [477]. This signed the Claimant off until 7 July 2023 [478].

SB's enquiries

2.54 On 5 May 2023 SB emailed PH, Ahsan Khan, Sarah Lawlor and Nick Philips (principal surveyors). SB said: *"I am required to assess how far the business can sustain the continued absence of individuals without affecting the efficient delivery of the S&I operation."* The email said the role supported the Marine Office by providing 60% of their time for survey and inspection activity which had not been carried out for over 6 months to date. He asked for an assessment to be carried out to help determine the business impact of the duties and responsibilities of that role not being carried out in the short time (3 months) and the business impact of the duties and responsibilities being partially carried out i.e. if the Claimant were to return in August 2023 but not on full duties. It was said the assessment may consider factors such as the number of vacant posts, surveyors in training posts, excess hours being worked by individuals, expected future workloads, other staff under medical restrictions and any other relevant factors [480].

2.55 On 5 May 2023 SB emailed PP in MG's absence on leave, saying the previous revalidation extension was due to expire in June 2023 and the Claimant had been off sick since November 2023. SB asked if the Claimant's qualification could be further extended beyond June in the event the Claimant's return to work was delayed [400]. SB also sent this to CO [400]. SB also sent a further email [404] to say the expected return to work would be August 2023 and a new extension for a minimum period of 8 months from June 2023 to allow time to return to full working and complete the outstanding tasks and provide evidence to Surveyor Training.

2.56 On 5 May SB also emailed PP saying on the Claimant's return to work he would be expected to support HQ 40% of the time. SB said "*Considering the Principal Consultant Position has been unable to support HQ for over 6 months to date. I would be grateful for the following information: If the Principal Consultant position in Cardiff were to remain unavailable for a further period of 3 months from 1st May until 1st August 2023 which could be followed by limited availability for a further 6 months, I would be grateful to know of the business impact in HW of the non-availability of this role*."

2.57 On 9 May Sarah Lawlor return an "office workloading" document [482]. We return to this document later in our Discussions and Conclusions. On 10 May PP emailed SB,

CO and MG to say that RG had said they had no output from the Claimant since the Claimant was allocated consultancy work and it was not something they could sustain any longer. PP said there was a lot of consultancy work pending due to shortage of resources e.g review of ltoS which has been pending for a few years in some cases, MSIS 40 review, Learning Management System (LMS) etc. He said: "*This is already having an adverse impact on surveyors as they do not have up to date instructions on some topics. The LMS is with us and we are not in a position to populate the database. In summary this situation is not sustainable for the business on multiple counts*" [483].

2.58 On 10 May PP emailed SB, CO and MG to say: *"We are not in a position to give any further extension to Warren's eligibilities. I am afraid he will have to start a fresh application for eligibilities, and we will need to review before a decision can be made. He will not be able to carry out surveys on his return as he will have no eligibilities. I would have thought, it will take time before he gains any eligibilities.*" [404].

2.59 SB says once he had gathered all the information he thought relevant, he considered the position. SB said in his view the spreadsheet at [482] showed him that the Claimant's absence was causing a significant impact on the Cardiff Marine Office's business delivery, and that it gave the picture to him that the office could not sustain the Claimant's absence any longer. The essence of SB's evidence was that he could not foresee a return to work in any form before, at the earliest, August 2023, including policy/technical services work and even with the potential for adjustments. SB did not see the Claimant could cope with the physicality of the survey and inspection work, but also that the technical services desk work was equally problematic with the Claimant's difficulties in sitting, standing, and managing pain. SB thought that a return to work in August 2023 was not a given, but, even if on the best case scenario, and the Claimant were to be able to return to work in some form in August 2023, SB did not consider an ongoing absence until that time was sustainable to the Cardiff Marine Office. In our judgement that was the primary factor in SB's decision making i.e. that sustaining the Claimant's likely absence from work *until* August 2023 was not something SB considered they could reasonably do. SB did not consider that a return to work in August 2023 was a return to work within a reasonable timescale.

2.60 We find that SB then had some secondary considerations. This included that the Claimant's absence was causing difficulties, according to PP, to the completion of HQ consultancy work, which SB considered not sustainable for the business based on what PP had told him. Further SB had his doubts that the Claimant would return to work in August 2023 because it depended on matters such as the outcome of the CT scan, the consultant's advice, the Claimant's response to treatment, and NHS waiting times. Further again that if the Claimant did return to work in August 2023 it would be likely to be on a phased return and on the basis of initially restricted duties on medical grounds before the Claimant could rehabilitate and return to surveying and inspection, but also that the Claimant would need to reinstate his eligibilities and SB thought that could take around 12 months. SB considered both of these things would have a detrimental impact further the provision of surveying and inspecting work in the Cardiff Marine Office.

<u>Decision to dismiss</u>

2.61 On 11 May 2023 SB sent the Claimant the decision letter. The letter said the latest OH report confirmed the Claimant's own statements of continuing absence until at

least August 2023 due to the ongoing back issue and expected treatment plan. SB said he had carefully considered the OH report, the Claimant's statements and the impact to the business that the Claimant's continued sickness absence will cause. He said he had also noted that in the Claimant's current state of health the Claimant would not be able to undertake any work including those that could have been carried out with temporary workplace adaptations and/or reasonable adjustments due to his continued sickness absence. SB said he had decided to terminate the Claimant's employment because the Claimant had been unable to maintain an acceptable level of attendance and had been unable to return to work in a timescale that SB considered reasonable [505].

2.62 SB said he had considered downgrading or an alternative post, but due to the nature of the illness and the scope of work within survey and inspection and the Claimant's qualifications, SB did not believe it would affect the Claimant's ability to return to work in a reasonable timescale.

2.63 The Claimant was given 3 months pay in lieu of notice with the effective date of dismissal being 12 May 2023. The Claimant was given the right of appeal. On 15 May the Claimant was sent an amended letter because the notice period was wrong and he was also sent the minutes of 21 April meeting [507]. The notice period was changed to 5 weeks.

Appeal

2.64 On 22 May the Claimant sent his appeal against dismissal [517]. The Claimant said the decision was premature because he had not been told in earlier meetings a possible outcome from the process could be termination. His absence had been for a period less than 6 months which was premature. He said he had not been officially made aware of any trigger dates when his pay would be reduced so had been shocked to be on nil pay in April. The Claimant said there was an incorrect assessment of his health because the OH report noted he anticipated being able to commence a return to work hopefully around August following the CT scan on 15 May, and steroid injections. He said this seemed to have been ignored in the decision rather than awaiting the outcome of the treatment programme. He said it seemed a decision to dismiss had already been taken. He said OH had also confirmed his condition was not deteriorating and there was a timebound treatment plan in place. The Claimant said the decision to dismiss was taken for unknown factors. He said there was a failure to consider other roles or activities and potential alternative duties were never discussed with him or posed to OH. He said there also cannot have been any meaningful assessment of his qualifications relative to roles within the Respondent as being a highly qualified surveyor of many years experience and again there had been no discussion around this. The Claimant said he was entitled to 3 months notice and there was also no mention of payment in respect of accumulated TOIL in addition to accrued and untaken annual leave.

2.65 GS deputy Director, was appointed as appeal manager. GS asked SB for more detail about considerations of moving the Claimant to a different role and also about nil pay. On 5 June 2023 SB sent CO and KB a draft response regarding the dismissal appeal saying he would be grateful for CO's comments [524]. On 6 June he then sent GS two word documents [526].

2.66 One document was called: "*Details about consideration of the possibility to moving Warren to a different role as alternative to dismissal"* [529]. It said the Claimant could not carry out the travel and physical activities involved in survey and inspection delivery. The 40% technical services work could be done from home but required a sharp mind, engagement with peers and stakeholders and the constant use of a computer. It was said an assessment for the Claimant to potentially carry out desk based activity as an alternative was carried out but that the constant pain, strong medication use, inability to sit down, or unable to stand up for periods were barriers to desk based activity (including the ability to use a standing desk). The inability to sit in a car would mean he could not do face to face policy related engagements. It was said there was a low potential for the Claimant to return fully fit for all survey and inspection work as indicated in the OH report and a return on a graded return to work pattern was concluded as unsustainable for the business. It was said: "*Due to the nature of Warren's medical condition as confirmed by his GP and Occupational Health in their reports dated 24th February 2023 and 3 May 2023, it is concluded that Warren cannot be assigned to alternative roles or tasks. The Head of Technical Performance on 26th April 2023 requested Warren to carry out a desk based task from home which was understandably declined by Warren, which confirms Warren's inability to perform desk-based tasks. Alternative roles were considered however, these roles required either a specific technical qualification or required a high level of physical mobility on a frequent basis due to the specific nature and responsibilities of the role."*

2.67 SB also provided a document headed "How far the business can sustain the continued absence of individual without affecting the efficient delivery of operation" [532]. The document referred to the Cardiff Marine Office survey and inspection delivery saying the Claimant's absence would not be sustainable for the business due to the state of current surveyor manning levels of the Cardiff Marine Office, unfilled vacancies, and some medical restrictions on existing surveyors**.** It was said that HQ had a lot of consultancy work pending due to shortage of resources so the absence could not be sustained in the short and long term. Thirdly it was said that surveyor training had concluded no further extension would be granted which may require the Claimant to retrain to obtain surveyor eligibilities which was concluded to be a significant impact for the Cardiff Marine office.

2.68 GS asked SB about TOIL [521] and SB also responded to that [520] and [564].

2.69 The Claimant was invited to an appeal meeting which took place on 16 June [549]. The draft notes are at [566]. The Claimant attended with BM. The Claimant said he found it bizarre his qualifications could not be used for other roles, and he did not understand why his role had to be filled so urgently particularly the consultant part as he had never been asked to do any consultant work. BM said the dismissal letter came out of the blue and did not consider the Claimant's health or mobility being regained. BM said there had been no dismissal meeting which was a requirement of the procedure. HR said that line managers above a certain grade can make the decision for dismissal without the separate appointment for a decision manager. BM said the policy required a formal meeting to discuss potential dismissal which was not the 21 April meeting and model letter 13 was a different kind of invitation letter. GS said the letter forewarned that employment could be affected and said advice would be taken from Department for Transport HR.

2.70 The Claimant said his treatment timeline including an imminent scan were not included in the report, with the treatment timeline expected to yield good results. He expressed concern that SB had ignored this or misunderstood it in deciding no other job roles would be available. GS said the OH report referred to August 2023 as being the earliest date for a potential phased to return and he believed that was the basis of SB's decision making and so the medical picture had not been misunderstood.

2.71 BM said there had been no discussion with the Claimant about the sustainability of absence or alternative roles and questioned how the decision had been made. GS said SB had given him evidence that SB had sought input from other staff which showed the rationale for the decision taken. GS said that took account not only of the Claimant's potential return to work but also the fact all his eligibilities would have expired. BM said the decision letter should have included this rationale. GS also said the Claimant's health would also have impacted on other roles available. The Claimant disagreed saying his current condition was not permanent. GS referred to the timeline in the OH report and said the current roles availability did not align. BM said SB was uninformed about the Claimant's health as SB had not discussed with the Claimant a timeline for his health and other roles. The minutes refer to BM saying he believed a potential bridging mechanism should have been discussed. In cross examination GS accepted that BM had said something along the lines of the Claimant being able to dose up on painkillers to get through one day to do the missing Activity Monitoring. GS denied, as had been suggested by the Claimant and BM in oral evidence, that it had been said there was an improvement in the Claimant's health since the last meeting with the consultant or even some suggestion of the Claimant returning earlier. On this point we prefer the evidence of GS. It seems to fit in with the wording of a bridging mechanism. Moreover we consider that if the Claimant had clearly said to GS that there had been a dramatic change in his condition due to doing the exercises the specialist had given to the Claimant and/or that he might be able to come back to work quicker, then it would at the very least have been recorded in the minutes, or indeed the Claimant would have sought the amendment of the minutes to include it given its significance.

2.72 The Claimant was referred for consideration for a dismissal efficiency compensation payment, the form for which was completed by SB on 13 June 2023 and said that consideration of ill health retirement as an alternative was not appropriate [553]. It said: "*During the meeting 21 April Warren informed me that he is waiting for and undergoing medical interventions that will ultimately be able to ease his symptoms and suggested that the return to work would not be until August 2023. This date is a best case scenario date and does not take account of any slippage due to medical waiting times or the duration for a phased return. The return date is on an assumption that the treatment is fully successful."*

2.73 On 30 June the Claimant was sent the outcome of the appeal [569]. GS said that a decision should be taken primarily in the context of the forward projection of a potential return to work with OH indicating August 2023 was the earlier date for a potential phased return to work. GS said even if that date was achieved, the Claimant would be returning without surveyor eligibilities so an additional period would be needed before the Claimant could return to full operational capability. GS provided the evidence obtained by SB. GS said it was unfortunate that the rationale had not been fully communicated to the Claimant, but the decision to dismiss was still reasonable because even with fuller discussion there was no additional information that could be

provided to have a substantial impact on the decision making. GS said the OH report was not incorrectly assessed. GS said the Claimant was unfit to undertake any work and the offer of an alternative role would not have accelerated the Claimant's return to work. He provided SB's summary of the alternatives considered. Again, he said it was unfortunate that was not given to the Claimant, but that even if there had been a fuller discussion additional information would not have had a substantial impact on decision making. It was said there was no procedural failing in not holding a separate dismissal meeting because SB could take a dismissal decision, but that the record of the meeting on 21 April made it difficult to confidently conclude there was a meaningful discussion about the implications of ongoing absence. GS recognised there was a procedural weakness there but said it would not have made a difference in any event. SG recommended the payment of TOIL even though it was not normally paid.

