EMPLOYMENT TRIBUNALS

Claimant: Mr S O'Boyle

Respondent: The Co-Operative Bank PLC

Heard at: Manchester **On:** 15 and 16 November 2018, 11-13 March 2019, and in chambers on 14 March 2019

Before: Employment Judge Franey (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Ms A Niaz-Dickinson, Counsel

JUDGMENT

1. The complaint of unfair dismissal is well founded. The claimant was unfairly dismissed.

2. The basic award for unfair dismissal shall be reduced by 75% on account of contributory fault by the claimant.

3. The compensatory award for unfair dismissal shall be limited to losses sustained in the period of one month from dismissal, and shall also be reduced by 75% on account of contributory fault by the claimant.

4. The complaint of unlawful deductions from pay and/or breach of contract in relation to holiday pay succeeds.

REASONS

Introduction

1. By a claim form presented on 20 June 2018 the claimant complained that he had been unfairly dismissed from his role as a Senior Test Analyst in February 2018. He was critical of the handling of an investigation into his decision to work from home in the aftermath of the Manchester bomb in May 2017, and asserted that the way in which a subsequent grievance was handled left him unable to return to work in his existing role. He complained that false accusations were made about an Occupational Health ("OH") report, and that eventually he was dismissed without any proper meeting being held. He also complained of a failure to pay him accrued but untaken holiday pay in the sum of £1,354.49.

2. In its response form of 2 August 2018, the respondent defended the claim on the basis it was a fair dismissal because of a loss of trust and confidence. In the alternative it was said to be fair because of a reason relating to the claimant's conduct. The loss of trust and confidence was said to stem from the sequence of events from May 2017, and reference was made to the claimant's complaints about a series of managers and his own assertion that there had been a breakdown of trust and confidence. It was also alleged that no holiday pay was due because the claimant had not been able to carry over substantial untaken annual leave from the previous leave year.

The Issues

3. The dismissal letter referred to a wide range of matters. Helpfully Ms Niaz-Dickinson had prepared a draft List of Issues which identified 22 separate matters which contributed to the belief that trust and confidence had broken down. However, in broad terms the issues to be determined by the Tribunal following submissions were as follows:

<u>Unfair Dismissal</u>

(1) Was dismissal for "some other substantial reason" in the form of a loss of trust and confidence in the claimant fair or unfair? In particular:

(a) Did the respondent have a genuine belief in its reason for dismissal?

(b) Was that belief based on reasonable grounds?

(c) Had the respondent carried out such investigation into the matter as was reasonable?

(d) Did the respondent follow a reasonably fair procedure?

(e) Was the decision to dismiss the claimant rather than take some other form of action within the band of reasonable responses?

(2) If dismissal was unfair, what is the appropriate remedy? Issues likely to arise include:

(a) Whether there should be any reduction to compensation on account of contributory fault by the claimant; and/or

(b) Whether it would be just and equitable to reduce the compensatory award on the basis that a fair dismissal would have taken place in any event had the respondent acted fairly.

<u>**Holiday Pay**</u>

(3) Had the respondent failed to pay the claimant the amount properly payable under his contract when it paid him for untaken annual leave upon termination? The claimant maintained that under his contract he was entitled to be paid additional holiday pay in the sum of £1,354.49.

Listing

4. On receipt of the claim form the case was listed for a one day final hearing in accordance with normal practice for unfair dismissal complaints. Upon consideration of the response form Employment Judge Warren extended that to a two day final hearing. On 18 September the respondent applied for the hearing to be listed for four days on the basis of the volume of documents and the number of witnesses needed. That application was refused by another judge.

5. At the start of the hearing we discussed whether it could be accommodated within two days. I was faced with a bundle of documents filling three lever arch files, five witnesses for the respondent and a witness statement from the claimant which consisted of 1,918 paragraphs over 205 pages. It was plain that reading the relevant material would take a full day.

6. I pressed Ms Niaz-Dickinson as to why the respondent needed to call anyone save for the dismissing and appeal managers. She pointed out that the claimant was taking issue with the way earlier matters had been handled, and of course looking at the primary facts might be relevant to contributory fault if the claimant succeeded. She said that the respondent had limited its witnesses to five rather than the eight it could in principle have called. The claimant supported that position because he said there were matters raised by the other three witnesses which he wanted to challenge.