2.74 The Claimant raised further questions about the TOIL calculation [574] PH provided his comments [576] but recommended contacting Andrew Brearley who said he could pull all the historic records [579]. He did so and further payment was made post dismissal.

3. The legal framework

Making a protected disclosure

3.1 Under section 43A ERA, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. A qualifying disclosure must fall within section 43B ERA and also must be made in accordance with any of sections 43C to 43H. Section 43B says:

"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

3.2 Section 43C provides a disclosure made to the employer will be a qualifying disclosure.

Protected Disclosure detriment

3.3 Under Section 47B(1) a worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Under section 47B(2) the section does not apply where the detriment in question amounts to a dismissal within the

meaning of Part X (because dismissals are governed by Section 103A within Part X ERA).

3.4 There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment (see Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 713 applying Derbyshire v St Helens MBC [2007] UKHL 16 and Shamoon v Chief Constable of Ulster Constabulary [2003] ICR 33.)

3.5 There must be a link between the protected disclosure or disclosures and the act (or failure to act) which results in the detriment. Section 47B requires that the act should be "on the ground that" the worker has made the protected disclosure. In Manchester NHS Trust v Fecitt [2011] EWCA 1190 it was said that "*section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."* This is a "reason why" test. Ordinarily, the Tribunal has to look at why (consciously or unconsciously) the decision maker acted as he or she did. It was said in Jesudason that:

> *"Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under Section 47B."*

3.6 There is a difficult body of case law addressing the scenario when a person knows about a protected disclosure and causes a whistleblower to be subject to a detriment for that reason by an another, unwitting individual. In Royal Mail Group Limited v Jhuti [2020] ICR 731 the Supreme Court was concerned with an automatic unfair dismissal case and not a detriment case. The Supreme Court there said that in looking for the reason for a dismissal the tribunals need generally look no further than the reasons given by the appointed decision-maker. But the Supreme Court also said that if on the facts of a particular case a manager in the hierarchy above the employee determines that an employee should be dismissed because of protected disclosures but hides that behind an invented reason, which the decision-maker adopts, the reason for the dismissal would be the hidden reason rather than the invented reason. The manipulator's state of mind would be attributed to the dismissing employer, rather than the deceived decision maker.

3.7 But a body of other cases including Malik v Cenkos Securities Plc UKEAT/0100/17, CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439 and William v Lewisham and Greenwich NHS Trust [2024] EAT 58 says that in a detriment case the situation is different. That one person's knowledge and motivation cannot be imputed to another person in a detriment claim (and therefore different to a dismissal claim). It was said that the person who subjects the whistleblower to a detriment must be personally motivated by the protected disclosure. If there has been, for example, improper influence then that influencing activity should be challenged as being its own separate detrimental act.

3.8 In First Great Western Ltd v Moussa [2024] EAT 82 a differently constituted EAT took a more nuanced approach and upheld the tribunal's decision that an employer (but not two individual managers) had subjected the employee to a detriment on the ground he had made protected disclosures 6 years previously; finding there had been a collective memory within the employer which had its origins in the protected disclosures and was prejudicial to the claimant. The EAT doubted the Malik line of reasoning, but in any event distinguished the case on its own facts. It was said on the particular facts of Moussa, it was the employer itself that was being found directly liable and not liable through vicarious liability for the acts of an employee (where there can be unfairness to an individual employee as a named respondent, who may otherwise be found liable for protected disclosure detriment, and yet knew nothing about the protected disclosures or that they were being inappropriately influenced).

Protected disclosure dismissal

3.9 Section 103A ERA provides:

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

3.10 When asking what was the reason or principal reason for a dismissal it is again a "reason why" question. As already mentioned, in Jhuti the Supreme Court held that in general a tribunal need look no further than the reasons given by the decision maker. But where the real reason for dismissal is hidden from the decision maker behind an invented reason, it is the tribunal's duty to look behind the invention. Provided the invented reason belongs to a person higher up in the management chain it is possible to attribute the manipulator's state of mind to the employer, rather than that of the deceived decision-maker.

Protected disclosure - burden of proof

3.11 Where a claimant has established that there has been a protected disclosure and they have suffered a detriment, it is for the employer to show that the detriment was not because of the disclosure; that is, that the disclosure did not materially influence - in the sense of being more than a trivial influence - the employer's treatment of the Claimant (see Fecitt).

3.12 In a protected disclosure unfair dismissal claim, the employer bears the burden of proof of showing the reason for the dismissal. Where an employee disputes the reason given by the employer, an evidential burden arises to cast some doubt on the employer's reason. The employee has to demonstrate some evidential basis for questioning the employer's reason. The stages as explained by the Court of Appeal in Kuzel v Roche Products Ltd are: (a) has the claimant shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason? (b) if so, has the employer proved the reason for dismissal? (c) If not, has the employer disproved the section 103A reason advanced by the claimant? (d) if not, dismissal is for the section 103A reason. However, if the employer does not show to the satisfaction of the tribunal their asserted reason, it does not follow that the tribunal is obliged to find the reason is as put forward by

the claimant. That said, the EAT also endorsed the proposition that in practice in many cases the tribunal can make findings of fact about what was operating in the mind of the decision makers and therefore, in practice, only a small number of cases will ultimately turn upon a burden of proof analysis.

Disability

3.13 Under section 6 of the Equality Act 2010 a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his ability to carry out normal day to day activities. Under section 212 "substantial" means more than minor or trivial.

3.14 Under paragraph 2 of Schedule 1, an effect of an impairment will be long term if it has lasted for at least 12 months, or is likely to last for at least 12 months or the rest of the person's life.

3.15 When assessing the impact on ability to carry out normal day to day activities, the focus is on what a disabled person cannot do or can only do with difficulty, rather than on things the person can do: Goodwin v Patent Office [1999] ICR 302. However, depending on the facts of a case, what a claimant actually can do may throw significant light on the question of what he cannot do: Ahmed v Metroline Travel Limited UKEAT/0400/10.

3.16 The effect on the individual of the disability has to be compared with how he would carry out the activity if the individual did not have the disability: Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763. The question of disability status must be assessed on the basis of information available at the time: All Answers Ltd v W [2021] IRLR 612.

3.17 Under section 6(5) Equality Act a tribunal must take account of the "Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability" ("the Guidance") to the extent the tribunal thinks relevant. Under Section 14 Equality Act 2006, the Equality and Human Rights Commission has also issued a Code of Practice which under section 15 which must again be taken into account where it appears to the tribunal to be relevant. The Code and Guidance are not to be construed as if statutes and must always give way to the statutory provisions if, on a proper construction, they differ from the Code or Guidance.

3.18. In Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763, it was held that, to give effect to what was then European Community Law, a meaning should be given to day to day activities which encompasses activities which are relevant to participation in professional life.

3.19 The current version of the Guidance says:

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples including shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following

instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

…D10 However, many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example they may involve normal activities such as: sitting down, standing up, walking, running, verbal interaction, writing, driving, using everyday objects such as a computer keyboard or a mobile phone, and lifting, or carrying everyday objects, such as a vacuum cleaner."

Failure to make reasonable adjustments

3.20 The duty to make reasonable adjustments appears in Section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3):

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

3.21 Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the Claimant has a disability or that the Claimant is likely to be placed at a substantial disadvantage.

3.22 In Environment Agency v Rowan [2008] ICR 218 it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the Claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

3.23 The words "provision, criterion or practice" ["PCP"] are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In Ishola v Transport for London [2020] EWCA Civ 112 it was said: "*all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."* It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

3.24 Substantial disadvantage is such disadvantage as is more than minor or trivial; Section 212. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability i.e. whether the PCP has the effect of disadvantaging the disabled person more than trivially in

comparison with others who do not have any disability – see Sheikholeslami v University of Edinburgh [2018] UKEAT 00113 17 0510.

3.25 Consulting an employee or arranging for an occupational health or other assessment of their needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.

3.26 What adjustments are reasonable will depend on the individual facts of a particular case. Paragraphs 6.23 to 6.29 of the EHRC Code give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

3.27 In County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the EAT summarised the following additional propositions:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;
- It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; they need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;
- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
- Once a potential reasonable adjustment is identified the onus is cast on the Respondent to show that it would not been reasonable in the circumstances to have to take the step(s);
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include: the extent to which taking the step would prevent the effect in relation to which the duty is imposed; the extent to which it is practicable to take the step; the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities; the extent of its financial and other resources; the availability to it of financial or other assistance with respect to taking the step; the nature of its activities and size of its undertaking;
- If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

Unfavourable treatment because of something arising in consequence of disability

3.28 Section 15 of the Equality Act states:

"15 Discrimination arising from disability

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

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

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

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

3.29 The approach to determining Section 15 claims was summarised by the EAT in Pnaiser v NHS England and Another [2016] IRLR 170. This includes:

- The first stage is to assess the "because of". In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;
- The "something" that causes the unfavourable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it;
- Motives are not relevant;
- The second stage is to determine whether as a matter of fact the "something arising in consequence" was a consequence of the disability;
- The expression "arising in consequence of" can describe a range of causal links between the something that causes unfavourable treatment and the disability;
- This stage of the test is an objective question and does not depend on the thought processes of the alleged discriminator;
- Knowledge is only required of the disability. Knowledge is not required that the "something" leading to the unfavourable treatment is a consequence of the disability;
- It does not matter precisely in which order these questions are addressed.

3.30 In assessing whether something is "unfavourable" treatment there must be a measurement against "*an objective sense of that which is adverse as compared to that which is beneficial*"; Trustees of Swansea University Pension & Assurance Scheme v Williams [2018] UKSC 65.

3.31 The respondent will successfully defend the claim if it can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. This is often termed "objective justification." The burden of proof is on the employer to establish justification. The Supreme Court in Ministry of Justice v O'Brien [2013] ICR 449 re-stated the general principles of objective justification that:

(a) firstly, the treatment must pursue a legitimate aim;

(b)second, it must be suitable for achieving that objective; and

(c) third, it must be reasonably necessary to do so.

3.32 The Equality and Human Rights Commission Code of Practice on Employment contains guidance on objective justification, to reflect some of the case law in the field.

It terms the first issue as being determination of whether the aim is legal and non-discriminatory and one that represents a real, objective consideration. In Bilka-Kauhaus GmBH v Weber von Hartz [1987] ICR 110 it was termed: "*correspond to a real need on the part of the undertaking."*

3.33 In Chief Constable of West Yorkshire Police and anor v Homer [2012] ICR 704, the Supreme Court reiterated that the measure in question has to be both an appropriate means of achieving the legitimate aim, as well as being reasonably necessary in order to do so. Some measures may simply be inappropriate to the legitimate aim in question, or they may be appropriate but go further than is reasonably necessary and so be disproportionate.

3.34 As to the third stage, the EHRC Employment Code notes: "*Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts."* We pause here to note that in a section 15 claim, it is of course the treatment that is being justified, not a provision, criterion or practice (the terminology from an indirect discrimination complaint). In Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15 the Supreme Court set out a four stage approach to the balancing exercise: first, whether the aim is sufficiently important to justify the treatment; second, whether there is any rational connection between this aim and the less favourable treatment or disadvantage suffered; third, whether the means chosen are no more than is necessary to accomplish the aim(and whether proportionate alternative measures could have been taken without a discriminatory effect); and, fourth whether the steps complained of strike a fair balance between the need to accomplish the aim and the detriment suffered.

3.35 It was said by the EAT in Ali v Drs Torrosian, Lochi, Ebeid & Doshi t/a Bedford Hill Family Practice [2018] UKEAT0029 18 0205 (which was a section 15 case) that:

- Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer;
- When determining whether or not a measure is proportionate it will be relevant for the tribunal to consider whether or not any lesser measure might nevertheless have served the employer's legitimate aim;
- More specifically, the case law acknowledges that it will be for the tribunal to undertake a fair and detailed assessment of the working practices and business considerations involved, and to have regard to the business needs of the employer;
- As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied;
- When the putative discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification.

3.36 Whilst justification under section 15 has to be established at the time when the unfavourable treatment was applied, the tribunal when making its objective assessment may take account of subsequent evidence; City of York Council v Grosset [2018] EWCA Civ 1105.

3.37 In a dismissal case, the balancing exercise is not the same as a "range of reasonable responses" test that applies in unfair dismissal (see below). The outcome of the analysis may often coincide but it does not have to: O'Brien v Bolton St Catherine's Academy [2017] ICR 737. In O'Brien the Court of Appeal considered a case of long term sickness absence where the tribunal had found there to be no detailed evidence about the impact on a school of the lengthy absence of a head of department. Underhill LJ expressed some sympathy with the view of the EAT that after such an absence an employer could reasonably conclude that "enough was enough." But he also warned that an appellate tribunal needed to be wary of second guess the judgment of the fact finding tribunal. He said: "*In principle the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing. What kind of evidence is needed in a particular case must be primarily for the assessment of the tribunal …"*

Burden of Proof under the Equality Act 2010

3.38 The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides:
"(2) if there are facts from which the Court (which includes a Tribunal) could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

3.39 Consequently, it is for a claimant to prove facts from which the tribunal could infer (absent explanation from the respondent) that discrimination has taken place. If such facts have been made out to the tribunal's satisfaction, applying the balance of probabilities, the second stage is engaged. At the second stage the burden shifts to the respondent to prove, again on the balance of probabilities, that the treatment in question was "in *no sense whatsoever"* because of the prohibited reason / that the protected characteristic was not a ground for the treatment in question. A tribunal would normally expect cogent evidence to discharge that burden of proof.

3.40 In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provisions should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931, as supplemented in Madarassy v Nomura International Plc [2007] ICR 867. Here it is important to note that although the concept of the shifting burden of proof involves that two-stage process, the analysis should only be conducted once the tribunal has heard all the evidence.

3.41 Further, as to what is required to discharge the burden at the first stage; it must be something more than a difference in protected characteristic and a difference in treatment. It was said that the bare facts of a difference in status and a difference in

treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It is not necessarily an error of law for a tribunal to effectively assume the burden has shifted and look to the respondent to provide an explanation for the treatment in question. It was said in Hewage that the burden of proof provision may have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. But the burden of proof provisions do require careful attention where there is room for doubt as to the facts necessary to establish discrimination; see Field v Steve Pye &Co [2022] EAT 68 and the important guidance there at paragraph 41 onwards.

Unfair dismissal

3.42 The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

3.43 The potentially fair reasons in Section 98(2) include a reason which:- *"relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".*

3.44 Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

3.45 Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4): **"…***the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –*

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

3.46 It has been clear since the decision of the EAT in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439 that the starting point should be always the wording of Section 98(4) and that in judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a tribunal must ask itself whether the employer's decision falls within or without that band.

3.47 The application of this test in cases of dismissal due to ill health and absence was considered by the EAT in Spencer –v- Paragon Wallpapers Limited [1976] IRLR 373 and in East Lindsey District Council –v- Daubney [1977] IRLR 181. The Spencer case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case. In Daubney, the EAT made clear that unless there were

wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

3.48 More recently the EAT considered this area of law in DB Schenker Rail (UK) Limited –v- Doolan [UKEATS/0053/09/BI). In that case the EAT indicated that the three stage analysis appropriate in cases of misconduct dismissals (which is derived from British Home Stores Limited –v- Burchell [1978] IRLR 379) is applicable in these cases. An overview was offered by the Court of Session in November 2013 in BS v Dundee City Council [2014] IRLR 131 at paragraph 27:

Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."

4. The Issues to be decided

4.1 The agreed list of issues is appended to this Judgment.

5. Discussion and Conclusions

Was the Claimant a disabled person within the meaning of section 6 of the EqA?

5.1 The Respondent asserts that sciatica was not a long term impairment. The Respondent argues that the Claimant had a sciatica flare up on 28 November 2022 and a similar flare up in April 2023 but that this was the last event. The Respondent asserts that the Claimant's case was that he was improving in May 2023 and would be fighting fit by August 2023; such sciatica lasted less than one year. The Respondent says in relation to arthritis that there was no tangible impact until September 2022 at the earliest and no medical evidence of any impact before 30 November 2022. The Respondent argues that again there was a road to recovery in place such that there was no long term substantial adverse impact.

5.2 We reminded ourselves that we had to assess the question of disability on the basis of the position as it stood at the material time.

5.3 The Claimant was diagnosed with degenerative changes in his lower discs and facet joints in the lumbar spine in January 2014, having had back pain for about 18 months.

He had treatment with facet joint injections and facet rhizolysis [SB7]. OH reported in February 2016 that the Claimant's last treatment had been May 2014 and the Claimant's recovery from that initial bout was good and uneventful [SB8].

5.4 We consider it likely, and find, that over the course of 2022 the Claimant's back condition started to deteriorate again with gradual increasing pain and restrictions on the activities the Claimant could so. The OH report of 23 February 2023 reported the Claimant saying he had suffered with lower back pain symptoms for over a year and with symptoms getting progressively worse [450]. Likewise the GP in his referral of 7 December 2022, reported that the Claimant had constant lower back pain for the last year [SB12]. The initial symptoms included the Claimant struggling to sit for periods of time. At home he would stand in the kitchen to eat rather than sitting round the meal table. He would avoid sitting with his family to watch TV or play board games or card games.

5.5 The Claimant's work involved driving long distances from Cardiff to various locations around Pembroke and Milford Haven. The Claimant would suffer increasing pain over such trips that could take 2.5 hours each way, and even if he stopped to take breaks. The Claimant arranged with PH that the Claimant could use his own car rather than the office cars and office car hire cars in 2022 because the Claimant's own car offered better back support. In the summer of 2022 the Claimant provided cover in Ireland and the business manager in Belfast wanted to fly the Claimant out and hire the Claimant a car to use whilst out there. However, the Claimant explained the difficulties he had with his back and was permitted to take his own car out on the ferry and use that, with his mileage expenses being repaid. The OH report of 23 February 2023 [18] confirms the Claimant reporting he had been finding seating duties intolerable as the Claimant's symptoms got progressively worse.

5.6 The Claimant's difficulties continued worsen over the summer of 2022 with increased pain and impact on work. He describes his pain as being more severe by September 2022, which we accept. The survey work included boarding vessels and working in confined spaces. The Claimant would adjust what he did when out on a survey to avoid having to sit at low tables with poor seating. He would ask a colleague who was with him to do the document reviews on ships when doing port state examinations. The Claimant would, instead, do the walk around examination of the vessel, which helped elevate the pain. Out on survey he would avoid entering restricted compartments which may cause pain.

5.7 The Claimant's back then locked during the night of 28 November 2022, and he was in acute pain unable to get out of bed for 3 days and he was unfit for any work at that time. By February 2023 OH was reporting that he could not sit for more than 10 minutes, or drive. He remained unfit for work at that time. By 12 April 2023 the Advanced Practice Physiotherapist [SB22] reported that the existing physiotherapy and medication regime where not impacting on his symptoms and he was to have a CT scan to then consider potential invasive options. By 2 May 2023 OH reported the CT scan was due to take place on 15 May, with the Claimant being dismissed before then on 11 May. At that time OH reported the Claimant remained unfit for work and that a graded return to work pattern in August 2023 could be feasible if the CT scan results took the Claimant down a steroid injection route.

5.8 In our judgement by the September of 2022 the impact of the Claimant's back condition on normal day to day activities had become more than trivial. Not being able to sit and eat a meal with family, or to sit and play board games with family, and to have difficulties driving for work because of pain, and having to get special arrangements made to use your own car for work, is a more than trivial impact on normal day to day activities. That the Claimant was having to ask for assistance from colleagues with travel and when on inspections shows both that there was something wrong and that there was an impact upon the Claimant's work activities and therefore the Claimant's professional life. Whilst the Claimant's difficulties with driving were driving long distances, there are plenty of occupations where such driving is a common work based activity. We took into account that the Claimant did not see his GP during this initial period. But we find that this was not because the Claimant was not symptomatic, but because he was just trying to get on with things at home and at work. We also took into account SB's evidence that he did not know of any back problems at the time, including a day he spent with the Claimant in West Wales. On balance, however, we did not consider that did not mean the Claimant was not having difficulties. The Claimant and SB did not spend a great deal of time together and furthermore given the difficulties in their relationship at the time we do not think the Claimant would have readily communicated any difficulties with his back to SB at the time.

5.9 The Respondent does not dispute that at 28 November 2022, when the Claimant's back locked up during the night, there was at that time a substantial adverse impact on the ability to carry out normal day to day activities.

5.10 By May 2023 there was still a substantial adverse impact on the ability to carry out normal day to day activities. OH at that time reported that lifting, and inactivity such as seated and standing positions were still exacerbating the back symptoms. The Claimant had done some trips in the car for about 10 miles and his back discomfort was exacerbated. He was at that time still unfit for work. Therefore by May 2023 there had been, in our judgement, a substantial adverse impact on the ability to carry out normal day to day activities by some 8 or 9 months.

5.11 The question is therefore whether was that substantial adverse impact in May 2023 was likely to last at least another 4 months. "Likely" here means, "could well happen." On 2 May 2023 OH reported that the Claimant was due to have a CT scan on 15 May 2023 and then have a review with the consultant and set a definitive treatment route. He had been given a new set of physiotherapy exercises to do for a month. He was still on prescribed mediation but was trying to wean himself off nighttime pain medication. OH said: "*Mr Ladyman's Musculoskeletal symptom is currently ongoing. However, there has been some progress with regard to his medical management. The outcome of his upcoming CT scan would determine the definitive next step for the Consultant to proceed. Mr Ladyman currently remains unfit for work. He is looking forward to the possibility of a return to work in some capacity by August 2023. OH supports that a return on a graded return-to-work pattern in August 2023 could be feasible with the steroid injection route. I have advised the outcome of the CT scan and the consultant's decision on the best treatment approach will determine when a return to work can happen."*

5.12 In our judgement, as at May 2023 OH was not saying that the Claimant was going to be fully fit by August 2023, or that the Claimant's symptoms would be at such a level that any impact on normal day to day activities would be trivial and minor. OH was

saying that the musculoskeletal symptoms were ongoing. The cause was still being explored. A definitive treatment pathway was still to come. OH was not anticipating a full return to work in August 2023. Some form of return to work then was feasible if the consultant went down the steroid injection route. But even then it would be a graded return to work. In turn, in our judgement, that again meant there would still be a further period of ongoing treatment, and hopeful recovery, and a gradual increasing return in terms of hours and workplace activities. There is nothing in the OH advice that suggests that treatment would be a sudden "cure" and the Claimant would suddenly be better (or the impact on day to day activities reduced to a trivial level) by September.

5.13 In our judgement, as at May 2023 the position was that it "could well happen" that the substantial adverse impact on normal day to day activities would continue into August and September 2023 and beyond in terms of the Claimant being unable to sit for sustained periods of time affecting his domestic and work life activities, and in terms of the Claimant's ability to participate effectively in his working life in terms of fulfilling the full duties of his job without adjustments. It "could well happen" that he would be unable, for a period of rehabilitative time after August 2023, to return to full physical duties in terms of travel and surveying, hence OH's reference to a graded return. That is even before the effects of treatment are discounted.

5.14 The Respondent in their submissions seek to separate out and analyse the sciatica separately from the arthritis. In our judgement, whilst appreciating they were the labels used by the Claimant when identifying his disability or disabilities, it is artificial to do so. The question of disability is a gateway provision, and is a functional assessment looking at the impact of an impairment(s) on normal day to day activities. It has never been about finer points of medical diagnosis or medical labelling. Nor indeed is there a bar to a person being disabled through the cumulative effect of more than one overlapping impairment. The Claimant's GP in the initial sick note just used the wording "severe lower back pain" and continued to do so. OH did not separate the Claimant into two conditions. The OH practitioner did refer to sciatica [SB18] but did not consider it to be something separate. Instead OH said: "*We discussed Mr Ladyman's current lower back pain symptom: he described this as predominantly on the left side, it travels down his left leg."* The Advanced Practice Physiotherapist likewise did not separate out two conditions but instead termed it "*Lower back pain – potential L5/S1 neural irritation."* Likewise the medical practitioners were not identifying two treatment pathways; one for arthritis and one for sciatica. The Claimant himself in his impact statement explains his understanding that: "*The arthritis has basically caused my sciatica and exacerbated it by producing pain down my leg."* In our judgement they are both part of the same underlying impairment of a low back condition, with the sciatica (ie pain radiating down the leg) emanating from the back. In our judgement that they met the test of disability at the material time. But even if the focus is simply on the Claimant's arthritic back condition, rather than flare ups of sciatica, we would in any event find for the reasons already given, that at the material time there was a substantial adverse impact on normal day to day activities had lasted, and was likely to last a further period, such that it met the definition of being long term.

Did the Respondent know or could reasonably have been expected to know the Claimant was disabled

5.15 The Respondent asserts that the Claimant did not challenge the Respondent's witnesses on knowledge of disability. It is said the OH reports did not report the Claimant was disabled or would fit the statutory definition.