7. Noting that in cases of dismissal for breach of trust and confidence the Tribunal may have to consider "the whole of the story" rather than simply look at the position as it appeared at the time of dismissal (see **Governing Body of Tubbenden Primary School v Sylvester** – below), I was satisfied that it was appropriate to allow the additional witnesses to be called. I was also conscious that this was a case in which the claimant was seeking the maximum compensatory award for unfair dismissal as well as a substantial basic award and his holiday pay, and that as a litigant in person the hearing might take a little longer than if both parties were professional represented. I therefore agreed that it would be appropriate to allow six days overall for this hearing.

8. After discussion the parties agreed that it would be appropriate to use the first two days for Tribunal reading and to start oral evidence from the respondent's witnesses, and then to resume for four days on 11 March 2019. I heard oral

evidence and submissions for three of those days, and deliberated in chambers on the final day.

Evidence

9. The parties had agreed a bundle of documents which ran to over 1,200 pages. Any reference to page numbers in these Reasons is a reference to that bundle unless otherwise indicated.

10. The respondent called five witnesses. Paul Casey was the Test Specialist Manager responsible for managing the claimant's workload who dealt with the investigation into the aftermath of the Manchester bomb. Juliet Godfrey was a manager about whom the claimant complained, and Ged Knowles was a Human Resources ("HR") adviser involved in the management of the claimant's sickness absence. Hazel Woods was the Senior Manager, Testing Services who decided to dismiss the claimant, and Luke Robertson the Chief Technology Officer who heard the appeal against dismissal. On the third day of the hearing Miss Niaz-Dickinson indicated that Mr Knowles would not be called in person, so his evidence was accepted in written form only. I attached less weight to it than if he had attended in person.[1]

11. The claimant was the only witness on his side.

Relevant Legal Principles

<u>Unfair Dismissal</u>

12. The complaint was made under section 98 which, so far as relevant, provides as follows:

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

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

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

(2) A reason falls within this sub-section if it … relates to the conduct of the employee …

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

[1] The claimant considered making an application for a preparation time order as he had wasted time preparing questions for Mr Knowles but at the end of the hearing he confirmed no such application would be made.

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

13. If the employer fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

14. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in the misconduct case of **British Home Stores v Burchell [1980] ICR 303**, but which has been subsequently approved in a number of decisions of the Court of Appeal. An approach based on the "**Burchell** test" can be useful in cases other than conduct cases, albeit that the focus must always be on the statutory wording. With modifications to reflect the fact that the potentially fair reason relied on in this case was a breakdown in working relationships, one can approach section 98(4) by considering these matters: Firstly, did the employer genuinely believe that there had been a breakdown in working relationships? Secondly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case and did it follow a reasonably fair procedure? Thirdly, did the employer have reasonable grounds for that belief?

15. If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

16. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal.

17. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

18. The seriousness of the effect on the employee of a decision to dismiss is relevant to the question of whether the employer has acted reasonably. In **Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457** the Court of Appeal said in paragraph 13

> **"Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In *A v B* [2003] IRLR 405 the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite."**

Trust and Confidence Dismissals

19. There have been a number of cases in which the higher courts and tribunals have considered situations where an employer claims to have dismissed an employee not for a reason related to his conduct or capability, but for what section

98 terms "some other substantial reason" ("SOSR") in the form of an irretrievable breakdown in working relationships or loss of trust and confidence in the employee.

20. In **Perkin v St George's Healthcare NHS Trust [2005] IRLR 934** the Court of Appeal considered an unfair dismissal claim brought by a Director of Finance dismissed not because of competence or integrity but because of difficulties in his relationships with colleagues and in his management style which were due to his personality. In paragraph 60 the court recognised that if the terms of section 98(4) were satisfied, it could be fair to dismiss an employee because of a breakdown in confidence for which the employee was responsible and which rendered it impossible for senior executives to work together as a team. The full court approved comments made by Sedley LJ when refusing permission to appeal to the effect that although capability might have been an appropriate statutory category for the findings of the Tribunal, it was not the only one and it could be correct to characterise the reason as SOSR in the dismissal of:

> **"an employee in a senior position who could not or would not work harmoniously with colleagues and outsiders with whom a harmonious relationship was essential."**