5.16 In our judgement the Respondent reasonably could have been expected to know the Claimant was disabled. The Respondent knew the Claimant had been off work since the end of November and from the OH report knew the Claimant had been having increasing difficulties prior to that. SB had access to the OH reports. The OH reports did not specifically address the question of disability because the specific questions was not asked but they contain the content already analysed. SB in his own witness statement said that at the time of the decision to dismiss the Claimant, the Claimant had been absent from work for almost 7 months with no certainty that the Claimant would return to work in the immediate future. SB in his own witness statement also said, in effect, he did not see a return to work in August 2023 either as a certainty or as an immediate return to full duties, but was dependent on a number of variables including the CT scan, consultant's advice, response to treatment, NHS waiting times, and period of rehabilitation and revalidation (with a phased return to work initially on office duties before returning to operational work, and physically demanding work, and taking account of the Claimant's difficulties with travelling) [paragraphs 56 and 57 of SB's statement]. In our judgement it is evident that SB saw the Claimant's work related difficulties as being long term, and in total, likely to last at least a year. He did not see the Claimant just returning as normal in August 2023. That is part of SB's very reasoning for dismissing the Claimant. That SB did not sit down and do a formal assessment of the question of disability is not the point; the essential information was there before him and, in turn, before HR. This is a Governmental body with a HR department. They had the resources and knowledge to be able to reasonably know the Claimant was a disabled person.

Complaint of failure to make reasonable adjustments:

Did the Respondent apply a PCP of the requirement to be fit and able to perform his substantive duties?
Did it put the Claimant at a substantial disadvantage compared to others who are not disabled?
Did the Respondent know or could reasonably be expected to know the Claimant would suffer a substantial disadvantage?
Were there reasonable steps that were not taken that could have been taken to avoid the disadvantage: The Claimant identifies: Adjustment to hours and/or duties; Working from home or from a different location; Consideration of alternative work

5.17 As Mr Probert puts it in his written submissions, the purpose of a reasonable adjustment is to enable the individual to remain or return to the workplace, and a proposed adjustment must be aimed a preventing a PCP from placing the disabled person at the relevant disadvantage. The adjustment must have a prospect of alleviating the disadvantage: Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10/JOJ

5.18 In our judgement, at both at the time of dismissal on 11 May 2023 and at the time of the appeal on 16 June 2023 the Claimant was not fit for a return to work even with adjustments. Adjustments to his hours or adjustments to his duties, or working from home, or working from a different location would not have at that point in time facilitated

a return to work and therefore were not reasonable adjustments to make at that point in time. Likewise "consideration" of alternative work would not of itself have removed the disadvantage the Clamant was facing. As Mr Probert puts it, what the Claimant was actually seeking was "more time" to become well enough to then have a phased return to work in due course. The heart of this case is really about whether it would have been reasonable to give that time. But that adjustment of "more time" is not part of the pleaded reasonable adjustment claim.

5.19 The complaint of failure to make reasonable adjustments is therefore not well founded and is dismissed.

Was the unfavourable treatment of dismissal because of something arising in consequence of disability – that is the Claimant's sickness absence which arose as a consequence of his disabilities

5.20 It is not in dispute that the decision to dismiss was unfavourable treatment.

5.21 The Respondent argues that the Claimant did not challenge the decision makers on the point that his absence arose in consequence of disability. It is said that evidentially the claim cannot stand. But the question in respect of SB (or GS on appeal) is whether the decision to dismiss was because of the Claimant's sickness absence (in the sense of being a material influence). It is entirely evident from SB's own evidence that was the case (a decision that GS went on to uphold). For example, SB sent the Claimant a letter headed "Dismissal letter for absence that can no longer be supported" at [504] and where he summarised the Claimant's sickness absence history, referred to the impact on the business the Claimant's continued sickness absence would cause, and said he was terminating the Claimant's employment: "*because you have been unable to maintain an acceptable level of attendance and have been unable to return to work within a timescale that I consider reasonable*." SB also went on to say he had considered a downgraded or alternative post but did not believe it would affect the Claimant's ability to return to work in a reasonable timescale. Likewise at [532] SB wrote (for the purposes of the appeal): "*The decision which was based on the outcome of the review in the mentioned areas above concluded Warren's absence as unsustainable."* Moreover the Grounds of Resistance at [56] accept that the dismissal was because of the level of sickness absence.

5.22 It is a matter for the Tribunal whether the Claimant's sickness absence arose in consequence of the Claimant's disability. We find that it was. His historic absence and anticipated future absence arose in consequence of the Claimant's disabling back condition.

Has the Respondent show it was a proportionate means of achieving a legitimate aim?

5.23 The question for us is therefore whether the dismissal was a proportionate means of achieving a legitimate aim. The legitimate aim is said to be being able to ensure regular and effective service from the Respondent's employees and being able to adequately manage the Respondent's resources. We accept they are legitimate aims.

5.24 In essence our task is to undertake a critical evaluation and then weigh the discriminatory impact on the Claimant of being dismissed against the benefits to the

Respondent in pursuit of its legitimate aims. Part of that is a consideration of whether there was a less discriminatory way of achieving those aims.

5.25 The Claimant's case is that a less discriminatory way of achieving the legitimate aims would have been to wait until August 2023 when it had been said by OH it was feasible he could return to work on a phased basis. That included waiting for the outcome of the CT scan due to take place in May 2023 and the ensuing further advice and treatment from the consultant, which it was hoped would be a course of steroid injections to facilitate that return to work. OH would also then be able to further advise and guide that process.

5.26 We considered the impact on the Claimant of the dismissal. We considered it was a significant impact. He lost his job and his means to provide for his family. The Claimant had worked for the Respondent for some 7 years, having left private practice to join. During his time with the Respondent he had, for reasons given in the background section above, moved within the Respondent organisation from Scotland to Wales. At the point of dismissal, again because of the sequence of events that had happened, his surveyor eligibilities had expired. Whilst we had no direct evidence on the transferability of the Respondent's eligibilities to the wider maritime surveying industry we considered the expiration of the Claimant's eligibilities would be likely to be a disadvantage in finding future work. When the Claimant had joined the Respondent he had been able to use existing experience be validated as eligibilities with the Respondent under their APL process – so there must be some transferability. We anticipate that eligibilities gained through a Government survey and inspection body must have some wider value in the industry. The prospect of the Claimant therefore finding other work was likely to be hampered by this and also by the impact of his disability at that point in time. The Claimant had a family to support.

5.27 Set against that we considered the various benefits the Respondent said flowed from the dismissal decision.

5.28 At around the time of the Claimant's dismissal the structure of the marine surveyors at the Cardiff Marine Office was SB at the head as Technical Manager. Below him were four G7s. There were two G7 Principal roles. One was held by NP. The other was held initially by AB who had left in March 2023 on retirement, and was replaced by AK. AK had moved across from being G7 Fish. That vacancy at G7 Fish had in turn been filled by SL in March 2023. SL had been promoted from SSEO. The fourth G7 was the Claimant's G7 Consultant post. Below the G7s were three SSEO posts. One was initially held by ZUH but by June 2023 there was a vacancy because ZUH had moved for personal reasons and had transferred to the Liverpool Marine Office. At the time of the Claimant's dismissal that had not been filled. Another SSEO was MM who had had a period of medical leave in February and March and who at the time of the Claimant's dismissal had medical restrictions in work but SB explained that only related to one job that MM could not do. There was also a vacancy at the third SSEO because of the gap created by SL being promoted. At SEO level, one SEO had medical restrictions but that related to the number of tasks given at any one time. There were then two other SEOs in training and a SHEO also in training. So at the time of dismissal there were gaps in terms of the Claimant's sickness absence as G7 Consultant and two gaps at SSEO level. The structure is shown at [482]. We have no evidence as to what was specifically happening in relation to those two vacancies at SSEO, but the spreadsheet does not envisage those gaps being filled by August 2023.

5.29 The Respondent's position is that the surveyors in the Cardiff Marine Office were under pressure both due to the Claimant's absence and also the other vacancies and medical leave and medical restrictions. It is said that they were working excessive amounts of overtime. For example, it is said that in the period 13 March 2023 to 16 April 2023 (cycle 56) 8 surveyors would be expected to work 1480 hours and that 1612.5 hours were worked meaning excess hours worked of 132.5. The approach taken to the spreadsheet at [482] was to say 60% of those additional hours were attributable to covering for the Claimant in his absence because the expected pattern of the Claimant's work was to work 60% for the Cardiff Marine Office and 40% for HQ on consultancy work. So on that analysis in that month it would be said that others worked 79.5 hours covering for the Claimant in his absence. For the period 28 November 2022 to 16 April 2023 the total figure attributed to covering for the Claimant was put at an average of 111 hours a month. There are some potential difficulties with how reliable the figures given are, however as a forensic tool. To take the example of cycle 56 there was also a vacancy at SSEO level due to the promotion of SL so why would that, for example, only have 53 hours attributed to covering that by way of excess hours but the Claimant at 111 hours? Also why does the spreadsheet at [482] in the section on "considerations" say that covering for the two gapped roles would mean remaining surveyors working at least 74 additional hours in a cycle, but covering the Claimant is put at 111 hours in a cycle? Potentially also MM was on medical leave for part of the period at cycle 56 which would have meant others covering his work. It is also notable that on the face of it that would also a particularly acute period because of absences and gaps, yet the figure for excess hours worked in the table is the lowest at cycle 56 out of all the cycles analysed. The Claimant also says, and we accept, that historically levels of overtime were high in any event, in part due to the structure of the region and very long days worked because of the distances surveyors would travel. SB did not seem to disagree with the Claimant that, for example, historically MM had worked a large amount of overtime, that the Claimant estimated at around 70 to 80 hours a month. There is therefore the risk that if the figures were looked at for the period prior to December 2022, and prior to the Claimant's sickness absence, excess hours worked in the cycles would be showing in any event. The additional hours worked figures at [482] therefore could be overstating the position. In that regard we also noted that whilst it is said by SB that the surveyors in the office were working on average around 166 hours more every 5 week cycle than their normal working hours since the Claimant commenced his sickness absence in November 2022 adding, SB says, considerable pressure to the team that in fact even if the Claimant had not been on sick leave he would have not been contributing hours to the Cardiff Marine Office temporarily in any event because he would have temporarily been doing the HQ work for RG. The Claimant's absence had also previously been sustained in the summer of 2022 when he was in Belfast. If the Claimant's absence from the Cardiff Marine Office could be sustained then, particularly to work for RG, it does somewhat beg the question as to exactly how much pressure the Claimant's absence was adding to the Cardiff team and as to the sustainability of his absence.

5.30 The table at [482] also identifies other workload pressures due to things such as an increase in new build work, an increase in UKLLE work, more CSM work, that Fishing Vessel works continued to take more time because of changes in regulations that had previously increased the number of inspections to take placed on each vessel, and the mid term DSM audit being due that year for most of the Domestic Passenger Vessels. The table also identifies tasks such as training and activity monitoring for new

surveyors. The table identifies as particular considerations that G7 Fish and the Principal Marine Surveyors were having to cover consultant work for the Claimant, that the Marine Office was unable to get technical advice and first hand information from the Claimant, that surveyors were unable to obtain advice from the Claimant resulting in increased direct communication with HQ, the medical restrictions and support needed for surveyors with medical leave/ restrictions, and the impact of potential industrial action. The section headed "conclusion/impact" says that "unable to meet KPI on survey and inspection booking", that there was potential for additional surveyors to be impacted by work related stress, there was a potential impact on audit outcome due to limited resources, that G7s were having to take on an additional training load because there was only 1 SSEO for 3 trainees and that with two new G7s in post added to further workload on top of learning new roles due to limited handover and learning opportunities.

5.31 Looking at things in the round, we accept as a matter of logic that the Claimant's absence on sick leave would have meant that others would need to do the work that he would otherwise have done (or that the work goes undone/is delayed) on tasks such as surveys and inspections (at least for the period if and when the Claimant's temporary role with RG came to an end) and also to cover the Claimant's turn on the Port State Control rota. We also accept, whilst none of this is the Claimant's fault, there were the two other staffing gaps at SSEO, as identified. We also accept that whilst the spreadsheet at [482] needs to be looked at with some caution, it does give a flavour of some of the perceived pressures in the Cardiff Marine Office as a whole at the time of the Claimant's dismissal.

5.32 The Respondent's argument is that dismissing the Claimant served their legitimate aim of adequately managing resources (or achieving regular and effective service from employees) because they could then recruit. A recruitment process, whether it be an external appointment, or an internal promotion, or a transfer within the Respondent's wider organisation needed a dismissal first because otherwise there is no vacancy to fill. GS made the point that at some point there needed to be a judgment call (as opposed to a bright line) as to when freeing up that recruitment process could start, rather than simply maintaining the absence of someone like the Claimant on long term sick leave. It is a point we acknowledge, as we do the observation of Underhill LJ that sometimes it is reasonable for an employer to say "enough is enough."