21. **Ezsias v North Glamorgan NHS Trust [2011] IRLR 550** was a decision of the EAT (Keith J presiding) in an unfair dismissal complaint where the claimant was a consultant surgeon who had repeatedly raised clinical concerns about colleagues, as well as other allegations against some of them, and was the subject of a petition signed by nine colleagues saying they could not work with him. Following an investigation conducted by an external HR adviser, he was dismissed because the working relationships had irretrievably broken down. The Employment Tribunal characterised this as a dismissal for SOSR, whilst finding that the breakdown had been caused in the main by behaviour on the part of the claimant. The appeal to the EAT raised a narrow question: whether, as a matter of contract, the employer's disciplinary procedures should have been applied. However, the EAT made some well known comments on the distinction between conduct and SOSR in cases of this kind. The Employment Tribunal had found that the reason for dismissal had been the breakdown of relationships; this had not been a situation where SOSR was used as a pretext to get rid of the employee without a lengthy disciplinary investigation in what was in truth a conduct case. In paragraph 53 the EAT recognised a "refined but important distinction" between dismissing the employee for his conduct in causing the breakdown of relationships, and dismissing him for the fact that those relationships had broken down. The Tribunal in that case found that the latter had been the reason, even though as a matter of history it was the employee's conduct which had in the main been responsible for that breakdown in working relationships. The EAT recognised that the question before it on the contractual point was a different question from that which arises under section 98, but suggested that the reasoning behind the jurisprudence under section 98 would apply in any event. The conclusion was that the reason for the action taken against the claimant in that case was not his conduct, and therefore that there was no contractual obligation to pursue disciplinary proceedings.

22. In the **Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11** (25 April 2012) the EAT chaired by Langstaff P considered an appeal in an unfair dismissal complaint where the Deputy Head of a Primary School had been dismissed due to a lack of trust of trust and confidence in her because of

her friendship with a colleague who had been arrested for possession of indecent images of children. The Employment Tribunal said that the dismissal was for SOSR but as a corollary to conduct on her part, and therefore that an equivalent standard of procedural fairness to that required in a misconduct case should have been displayed. It found dismissal unfair because the relationship had been condoned at an early stage by the respondent and because there had been no warnings that the continuation of the relationship placed the claimant's employment in jeopardy. In dismissing the appeal the EAT rejected the argument that the Tribunal was precluded from looking at how the parties had reached the position they were in at the time of dismissal. It emphasised that **Ezsias** was concerned with identifying the reason for dismissal, not with the question of whether fairness requires the Tribunal to have regard to how the position has developed. The EAT said (paragraph 37):

> **"Where the substantial reason relied upon is a consequence of conduct…, there is such a clear analogy to a dismissal for conduct itself that it seems to us entirely appropriate that a Tribunal should have regard to the immediate history leading up to the dismissal. The immediate history is that which might be relevant, for instance, in a conduct case: the suspension; the warnings, or lack of them; the opportunities to recant and the like; the question of the procedure by which the dismissal decision is reached. It cannot, in our view, always and inevitably be trumped simply by the conclusion that there has been a loss of confidence without examining all the circumstances of the case and the substantial merits of the case, as section 98 would require.**
>
> **We are not at all unhappy, as a matter of principle, to reach the view that that is so, because as a matter of principle if it were to be open to an employer to conclude that he had no confidence in an employee, and if an Employment Tribunal were as a matter of law precluded from examining how that position came about, it would be open to that employer, at least if he could establish that the reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before legislation in 1971 introduced the right not to be unfairly dismissed…The right [not to be unfairly dismissed] depends entirely on the terms of the statute, but there is every good reason, we think, depending upon the particular facts of the case, for a Tribunal to be prepared to consider the whole of the story in so far as it appears relevant and not artificially, as we would see it, be precluded from considering matters that are relevant, or may be relevant, to fairness."**

23. In paragraph 40 the EAT went on to say this:

> **"We are not saying that in every case in which there is a dismissal for some other substantial reason, where that reason is a breakdown of trust and confidence, that a Tribunal *must* have regard to how that situation came about…"**

24. Keith J had the opportunity to consider the matter again sitting in the EAT in **Lund v St Edmund's School, Canterbury UKEAT/0514/12/KN** (8 May 2013). The claimant was a teacher who had not been happy with the computer equipment he had been given to use, and as a means of advancing his concerns he dismantled the system and refused to allow his class to be observed by a consultant who had been engaged to report on his teaching. He was suspended and subsequently dismissed. The Employment Tribunal found that the dismissal was for SOSR, and was substantively and procedurally unfair. The issue for the EAT was whether the Tribunal had power to increase the award of compensation because of an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. The EAT decided that if the employer initiates a procedure which is a disciplinary procedure for misconduct the ACAS Code applies, even if the

outcome of that procedure is a dismissal not for misconduct but for SOSR. Keith J pointed out that the initial invocation of misconduct procedures distinguished the case from **Ezsias** (paragraph 16) and also suggested that the EAT was unclear about which side of the line the Employment Tribunal found that the reason for dismissal lay in that case. The distinction was put in these terms:

> **"Was it because his colleagues were no longer willing to work with him, which would have been a dismissal for some other substantial reason? Or was it because his conduct in alienating them had caused them not to want to work with him, which would have been a dismissal for a reason relating to his conduct?"**

25. Ultimately, however, it was not necessary for the EAT to resolve that question because whatever the reason for dismissal, the Code should have applied at the time that the procedures were invoked.[2]

26. Finally, it is relevant to note that there have been warnings from the Employment Appeal Tribunal about the danger in employers being able to reply upon a loss of trust and confidence as a means of avoiding the obligations which arise when the real concern is misconduct. Comments to that effect were made by the President of the EAT, Underhill P, in **A v B [2010] ICR 849**, upheld on appeal under the name **Leach v Ofcom [2012] IRLR 839**.