5.33 But in terms of proportionality there are also some contrary factors to weigh. First, SB (and indeed the Respondent in general) had no firm plan as to what, who and when would happen in terms of recruitment and providing that additional resource in place of the Claimant. We accept recruitment was what SB wished to achieve; but the position was that sign off ultimately lay elsewhere. SB accepted in evidence that generally the Respondent did not recruit at consultant level, because it is difficult to get candidates with the experience and qualifications. He said generally they would recruit at a lower level and that it would take new surveyors about 8-10 months to get their core qualifications done before moving on to obtaining Fishing Vessels and Domestic Passenger Vessels. SB said that a trainee progressing to consultant surveyor also took about a year albeit a SSEO could be quicker. We also know from GS's evidence that in general across the Respondent organisation there were shortages of surveyors with vacancies and the complement not being filled. But in fact the Claimant's dismissal did not even result in Cardiff with there being any recruitment including by way of an internal promotion and/or other recruitment to replace the

Claimant, including at a more junior level. In fact, SB said in evidence to questions from the Tribunal (the evidence would otherwise have not been before us) that after the Claimant's dismissal SB had been considering the options and had put proposals forward. SB said it took some time to get a decision and clarity from management above him. SB said ultimately the Claimant's role in fact was lost from the Cardiff Marine Office. SB said the job was moved and was performed in Plymouth and the Plymouth surveyors had support from Cardiff in some of the work. SB said it was not explained to him why the decision was ultimately made not to recruit in Cardiff.

5.34 Looking at that objectively as we must do, it is evidence in support of a notion that in terms of the Respondent adequately managing its resources at the time, or achieving effective service from employees in terms of staffing the Respondent's needs, that the Respondent could still do so with a gap at the Claimant's level in Cardiff. It also supports a notion that things were not so desperate that they could not wait 3 more months until August 2023 in anticipation of the start of a phased return to work by the Claimant where, if successful he would be delivering some work, rather than having no one in that position at all in Cardiff.

5.35 GS said in evidence that he did not know that the Claimant had not been replaced in Cardiff until he heard SB give that evidence in the course of the tribunal hearing. GS said that in any event the dismissal of the Claimant meant that the Respondent could look across the whole organisation in terms of their efficient allocation of staffing resources, and not just the Cardiff Marine Office. He said if there are vacancies at surveyor level it also made it more difficult to sustain absences compared to having a full complement of staff. We acknowledge the points. But the difficulty is that a central component of the reasoning the Claimant and the Tribunal have been given as to the justification of the Claimant's dismissal (alongside also the impact on HQ policy work) was that the Claimant's absence could not longer be sustained at the Cardiff Marine Office not across the board. That was why the spreadsheet at [482] was done. We simply have no evidence before us, other than the bald statement that the decision was made to move the post to Plymouth, as to what the needs of the whole organisation were and therefore why there was a need to dismiss the Claimant at that time to allow more resources in Plymouth. Furthermore, if there are general shortages of surveyors in the Respondent as a whole across all their offices, why would there need to be a dismissal in Cardiff to fund a post in Plymouth? If these kinds of evaluations were done by the Respondent, we were not given that information.

5.36 The Respondent's case is also that there was no guarantee the Claimant would return to work in August 2023 or as to what the Claimant would be meaningfully doing on such a phased return. SB said a return in August 2023 was very much best case scenario and was dependent upon a number of variables such as the results of the CT scan, the Consultant's advice, how the Claimant responded to treatment, NHS waiting times, and to allow for a period for rehabilitation and ultimately revalidation. GS said as the return in August was only a possibility, to retain the Claimant would potentially have allowed unsustainability to continue. We acknowledge there would be a potential benefit to the Respondent, by dismissing the Claimant, of avoiding the risk that the Claimant would not be fit in August 2023 or that there would be a long pathway to regaining fitness for the survey and inspection work and in gaining eligibilities. However, we also factor in that at the time SB made his decision August 2023 was the best medical information SB had. OH said a phased return in August 2023 was feasible if the consultant went down the steroid injection route. We accept there is never any

certainty in life, but that was the medical information that SB had. The fact that ultimately the course of a medical condition can in general be uncertain in life makes it all the more important an employer has up to date medical evidence addressing the key points before a decision to dismiss a long serving employee is taken. The possibility that the Claimant would have longer term difficulties, or face delay, or require surgery was just that; a possibility and the Respondent had a very firm commitment from the Claimant that he had been and was continuing to actively push a treatment programme forward and would do everything he could to be in a position to return. Furthermore, we come back to the position that a return to work by the Claimant in some capacity at some point in time would be more resources for the Cardiff Marine Office as compared to the reality of the post in fact being lost from that office.

5.37 SB said that even if the Claimant were fit to return in August 2023 the Claimant would be initially restricted to office duties before the Claimant could safely carry out operational work due to the intense physical demands of surveying and inspection work. It also involved driving long distances and SB said he felt it was unlikely the Claimant would be able to travel any distance from day one, or that from a health and safety perspective it was something as a manager it would be appropriate for him to allow the Claimant to do. We acknowledge that and factor it into our analysis. However, there were meaningful activities the Claimant could have potentially done if fit for a phased return in August 2023. In terms of the Cardiff Marine Office, looking at the [482] spreadsheet, the Claimant could potentially assist with some training where it was office based; surveyors would be able to obtain advice from the Claimant and avoid the increased direct communication with HQ (which is listed as a specific consideration at [482]); the Marine Office would be able to get technical advice and first hand information from the Claimant (again listed as a specific consideration at [482]); and in general there would be an experienced surveyor to hand when concerns expressed at [482] included concerns about numbers of junior and trainee surveyors and those new to roles on promotion. A phased return to work in August 2023 could only have been predicated by OH on the basis the Claimant would be fit for some office work with adjustments (for example the earlier OH report mentioned a standing desk). SB accepted in evidence that whilst his primary position remained the Claimant's absence until August 2023 was unsustainable, that hypothetically if the Claimant was in the position of saying he was initially fit to do an hour's work or so, there was work that SB could and would have found the Claimant to do as part of a phased return. As such taking that route in one sense would have achieved something in the way of regular and effective service from the Claimant and offered some beneficial resources to the Respondent. We accept it would not be as much compared to a fully fit individual instead taking the Claimant's full role. But such a replacement individual was not going to be in place in Cardiff in August 2023 in any event, and indeed as it turned out, was never going to be.

5.38 In the longer term, depending on if and when the Claimant was able to increase his activities and the position with regard to eligibilities being resolved, there is also the point that the Claimant may have been back towards doing his 60% operational work for the Cardiff Marine Office. This would mean that the G7 Fish and Principal Marine Surveyors would not have to cover the Claimant's share of that work and the Claimant's turn on the Port State Control rota. We acknowledge again the potential benefit for the Respondent, through dismissal of the Claimant, of avoiding the risk of that not coming good or being further delayed. But again as against that there are the

points that it would always take time to recruit and train, or train and promote, someone at the Claimant's level. In fact, it could be said it would be better to have the Claimant as a resource, with those risks, as against the reality of the resource being lost to Plymouth. Furthermore, the Respondent did not have to make a once and for all decision. It was open to the Respondent as an alternative to sustain for a further period of time and allow a further period of time for the CT scan results, an updated view from the consultant as to treatment plans and a pathway, and in turn updated OH advice answering the questions that the Respondent had posed to OH about return to work options that OH had said could better be responded to once there was that diagnostic and treatment pathway clarity. The Respondent had the option to look again at the position at that time, or at any other point in the future or indeed to wait and see if a return to work in August 2023 was a reality.

5.39 There is also the point about the Claimant's eligibilities. SB says in his witness statement that, following PP's decision to not extend eligibilities, it would be likely to take a period of 12 months for the Claimant to regain certification, once the Claimant was in fact physically fit enough to resume operational duties. SB says that period takes account of the potential need to travel to other Marine Offices across the UK and the seasonal nature of some of the work. A fairly sizeable chunk of the Tribunal hearing was taken up by a dispute as to what in fact the true position was with the Claimant's eligibilities. The Claimant's witness statement proposed that the missing Activity Monitoring due by June 2023 could have been raised with him and arrangements made for him to do one. It was put by BM at appeal stage that the Claimant could have dosed up on painkillers to get him through it. The Claimant's witness statement otherwise proposes that a further short extension could have been given to obtain the Activity Monitoring that could have been given with Assistant Director approval, as set out in the original email giving the extension until June 2023.

5.40 By the time of the hearing the Claimant's arguments became focused on the Respondent's document, the Instructions for the Guidance of Surveyors on Marine Surveyor Development Scheme MSIS40 ("MSIS") which starts in the supplementary bundle at [SB148]. According to [SB149] this is /the MCA policy for MCA surveyors to follow unless for reasons of practicality that is not possible, then guidance should be sought from the Head of Technical Performance or Surveyor Technical Training. MSIS talks about the importance, against a background of ship safety and the need to prevent pollution to the environment, of the MCA being able to demonstrate that it uses appropriately qualified and experienced staff. What MSIS specifically says about extending eligibilities only came to the Claimant's attention shortly before the tribunal hearing and it meant that the Respondent was somewhat ambushed by the point.

5.41 Paragraph E.1.1.5 provides that where it is likely revalidation records are incomplete on 31 December or not submitted, the line manager should request (with explanation) that the surveyor be issued with a new temporary Eligibility Record valid up to six months. (Paragraph G.2.3.1.1 provides something similar). This appears to be the process that was followed for the Claimant in December 2022; irrespective of sick leave the position already was that his revalidation records were incomplete by December 2022. By the time of the agreed due date all outstanding records must be complete. E.1.1.6 and E.1.1.7 provide for some extenuating circumstances such as where a surveyor is overseas and cannot do a revalidation course, or a surveyor who is about to retire.

5.42 Section G19 is concerned with surveyors who leave and return or who are on long term absence [SB220]. In particular G.19.2 is concerned with absences less than 1 year and says: "*For absences of less than 1 year (including long term sickness) then previous Eligibility can be re-instated, provided the absence does not cover revalidation. For an absence over revalidation, the Eligibility will be re-instated until the next course, which the surveyor must then attend and provide a completed … Continuation Training Record (including Activity Monitoring). Upon satisfactory completion of revalidation, the Eligibility will be valid to five years from the original revalidation date. There may be additional requirements for PSC."* For absences over 1 year but less than 5 years the same applies with the addition of having to attend HQ for updating on technical changes. After 5 years there is a requirement to undertake initial training again but tailored to an agreed programme set by a Review Panel.

5.43 Different witnesses had different views on the meaning of this provision. The Claimant's position at the hearing (but not in his witness statement) was that because his absence covered revalidation his eligibilities would simply be reinstated on his return and remain in place until he did a revalidation course in the Autumn together with his already completed CTR and an Activity Monitoring. He said it was not up to PP to decide to grant an extension or not as the temporary reinstatement of eligibilities was automatic. SB did not agree with this saying there was ambiguity over the meaning of the paragraph, including the meaning of an "absence over revalidation." SB pointed out that the Claimant had recently done a revalidation course so it did not seem to make sense that the Claimant would do one again. He said he did not see that it was the case that the Claimant, with an expired certificate, could simply return and undertake surveys and inspections. SB said the Claimant presented a particular risk because with the Claimant joining via APL some of his qualification examples were quite old, hence the original plan for Activity Monitoring. SB said he there had not been surprised when he received PP's email about not granting a further extension. We did not hear from PP for his views about the paragraph or indeed how it fitted in with his email declining to grant a further extension through to February 2024 because, as already stated, the Respondent did not know the Claimant was going to run that line of argument. We therefore do not know what PP specifically had in mind when saying that the Claimant would have to make a fresh application for eligibilities that would need to be reviewed before a decision could be made. We do not know that PP did not know about what is said at [SB220]

5.44 As Mr Probert says we therefore need to proceed with some caution in light of that, and we also exercise some caution because we have no expertise in the technical field itself. Our view was that the Claimant's situation was complicated and unusual. The Claimant had already had a 1 year extension to his revalidation and then a further 6 months in December 2022, neither of which were due to sickness absence but because of the unique circumstances of the Claimant's career pathway at the Respondent. The sickness absence then came on top of that. As SB says the Claimant had also recently undertake a revalidation course. It is inevitable that MSIS would not be written in a way that would specifically cover such an individual set of personal circumstances. A policy such as G.19.3 would tend to be based on principles of risk management. On the one hand it is possible to say that safeguards are already in place in terms of the temporary reinstatement of eligibilities bearing in mind the absence must have been less than 1 year and there will also always be a limited time until the next revalidation course. On the other hand, the Claimant had two prior extensions. There is also the point (hence why SB made the request to PP that he did)

of the risk of the Claimant returning to work on a phased return to work but not being fit to do a further revalidation course (if required) in the Autumn of 2023. If that was the case, on a literal reading of the paragraph the Claimant's eligibilities would expire at that point in any event. Furthermore, what would a completed Continuation Training Record require? Could the Claimant simply reuse his previous one? If so, what if it was based on some records that now fell outside the 5 year assessment period? What about the two missing surveys and would the Claimant be fit to do that at that time? What if the Claimant were not fit at that time for Activity Monitoring? What about SB's concern that there were already older competencies that had not been fully met by more recent surveys but which had been intended to be covered by Activity Monitoring?