27. The learned editor of *Harvey on Industrial Relations and Employment Law* makes the tentative suggestion that the position is as follows (division D1 paragraph [1915.02]):

> **"(1) Loss of trust should not be resorted to too readily as some form of panacea (A v B;...).**
>
> **(2) In particular, if there are specific allegations of misconduct the employer should rely primarily on those and be prepared to prove them in the normal way (a point made strongly by the Court of Appeal in Perkins in the parallel area of awkward personality).**
>
> **(3) However, in a strong enough case an allegation of (terminal) loss of trust may come within SOSR and justify dismissal (Ezsias, where arguably a vital factor was that the *patient* interest was suffering because of the dysfunctional nature of the hospital department).**
>
> **(4) Where this is the case, it may not be enough for the employer to establish merely the fact of that loss of trust because the Tribunal may (not must) look into the background to that loss to consider the fairness of the dismissal in the light of all the facts (Sylvester)."**

Holiday Pay

28. The complaint in respect of holiday pay was brought as a complaint of unlawful deductions from pay pursuant to Part II Employment Rights Act 1996, or in the alternative as a complaint of breach of contract. It was necessary for me to identify whether the claimant had a contractual right to be paid in respect of annual leave accrued but untaken for 2017 when his employment was terminated in 2018. If

[2] There are conflicting authorities on this point from the EAT but as the claimant did not ultimately seek any uplift in compensation for a breach of the ACAS Code it is unnecessary to set them out.

he was paid less than the amount properly payable on that occasion there would have been an unlawful deduction.

Relevant Findings of Fact

29. This section of the Reasons sets out the broad chronology of events required to put my decision into context.

Background

30. The respondent is a bank with approximately 4,000 employees. It is a substantial employer with access to specialised HR advice.

31. The claimant was employed in November 1999 as a Pension Review Analyst. The written statement of his main terms of employment appeared at pages 53-62. In 2009 a secondment to a role of Technical Adviser within the Testing Team was made permanent.

32. At the time of the events which gave rise to this claim he was working as a Lead Tester in the Functional subdivision of the Services Division. The Services Division tests software and hardware for various projects. The Functional subdivision is focussed on testing software to ensure that it meets the business requirements.

33. The claimant and some colleagues in his department were based at the Bank's headquarters on Miller Street in Manchester. The majority of the department was based at Delf House in Skelmersdale. The claimant was on a working pattern of compressed hours: a full working week spread over four days Monday – Thursday each week.

34. Within the Services Division each employee has two different managers. The "task manager" assigns members of staff to work on different projects and deals with their work; the "people manager" manages the personal development of particular employees and any personal issues they might have. The people manager need not be from the same subdivision as the employee.

Manchester Bomb 22 May 2017

35. The chain of events which culminated in the dismissal of the claimant began with the aftermath of the terrorist bomb at Manchester Arena on the evening of Monday 22 May 2017. That incident occurred very close to the Bank's headquarters on Miller Street, where the claimant worked.

23 and 24 May 2017

36. On the day after the terrorist attack the claimant was due to be working from home because of a medical appointment. The following day (24 May) he was due to be back in the office at Miller Street.

37. On 23 May the Chief Operating Officer issued a notice to staff about the explosion, saying that colleagues in Miller Street were encouraged to work from home if possible (page 128). The claimant emailed Vittoria Beard, a manager

reporting to Hazel Woods, questioning why no message had been sent out about business continuity (page 129). At 3.22pm on 23 May the Head of Department, Andrew Young, sent an email to Testing Services staff (page 131) saying that Miller Street staff should where possible work from the Skelmersdale office.

38. The claimant raised a query about that. He asked whether he should "travel needlessly to Skelmersdale" or try to get into Miller Street. His query was sent a few minutes after the email from Mr Young (page 132).