5.45 Looking at it objectively, we considered the answer probably lay in wider evidence that SB gave. SB said there was always likely to be a solution. SB said he thought it unlikely that, at least, the Claimant would lose his newer eligibilities gained in Port State Control, Domestic Passenger Vessels, and Fishing Vessels under 15 metres. They were the qualifications that were important to the Cardiff Marine Office and were fairly new eligibilities that the Claimant had both recently secured and was in the process of revalidating (other than the outstanding surveys and Activity Monitoring). From what we understood of the Claimant's appraisal record, on his move to the Cardiff Marine Office he had also been undertaking the initial core training he had not done when he initially joined in 2016, having joined on the basis of APL. Again the Claimant also presumably had to put those core training qualifications also through the revalidation process (subject to the outstanding Activity Monitoring). It is not clear to us on what we had before us (which did not include the Claimant's revalidation application) whether there were also potential outstanding surveys relating to the core training that there had been a plan to cover by Activity Monitoring or whether that related to other additional qualifications. But on the face of it, either way, the Claimant had some relatively newly obtained qualifications, subject to final completion such as Activity Monitoring. It also seems unlikely that the Claimant would have been fit to immediately return to survey and inspection work straight away in August 2023. There was therefore scope and time to address the eligibilities situation as part of the phased return to work guided by OH. There was scope for part of that rehabilitative return to work to have a bespoke plan about what, if anything, was needed in terms of any revalidation course, or HQ training, or completion of the Continuous Training Record and the requirements lying behind that, or the completion of any outstanding surveys and Activity Monitoring, or indeed as to whether some eligibilities could be more easily retained or reinstated compared to others. Furthermore, in that regard the Claimant would be assisted by the fact his more recent eligibilities were the ones that SB wanted the Claimant to have at the Cardiff Marine Office. Indeed, by the time of the closing submissions in this case the Respondent's position was that the situation with eligibilities was really an ancillary part of why the Claimant's continued employment was considered unsustainable.

5.46. For the Respondent dismissing the Claimant gave the benefit of not having to address the potential difficulties with the Claimant's eligibilities. Furthermore, if indeed the Claimant had to go through an eligibilities reinstatement process the Respondent would have the benefit of avoiding that and the impact that may have on the work the Claimant could perform in the interim. There would be a resourcing advantage for the Respondent in that sense. But balanced against that would be the fact that there would be other work the Claimant could be doing for the Respondent once the

Claimant returned and was rehabilitating; and that in the longer term the Claimant would have eligibilities; and also bearing in mind the difficulties there would be recruiting and training a replacement at the Claimant's level; and indeed the point that having the Claimant working with restrictions would on the face of it be better for Cardiff resourcing that the position they ended up in with the Claimant not being replaced at all and the role moved to Plymouth.

5.47 The Respondent's position is also that one reason why the Claimant's retention was unsustainable because the Claimant had not been performing HQ policy work. PP's position was that RG had told him that there had been no output from the Claimant since he was allocated consultancy work and it was not something they could sustain any longer. PP said there was a lot of consultancy work pending due to shortage of resources such as review of ItoS which had been pending for a few years, MSIS review, Learning Management System etc. PP said this was already having an adverse impact on surveyors who did not have up to date instructions on some topics and they were not in a position to populate the LMS database. SB accepted in evidence that the Claimant did not require eligibilities to do this type of work. Dismissing the Claimant would free the Respondent up, in theory, to recruit someone to do this work. But again that has to be set against the points about the difficulties in recruiting at consultant level and recruiting someone with the expertise to do that work. It is difficult to see how such an individual would have been recruited before August 2023 when, on the face of it, if OH's views on feasibility were correct, there was the potential for the Claimant to start a phased return to work undertaking office work that could have included this HQ policy work. SB's evidence is that he did consider whether the Claimant could do HQ policy work 100% of the time but that the OH advice was that the Claimant could not tolerate sitting or standing for long periods that the policy work would require, and pain may also bring difficulties with focusing. But, as already stated, a phased return to work under the watch of OH would inevitably have been on the basis that the Claimant would by then be fit to do some office work with adjustments, such as reduced hours and the provision of facilitative equipment such as a standing desk. We acknowledge that having someone on restricted, rehabilitative duties might not be seen as the most efficient use of resources for the Respondent, but likewise it could also be said that having some resource is better than none; particular given PP's comments about how much was outstanding. It is notable that the Claimant had previously been seen as a strong candidate for such policy work bearing in mind the arrangement that had previously been made with RG. We also have no evidence as to what opportunities may have been available in the wider Marine Office at the Claimant's level or on a regrading, which is particularly relevant given the Claimant had moved location previously and bearing in mind what GS about general shortages of surveyors. SB stated at [530] that alternative roles were considered but the roles required either a specific technical qualification or require a high level of physical mobility on a frequent basis. But we have no information as to what specific roles were considered, and their technical qualifications and whether the Claimant could meet them. Further, the medical evidence was not at the time that the Claimant would never become fit enough to return to the physical activity of survey and inspection.

5.48 We also factor in that the Claimant was on nil pay and therefore there were no direct salary costs to the Respondent in sustaining the Claimant's absence for a further period. Indeed, on termination for a period the Respondent had the cost of the Claimant's notice pay and potentially also the severance payment that was paid. We

also factor in the length of time that the Claimant had been off and that the earliest anticipated return to work would be August 2023 and then on a phased return.

5.49 Putting all those matters together, and balancing the discriminatory effect on the Claimant against the benefits to the Respondent of dismissal, we concluded the Respondent had failed to prove that dismissal was a justified, proportionate step. We considered that waiting a further period was a more proportionate way of advancing the stated aims of regular and effective service from the employees and adequately managing the Respondent's resources and was a measure which had a less discriminatory impact on the Claimant. It was more proportionate to wait for the anticipated scan result, updated consultant's plan as to diagnosis and a treatment pathway and OH's advice at that point. The Respondent would then have up to date advice about would the Claimant return to work in August 2023 as previously seen as feasible if the consultant went down the steroid injection route, and if not when, and what a phased return to work in terms of capabilities and adjustments would look like in the Claimant's role or an alternative. There was scope at that time, depending on what ultimately was the OH advice to have a phased, rehabilitative programme in place for the Claimant to work towards returning to operational work and regaining or finalising eligibilities if required and completing any necessary surveys and Activity Monitoring. There was scope for the Claimant to do some duties for the Cardiff Marine Office and/or policy work for HQ in the interim that would have been some additional resourcing for the Respondent both in Cardiff and/or for HQ.

5.50 The decision to dismiss was not justified at dismissal or appeal stage and the complaint under section 15 succeeds.

Protected Disclosures

5.51 The Respondent does not dispute that the Claimant made protected disclosures in his document sent to JJ on 9 December 2019 and on that basis said they also would not be challenging the Claimant on the qualifying nature of the other alleged disclosures. Instead they chose to focus on the question of causation. We therefore accept the Claimant made the protected disclosures he claims.

Protected Disclosure Detriments: the instigation of the formal absence procedure in January 2023 and the failure to pay overtime accrued prior to dismissal

5.52 During the course of the hearing the Claimant withdrew detriments 1 and 4: the instigation of the formal absence procedure in January 2023 and the failure to pay overtime accrued prior to dismissal. Those detriment complaints are therefore dismissed upon withdrawal.

Protected Disclosure Dismissal / "automatic" Unfair Dismissal – Was the reason or principal reason for the Claimant's dismissal the fact that he had made a protected disclosure(s)

5.53 In terms of the remaining protected disclosure complaints, we are addressing the dismissal complaint first because it is the complaint that we heard the most evidence about. The decision to dismiss was made by SB. SB's evidence was that he did not know about the Claimant's claimed protected disclosures until the course of these proceedings. By the conclusion of the case the Claimant seemed to accept that SB

may not have been aware of his protected disclosures. But the Claimant also said the management team were a close team, and it seemed implausible that knowledge of disclosures would not have been communicated. The Claimant said that some Assistant Directors were aware and the involvement of KW would have permeated down the management line.

5.54 We accept SB's evidence that he did not know about the protected disclosures. In fact, SB did not even know that the allegation the Claimant made about sharing of questionnaire information, (where SB had once placed at part as he was the initial decision maker for one of the affected members of staff) was part of the widespread disclosures that the Claimant took to JJ and were investigated by the GIAA. SB described himself as not a particularly curious person. Indeed, SB commented directly to the Claimant that he (SB) really had no idea how the Claimant knew the things that the Claimant seemed to know. It shows the contrast in their personalities, and also accords with our assessment that SB was just concentrating on the running of his own marine office and did not concern himself in other matters.

5.55 We invited the Claimant to put his case to SB as to how he said the principal reason for the decision to dismiss was the making of the protected disclosures. For example, it seemed at times that the Claimant's case was that SB was acting on the instructions of others, such as KW (whether knowingly or unwittingly). SB denied any such instructions, and we accept his evidence in that regard. In fact, by the time of closing the Claimant's case was not so much that SB was acting on direct instructions but instead that SB, although perhaps not aware of the protected disclosures, was instead willing to conform to the prevailing wishes of senior management who were influencing how SB perceived and treated the Claimant, albeit not necessarily done through direct instructions to SB. We invited the Claimant to put his case to SB as to who that was and how it was done. By the time of closing submissions the Claimant's case was that this influence happened through HR and that HR, who had been in regular discussions with management, had influenced SB as decision maker in the direction of dismissal at an early stage. The Claimant said that the Respondent had tried to dismiss him before in 2019 when they said there was no place for him in the agency. The Claimant said that SB restricted his opportunities to revalidate, and that SB had given the Claimant an unrealistic action plan with the assistance of HR. The Claimant said this was withdrawn when the Claimant requested a meeting with his trade union representative present. The Claimant said SB had also paid a lack of attention to arranging Activity Monitoring that had meant a threat to the Claimant's authorisations by the end of 2022. He said there was a continuous period of attempts to dismiss him and that the driving force for this was his protected disclosures that were known to senior managers and driven through HR. The Claimant said they were coercing, through HR, SB to the decision they desired, and that SB had shown no resistance to that outcome.

5.56 SB denied there being anything inappropriate in how HR had dealt with the situation. He said he did not consider he was being directed or influenced by them in the way the Claimant suggested and that he could see little scope for that to happen because in the process they were following he and HR were following what they understood the attendance policy to be and following the flow chart within it. He said he received no general "messaging" that the Claimant was not liked, for example, from HR or anyone else.

5.57 We did not hear evidence from KB or anyone else in HR. But that is not surprising because we can see no way that the Respondent would have known exactly who and what it is said was done by HR or anyone else at the Respondent to, as the Claimant would say, influence SB to dismiss the Claimant. We can therefore draw no inferences from the fact that we did not hear from HR or indeed anyone else in the management chain the Claimant is suspicious about. If a case is going to be brought in the way the Claimant seeks to bring it the Respondent does have to be on notice as to who it is alleged did what, so that the Respondent can fairly call evidence. These are serious allegations, and a party has to be in a position to respond to them.

5.58 We accept SB's evidence and find that he did not receive cues or messages that were against the Claimant from HR or anyone else. As we have already said, we would not be in a position to infer that SB had been influenced, potentially according to the Claimant in way that SB would not even see (such as being directed towards dismissing the Claimant but in a way that SB would not be suspicious about), when the Respondent has not been in a position to call as witnesses those who the Claimant holds accountable for that influence.

5.59 We do not find that SB was seeking to limit the Claimant's opportunities for revalidation; SB was seeking to progress the Claimant hence the action plan that he prepared, which SB dropped away because of the Claimant's reaction to it and because SB considered he would be better off leaving the Claimant to deal with Surveyors Training about the revalidation elements directly. SB sought out the extension for the Claimant for revalidation and when SB did so SB had no idea that the Claimant was going to be off sick for as long as the Claimant was. Whilst the Claimant was suspicious about the action plan, such suspicion was borne of the Claimant's prior experiences and we do not find that the action plan itself was sinister. We accept that SB was trying to progress the Claimant to revalidation and to get the qualifications SB considered important to the Cardiff Marine Office, and SB thought he was not getting the engagement from the Claimant that he hoped for. SB in dropping the Claimant's grading to developing was advised by HR that in doing so he should set the Claimant an action plan. There is nothing wrong with that or anything suspicious about that; it is the advice you would expect HR to give. The deadlines that SB gave he thought were achievable and he was happy to hear back from the Claimant with counterproposals but the Claimant did not do so because of the Claimant's reaction to the action plan. In terms of Activity Monitoring we accept that in the particular circumstances SB thought that the Claimant was making arrangements directly with Surveyor Training and he left the Claimant to do that. SB accepted in evidence that he could have arranged it, and we accept that communication had probably become difficult between the Claimant and SB. But we do not find that was because of the Claimant's protected disclosures or "messaging" being given to SB. It was because SB and the Claimant were in a difficult situation with SB having to line manage the Claimant who had previously line manged SB and who himself had previously been a Technical Manager. The Claimant did not respond well to the action plan and had in any event been dealing directly with Surveyor Training. So, SB decided to back off and leave the Claimant to it. The Claimant himself was not communicating with SB, hence SB not having seen the Claimant's revalidation application or telling SB about what he was missing in revalidation until the Claimant had to do so. We therefore do not find this a basis to infer that SB was "out to get" the Claimant or was influenced by others, such as HR, to do so.

5.60 We also do not find that the handling of the dismissal process itself was indicative of there being some ulterior motivation or inappropriate influencing taking place. Assessing it now after the event we have found in the discrimination arising from disability complaint and in the unfair dismissal complaint (below) that mistakes were made or that things could have been done better. But we do not find that any such failings are themselves suspicious. SB and HR were following the policy as they understood it to be. SB was trying to gather objective evidence when making his decision to dismiss, hence the task he set the surveyors in the Cardiff Marine Office and the questions he sent to PP. The type of questions SB was asking were the right type of question. SB ultimately made a decision that we have found to be wrong, but the decision was based on SB's genuine thoughts.

5.61 In terms of appeal, we likewise accept GS's evidence that he did not know about the Claimant's protected disclosures or had heard or any negativity about the Claimant. We find in rejecting the appeal GS was not personally influenced by the protected disclosures because he did not know about them. We can also find no evidence that GS was unwittingly inappropriately influenced towards upholding the Claimant's dismissal. GS was chosen to hear the appeal because he had no connection to the Claimant and was in a different department. We are satisfied that GS, although again we have disagreed with the outcome of his decision making, was genuinely hearing the appeal.

5.62 We would not find that the Claimant has shown sufficient reason to doubt the reason for dismissal, but in any event we would find that the Respondent has satisfied us that the reason or principal reason for dismissal was not the making of protected disclosures. The complaint of protected disclosure dismissal is not well founded and is dismissed.

Protected Disclosure Detriment – The decision not to have a meeting with the Claimant before his dismissal

5.63 We address this further below as part of the unfair dismissal analysis. But we find that no further meeting took place with the Claimant before dismissal because SB and HR genuinely did not believe that one was required under the policy. We do not find that it was in any way influenced by the Claimant's protected disclosures; it was a matter of interpretation of the policy. We had the benefit of hearing evidence from SB and we are satisfied that the Respondent has shown the protected disclosures were not a material influence. The protected disclosure detriment complaint is not well founded and is dismissed.

Protected Disclosure Detriment – Failure to wait for the outcome of the CT scan on 15 May 2023 and not seeking further medical advice

5.64 SB did not wait for the outcome of the CT scan and did not seek further medical advice because he was proceeding on the basis that the medical advice was that the Claimant returning to work in August 2023 was the best case scenario. SB's view was sustaining the Claimant's absence until then was unsustainable. He therefore did not think that waiting for the CT scan outcome and further medical advice was needed. That was SB's genuine opinion, and we do not find it was in any way influenced by the Claimant's protected disclosures. We had the benefit of hearing evidence from SB and we are satisfied that the Respondent has shown the protected disclosures were not a

material influence. The protected disclosure detriment complaint is not well founded and is dismissed.

"Ordinary" Unfair Dismissal

5.65 The first question for us was whether the Respondent had shown a potentially fair reason for dismissing the Claimant. We were satisfied that the Respondent had done this. As set out above we do not find that the principal reason was the making of protected disclosures. We find the principal reason related to the Claimant's capability and in particular the following key factors:

5.65.1 The Claimant's absence from November 2022 to the date of dismissal;
5.65.2 The predicted length of absence before the Claimant could return to some form of work potentially in August 2023 and the perceived pressures associated with maintaining his absence for that period in the Cardiff Marine Office and HQ policy work;
5.64.3 A concern that a return to work could turn out to be later than August 2023;
5.64.4 A concern about what duties the Claimant could do on any return on terms of restrictions and the need to regain eligibilities.

5.66 We therefore turned to the test of fairness under section 98(4) ERA. This requires us to have regard not only to the size and administrative resources of the employer but also as to equity and the substantial merits of the case. We reminded ourselves of the legal framework and the need for a different approach compared with the section 15 Equality Act complaint. The central focus here is whether the employer's approach fell within the band of reasonable responses and it is based on what the Respondent knew at the time or could reasonably have known through a reasonable investigation. It is different to the objective assessment we undertook for the section 15 Equality Act complaint.

5.67 Applying questions akin to Burchell, the first question would be whether the Respondent had a genuine belief in the matters that caused it to dismiss the Claimant. For reasons given already, particularly in our analysis of the whistleblowing complaint we find that these were SB's genuine beliefs (and that of GS on appeal). They genuinely believed the position was no longer sustainable.

5.68 The second question is whether the Respondent carried out such investigation into the matter as was reasonable in the all the circumstances. Here we considered that the Respondent had not carried out sufficient investigation into the sustainability of the policy HQ work. PP understandably spoke of the demands and the delays, but there had been long term difficulties finding staff with the right skills and experience to do the work. Hence the previous plan for the Claimant to spend some time working for RG, and on the face of PP's email there were sizeable projects outstanding. What there was no reflection on was if the Claimant was dismissed then how did that actually help in terms of covering the work particularly given the difficulty with recruiting consultant surveyors? What was the plan? How did that compare with the possibility of sustaining the Claimant's absence until an anticipated return in August 2023 when he may have been able to, on a phased return to work, start picking up some of that work and bearing in mind the Claimant's specialist skills and experience?

5.69 Further, we consider that the Respondent as a whole had not carried out sufficient investigation into what the plan was in terms of replacement of the Claimant. SB (nor GS on appeal) were not told there was potentially a plan not to replace the resource in Cardiff. It did not allow SB to then consider the sustainability of maintaining the Claimant's absence in that context. If the Claimant was not going to be replaced as a resource, then there is a prospect SB may have taken a different view on the viability of sustaining the Claimant's absence until August 2023 or sustaining the Claimant's absence until the CT scan was known, the updated consultant's view obtained, and updated OH advice received. There was therefore also a failure to reasonably investigate the medical position and what a phased return to work would look like in that regard too. Having some resource may be better than none, particularly bearing in mind the resource was at a level where it was difficult to recruit, and the spreadsheet demonstrated there was a shortage of experience, supervision and advice. Not telling SB about the wider recruitment/resource allocation position also meant that SB focussed his investigations and reasoning on the Cardiff Marine Office and not the Respondent as a whole. In turn it also meant there was, at least in terms of what was shown to the Tribunal, no proper investigation into the resourcing of the Respondent as a whole and the advantages and disadvantages of sustaining the Claimant's absence for a further period across the establishment.

5.70 We therefore concluded the Respondent had failed to conduct as much investigation as it would have been reasonable to undertake and that was outside the band of reasonable responses.

5.71 The next element of the Burchell type test is to consider whether there were reasonable grounds for the conclusion that had been reached. There were reasonable grounds for the conclusion the Claimant had been off for 5 or 6 months already and that the earliest anticipated return would be August 2023. There were reasonable grounds to believe that the Claimant's absence and continued absence was adding to the pressures (but not the sole cause) in the Cardiff Marine Office and in covering HQ consultancy work.

5.72 We were, however, satisfied that the Respondent's conclusion that maintaining the Claimant's absence until a potential phased return in August 2023 was unsustainable, was outside the reasonable range in the circumstances. This very much linked to our findings about the reasonableness of the investigation. There was no mapped out plan as to what the Claimant's dismissal would achieve in terms of additional resourcing for the Cardiff Marine Office, or HQ consultancy work, or indeed across the Respondent's establishment as a whole. The Respondent is a Governmental body with sizeable resources. August 2023 was in the scheme of things, and even when added to the Claimant's existing period of absence, not an extensive further period of time away, particularly when compared to the important point of thinking realistically about what other resources would become available in that time period, freed up by the Claimant's dismissal. Whilst we acknowledge the point that the dismissal of the Claimant frees up a vacancy and also that at some point a judgement call needs to be made; that judgement call should be made in the context of actually having a properly thought through plan.

5.73 In terms of the conclusion that the Claimant returning to work in August 2023 was not a certainty, then there would be reasonable grounds for that conclusion because in life there never could be that certainty. However, to the extent that the decision to dismiss

was based upon concerns about the viability of that anticipated return to work (which we acknowledge was a secondary factor bearing in mind the primary conclusion was that waiting to August 2023 was not sustainable in any event) we do not consider there were reasonable grounds. August 2023 was the only date the Respondent had that was based upon medical advice and if the Respondent was going to doubt that then they should have waited and obtained the updated advice. Further, to the extent the decision to dismiss was based upon concerns about the Claimant's eligibilities (which again we acknowledge was a secondary factor) it was reasonable to dig further into what PP actually meant and what the pathway forward would potentially look like bearing in mind, for example, SB's observations that the Claimant's newest qualifications (which were the ones that were important to the Cardiff Marine Office) probably would be ok (we take it presuming the outstanding aspects such as Activity Monitoring were completed). There also reasonably should have been consideration as to how a phased return to work, rehabilitative duties, and regaining eligibilities could potentially have all slotted together which in turn links back to the question of the reasonableness of obtaining updated OH advice.

5.74 Ultimately given the size and resources of the Respondent it was outside the band of reasonable responses to dismiss the Claimant at the time the Respondent did so and based on the inadequate information and evaluation undertaken at that time. These flaws at dismissal stage were not corrected on appeal.

5.75 There were also, in our judgement, elements of procedural unfairness. The detail of SB's rationale was not shared with the Claimant at the initial dismissal stage or indeed prior to the appeal. He only received them with the appeal outcome. SB said he had been following the policy documents and did not realise they should be sent. GS said that at the time he thought the sustainability assessments were factual and therefore did not think there was much debate that could be had about them. We accept this was done through genuine error but in our judgement not sharing the information with the Claimant was outside the range of reasonable responses. It deprived the Claimant to ask questions and make points such as how dismissing him rather than waiting for a phased return helped the Cardiff Marine Office and HQ in terms of resourcing needs. It deprived the Claimant of asking questions about the status of his eligibilities. It deprived the Claimant of the opportunity set out what he could offer by way of service to the Respondent. Giving the Claimant the information might have led the Respondent themselves to reach a better quality decision making process. It would also have helped the Claimant appreciate that the Respondent was in the final stages of considering dismissing him.

5.76 There is then the question of whether the Claimant should have been called to another meeting, clearly termed a dismissal meeting. The Respondent's Supporting Attendance Procedure starting at [1021] is not clear in some respects. Paragraph 53 is part of a section dealing with Formal Health and Attendance Improvement Meetings and says their purpose is for the manager to understand more about the employee's absence including more about their illness, treatment, and what might be done to achieve a satisfactory level of attendance. It is called by using "Model letter 3" but we do not have a copy of the model letters.

5.77 Paragraph 56 is a new section and is headed "Decision points during formal action for unsatisfactory attendance" and says that formal action for unsatisfactory attendance consists of a first written warning, a final written warning and consideration

of dismissal/downgrading either after a final written warning or when a continuous sickness absence can no longer be supported. But of itself paragraph 56 does not link to a specific stage in a process. Later in the policy there is a section headed "meetings during continuous sickness absence" at paragraph 85 which says the manager and employee will meet at an informal review and a Formal Health and Attendance Review Meeting. It then says something different about that meeting when compared to paragraph 53. It says that the meeting is to explore the support needed but "*also to consider whether the employer is likely to return within a reasonable time frame A decision on whether the business can continue to support the absence may also be taken."* Paragraph 93 has a similar content to paragraph 85 and says that during the meeting, amongst other things, the manager should consider whether the business can continue to support the absence and explain that they may consider dismissal/downgrading if the business cannot continue to support the absence. Paragraph 95 then says if a return to work is not likely within a reasonable timescale and the business cannot continue to support the absence the manager should seek Occupational Health advice to consider whether the employee is likely to meet the criteria for ill health retirement and if not, whether dismissal/downgrading is appropriate. Model letter 2 should be used to set out the outcome of the meeting, but again we do not have a copy of that.

5.78 There is then a heading of "Considering dismissal or downgrading" where it says at paragraph 96 that dismissal is lawful when it is a reasonable outcome arrived at through a fair process and it should be a last resort because the consequences for an employee can be very significant. The manager must be at least one grade higher than the employee and applies when they do not expect an employee who is on a period of continuous absence to return to work within a reasonable time frame and where the employee is absent for a reason related to disability the department has explored all options to make adjustments that could enable an employee to return to work. Paragraph 98 says "*The manager or Decision Maker should conduct a formal meeting with the employee before making a decision about dismissal or downgrading"* and it refers to Model letter 13 that again we do not have. There is no definition of "formal meeting". Paragraph 99 says that in arranging the formal meeting the manager should follow Annex 1 and paragraph 100 says the manager should explain why they are considering dismissal or downgrading and allow the employee to present any new information which might affect the decision. What it does not clearly state is whether that requires a further formal meeting following the previous Formal Health and Attendance Review Meeting but certainly one reading of it is that there should be a separate, different formal meeting with adequate notice of that given to the employee.

5.79 Paragraph 104 says there should only be dismissal if the business can no longer sustain the level of sickness absence, downgrading is not appropriate, there are no further workplace adjustments that can be made, OH advice has been received within the last 3 months, and an application for ill health retirement would not be appropriate or has been refused. Paragraph 105 then refers to the potential for an efficiency compensation payment. There is a section dealing with the right of appeal which should be based on procedural error, new evidence coming to light that may change the outcome, and that the sanction imposed was too severe/disproportionate or not supported by the evidence. At paragraph 118 an appeal should be conducted as a full re-hearing of the case.

5.80 Annex 1 says that it applies to all formal meetings and that before the meeting, amongst other things, the manager should invite the employee to a meeting to discuss their attendance and tell the employee they are expected to attend. The manager should explain the reason for the meeting, what issues will be discussed and what the possible outcome will be. It also says the manager should notify the employee of the potential outcomes including dismissal/downgrading and give the opportunity to raise anything they think is relevant prior to the manager making a decision about next steps.

5.81 There is a step by step guide at page [1056] which talks about holding Formal Attendance Review Meetings and if the employee does not return to work about making a decision whether the absence can continue to be supported and consideration of dismissal or downgrading. It does not specifically say there should be a separate formal dismissal meeting (and the same applies to the flow chart).

5.82 SB says that he and HR were following the policy in not holding a further meeting, and that the Claimant had been adequately forewarned dismissal was a possibility if a decision was made that the absence could not be sustained. At appeal stage GS said they had sought advice from the Department for Transport on whether there should have been a separate formal dismissal meeting and that the advice was that was not required, but that he accepted there was an element of procedural weakness. He said, however, that having another meeting would not have changed things in any event. The Claimant's position is that neither he nor BM understood that SB had reached the point of considering dismissal because, if so, BM would have attended the last meeting. BM says if SB considered the Claimant's absence was unsustainable then there should have been a formal invite to a formal meeting to specifically consider dismissal using Model letter 13.

5.83 How Model letter 13 differs to the letters the Claimant received we do not know as we were not given a copy. The Respondent says that the Claimant and BM were intelligent and experienced from a trade union perspective and were lackadaisical in attitude in not appreciating SB was going to make a decision on dismissal and in not understanding the warnings. But the point goes both ways; despite their knowledge and experience they very evidently did not appreciate that was the stage the process was at because otherwise BM would have attended the meeting

5.84 In our view the policy is unclear in its direction as to whether a further meeting is required or not. It is also our view that no one i.e. employees, managers, HR and trade union representatives, should be left in the position where such a policy is unclear or is open to interpretation. It should not be the position that GS had to go way and make enquires of the Department for Transport as to what the policy meant. Clarity is particularly important in circumstances where someone's employment is at stake. The Acas Code of Practice on disciplinary and grievance procedures does not apply because there was no disciplinary element to what the Respondent was doing. But there is a principle of natural justice at stake here in terms of the fairness of a capability process: that someone should be able to understand that they are at risk of dismissal; that they have the opportunity to understand why; that they have the opportunity to put forward their case on that with representation from their trade union, ideally at a meeting; and that these things happen before the decision is actually made. In our judgement, there was not sufficient clarity in the letter that the Claimant had been sent for him to understand that in effect the attendance review meeting he attended may well be the last meeting and that this was his opportunity to put forward his case against dismissal. The wording in advance of the second attendance

meeting was no different to what was in the first letter, and we do not consider in the circumstances put the Claimant on sufficient notice. The process followed was outside the range of reasonable responses. Likewise, as we have already said, the Claimant not being given full details of the rationale and evidence that SB was considering and the opportunity to comment on it before a decision was made was outside the band of reasonable responses. Those two things go hand in hand and were not corrected at appeal stage because the Claimant still was not given the rationale documentation.

5.85 The Respondent's case is that any procedural defects would not have made a difference. We do not agree because the Claimant was, as we have said, deprived of the opportunity to give a detailed response to the particular factors and evidence that SB was considering. He also lacked sufficient information to know to arrange representation from his trade union. If he had had the opportunity to ask those questions and put his points of dispute forward it may be that the Respondent would have looked at things differently. In any event, for the reasons already given we consider the Claimant's dismissal was substantively unfair; it has not succeeded on procedural points alone.

5.86 In terms of the Spencer/Daubney questions; the Respondent could reasonably have been expected to wait longer because they had not properly investigated how the Claimant's dismissal, as opposed to waiting until August 2023, or waiting a further period to obtain an updated medical opinion and OH opinion was going to meet the Respondent's resourcing needs. There was not adequate consultation with the Claimant. To the extent that there was a question as to whether the Claimant was likely to return in August 2023 and what work he could do then, or thereafter, there were also inadequate steps undertaken to discover the true medical position. This is a case in which the Claimant was anxious to return to work as soon as he safely could and hoped he would be able to do so in the relatively near future. Taking into account the size and administrative resources of the Respondent, the dismissal was unfair and the complaint of unfair dismissal is well founded and upheld.

5.87 During the course of the hearing we had discussed the "Polkey" issue with the parties. It was agreed, that if appropriate, we could consider the issue in its narrowest form: if the Claimant succeeded in an unfair dismissal because of procedural failings alone, would that have made a difference? We have, however, found that the dismissal was substantively unfair. There needs to be a remedy hearing, both in relation to the unfair dismissal claim and the discrimination arising from discrimination claim. As part of that the Tribunal will have to consider wider Polkey/Chagger type issues about what would have happened to the Claimant if this employer had acted in a non-discriminatory/fair manner. This includes (but is not limited to) questions such as what were the Claimant's career plans and how were they likely to unfold? What medically would have in fact happened? How would this employer have handled the situation if acting fairly and in a non-discriminatory manner? The parties will be sent separately remedy case management orders.

Employment Judge R Harfield

10 February 2025

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

10 February 2025

Katie Dickson
FOR EMPLOYMENT TRIBUNALS

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Appendix - Parties' Agreed List of Issues

This list of issues is based on the Claim Form dated 6 October 2023 and the Further Information as provided by the Claimant on 5 June 2024.

Summary of Claims

1. The Claimant has brought claims for:

1.1 Unfair dismissal contrary to sections 94 to 98 of the Employment Rights Act 1996 ('ERA');
1.2 Automatic unfair dismissal contrary to section 103A of the ERA;
1.3 Detriments for making a protected disclosure contrary to section 47B of the ERA;
1.4 Discrimination arising from a disability contrary to section 15 of the Equality Act 2010 ('EqA'); and
1.5 Failure to make reasonable adjustments contrary to section 20 of the EqA.

Unfair Dismissal – section 94 and 98 ERA

2. Was the Claimant's dismissal for a potentially fair reason under section 98(2) of the ERA? The Respondent contends the Claimant was dismissed due to capability.

3. Was the decision to dismiss the Claimant fair or unfair in all the circumstances in accordance with section 98(4) of the ERA?

4. If the dismissal was procedurally unfair, what is the likelihood that the Claimant would have been dismissed in any event?

Automatic Unfair Dismissal – section 103A ERA

5. Did the Claimant make a protected disclosure?

5.1 The Claimant alleges that he made verbal disclosures in August 2016 and written disclosures on 9 December 2019 raising the following complaint:
5.1.1 the lack of a functional quality system, including that surveyors were signing off surveys based on documents completed by fishermen [C alleges this amounted to a qualifying disclosure as per section 43B(d) and (f)]

5.2 The Claimant alleges that he made verbal disclosures to the Respondent in February 2015, May 2016, February and June 2017, January 2018, on 23 May 2018 and written disclosures between September to December 2016, March, April, June, July, August and September 2017, around the end of 2017/early 2018 and on 9 December 2019 raising the following complaints:

5.2.1 vessels were operating without certification for months or years
5.2.2 the Spanish fishing vessels under the UK flag were in an appalling state of survey
5.2.3 Non application of the International Convention for the Prevention of Pollution from Ships (MARPOL) conventions relative to vessels in Scotland, Spain and Holland

5.2.4 Domestic passenger and larger fishing vessels operating without proper certification [C alleges this amounted to a qualifying disclosure as per section 43B(b), (d), (e) and (f)]

5.3 The Claimant alleges that he made verbal disclosures to the Respondent on 25 January 2018 and written disclosures at the end of 2017/early 2018 and on 9 December 2019 raising the following complaints:
5.3.1 a Dutch fishing vessel was without operational pollution prevention equipment.
5.3.2 Non application of the International Convention for the Prevention of Pollution from Ships (MARPOL) conventions relative to vessels in Scotland, Spain and Holland. [C alleges this amounted to a qualifying disclosure as per section 43B(b) and (e)]

5.4 The Claimant alleges that he made written disclosures to the Respondent in December 2016, February to September 2017, December 2017 to early 2018 and on 9 December 2019 raising the following complaints:
5.4.1 Lack of a proper authorisation system at Aberdeen;
5.4.2 General lack of competence of Aberdeen surveying staff and failures to carry out robust surveys and inspections. [C alleges this amounted to a qualifying disclosure as per section 43B(b)]

5.5 The Claimant alleges that he made written disclosures to the Respondent between June to October 2016 and on 9 December 2019 raising the following complaint:
5.5.1 Lack of timely provision of PPE and the absence of a safety culture within the MCA, including lack of fall arrest harness which are recommended when working at height. [C alleges this amounted to a qualifying disclosure as per section 43B(d) and (f)]

5.6 The Claimant alleges that he made written disclosures to the Respondent on 9 December 2019 raising the following complaint:
5.6.1 A technical manager provided the password for the SCAS questionnaire answers to staff to facilitate cheating on the SCAS. [C alleges this amounted to a qualifying disclosure as per section 43B(b) and (f)]

5.7 The Claimant alleged that he made written disclosures to the Respondent on 9 December 2019 raising the following complaint:
5.7.1 Acceptance and non-disclosure of gifts by surveyors from external parties.
[C alleges this amounted to a qualifying disclosure as per section 43B(a) and (f)]

5.8 The Claimant alleged that he made written disclosures to the Respondent on 9 December 2019 raising the following complaint:
5.8.1 Absence of powers for detention of Warrant Cards for Aberdeen surveyors for at least 8 years [C alleges this amounted to a qualifying disclosure as per section 43B(d)]

5.9 The Claimant alleged that he made written disclosures to the Respondent on 9 December 2019 raising the following complaints:
5.9.1 Wilful manipulation of recruitment outcomes to create recruitment and retention problems to justify a business case for significant salary increases to breach the Treasury cap regime
5.9.2 Deliberately inflated salary figures presented to DfT/Treasury/Cabinet Office to secure monies for the SITP programme.
[C alleges this amounted to a qualifying disclosure as per section 43B(a) and (b)]

5.10 The Claimant alleged that he made written disclosures to the Respondent on 9 December 2019 raising the following complaint:
5.10.1 Lack of co-operation with the Marine Accident Investigation Branch (MAIB), file tampering and the loss of security files.
[C alleges this amounted to a qualifying disclosure as per section 43B(d) and (f)]

5.11 Did the complaints above amount to protected disclosures?

5.12 Did the disclosures of information above amount to qualifying disclosures as per section 43B(a) to (f)?

5.13 Did the Claimant have a reasonable belief that the information showed breaches of section 43B(a) to (f)?

5.14 Did the Claimant have a reasonable belief that the alleged disclosures were in the public interest?

5.15 If so, was the reason or principal reason for the Claimant's dismissal the fact that the Claimant had made a protected disclosure?

Subject to a detriment for making a protected disclosure – section 43B ERA

6. If the Claimant did make a qualifying protected disclosure, was the Claimant subject to a detriment under section 43B? Specifically:

6.1 The instigation of the formal absence procedure in January 2023.

6.2 The decision not to have a meeting with the Claimant before his dismissal.

6.3 Failure to wait for the outcome of the CT scan on 15 May 2023 and not seeking further medical advice.

6.4 Failure to pay overtime accrued prior to dismissal.

The Claimant relies on one or more, or all of the disclosures listed above at point 5.

7. If it is found that the Claimant was subject to a detriment and that he did make a protected disclosure, was such detriment on the ground of him making a protected disclosure?

Disability

8. Was the Claimant a disabled person within the meaning of section 6 of the EqA?

8.1 The Claimant contends that he was disabled on account of sciatica and arthritis.

9. If the Claimant was disabled, did the Respondent know or could the Respondent have reasonably been expected to know that the Claimant was disabled.

Discrimination Arising from Disability

10. If the Respondent knew or ought to have known that the Claimant was disabled, was the Claimant subjected to unfavourable treatment?

10.1 The alleged unfavourable treatment is the Claimant's dismissal.

11. Was the unfavourable treatment caused by something arising in consequence of the Claimant's disability?

11.1 The alleged "something arising" was the Claimant's sickness absence which arose as a consequence of the Claimant's disabilities.

12. If the Claimant has proved that the unfavourable treatment arising from disability, has the Respondent proved that the treatment was a proportionate means of achieving a legitimate aim as per paragraph 24 of the Respondent's grounds of resistance?

Reasonable Adjustments – section 20 and 21 EqA

13. Did the Respondent apply to the Claimant the following provisions, criterion or practice ("PCP")?

13.1 the requirement to be fit and able to perform his substantive duties.

14. Did the PCP put the Claimant at a substantial disadvantage in relation to others who are not disabled?

15. If so, did the Respondent know or could it reasonably be expected to know that the Claimant would suffer a substantial disadvantage?

16. If so, were there reasonable steps that were not taken that could have been taken by the Respondent to avoid the disadvantage? The Claimant has identified the following reasonable adjustments:
16.1 Adjustment to hours and/or duties;
16.2 Working from home or from a different location; and
16.3 Consideration of alternative work.

19 August 2024