39. After sending that internal message the claimant went to the dentist. On his return he saw that there had been a business cascade message saying that it was "business as usual" at Miller Street, and that Andrew Young had replied to him saying:

> **"Skem please (not needlessly)😉"**

The claimant also saw that shortly before 5.00pm Mr Young had sent a further email (page 133) which said:

> **"The request remains in place for Miller Street staff in Test to work from Skelmersdale if possible…"**

40. The claimant exchanged text messages with Mrs Beard on 23 and 24 May (page 130). He said Mr Young had said he should travel to Delf House to free his desk at Miller Street, but said that made no sense because he had the tools to do the job from home. He was referring to his laptop and dual screen set-up. Mrs Beard responded to say:

> **"Steve, as instructed by Andrew [Young] can you please go to Delf".**

41. The claimant responded by saying that he would go to Skelmersdale but:

> **"I don't agree with the decision…I think it is total madness…"**

42. Mrs Beard had not told him that she had spoken to Mr Young. He thought it was only her view that it was an instruction. He disagreed and thought it was a request which he could decline. Had he known that the "instruction" came from Mr Young personally he would have gone to Skelmersdale. Instead he worked from home.

43. In the course of the day Mrs Beard sent him an email in which she referred to his emails coming across as "disruptive, argumentative and not acceptable behaviour" (page 145). Mr Young also expressed his disappointment at what the claimant had done (page 146). Having received that email the claimant rang Steve Casey, his Task Manager, and said he had had enough and was signing off work as sick. Mrs Beard prepared a file note of events at pages 150-154.

<u>Sickness Absence to 15 June 2017</u>

44. The claimant explained his actions by email the next day despite being off sick (pages 155-156). Mrs Woods emailed Mrs Beard and Mr Casey (copying it to Mr

Young) expressing concerns about the claimant's behaviour. She requested Mrs Beard and Mr Casey (email pages 159-160):

> **"To progress formally with HR whether we should/can initiate the disciplinary process or other formal action against [the claimant]."**

45. The claimant had the first seven days as self-certificated absence. On Wednesday 31 May he rang Mr Casey to say that he could not see his GP that day but would ring the following morning to get an appointment and thereafter a fit note.

46. On 2 June 2017 Mr Casey rang the claimant to see where the fit note was, and also emailed him about a password for a particular document which turned out not to be the claimant's document. It was later found in the grievance outcome that Mr Casey should not have contacted the claimant in this way because he was off sick with what was subsequently certified to be an "acute stress reaction". Mr Casey was given advice to that effect at the conclusion of the claimant's grievance, advice which he accepted.

<u>15 June 2017 and Investigation Meeting</u>

47. The claimant returned to work on Thursday 15 June 2017. He was in work for 8.00am. He had over 130 emails waiting for him. Amongst them was an email from Mr Casey sending him an appointment for 9.00am that day (page 179) which said the following:

> **"Steve, this is an informal meeting to investigate some issues that arose from your unacceptable behaviour w/c 22/5 when business continuity was involved. We need to address these as I'd like to ask you some questions to understand your point of view."**

48. The claimant saw this email before 9.00am and responded by declining the meeting. His electronic message doing so appeared at page 180. He did not think the timing was appropriate. He thought it had already been decided that his behaviour had been unacceptable. He pointed out he had been off with stress for three weeks, and it was disgraceful to receive an invitation where a guilty verdict had already been made. He made Mrs Woods and others aware of his concerns.

49. In fact the informal discussion did go ahead that day. Immediately after it the claimant had his return to work meeting with Mrs Beard. She told him that his half year rating had been "unacceptable". He was shocked to hear this. There was also a later discussion in Skelmersdale with Mrs Woods at which Mrs Godfrey was present.

50. The notes of the informal investigation were emailed by Mr Casey to the claimant at just after noon (page 181). They appeared at pages 182-185. The claimant was questioned about his email about business continuity, and why he had worked from home on 24 May. The notes recorded what the claimant said about the benefits of working from home that day where two monitors were available.

51. The claimant responded to the notes of that meeting shortly before 11.00pm on an email at pages 186-187. He made clear his concerns at the timing of the meeting and that he had not had a chance to say a number of things. He attached an amended version of the notes incorporating further comments (pages 188-205). He

pasted into his version of the notes full copies of the text and email exchanges. He said he wanted the matter dealt with as quickly as possible.

Investigation Outcome

52. Mr Casey had already spoken to HR that afternoon. At 11.43am on 16 June he texted the claimant to say he had an update for him (page 206). The claimant rang Mr Casey, and Mr Casey told him that he had made the final decision that there would be no formal discipline proceedings. The claimant was relieved to hear that. Mr Casey had been keen to get him that good news prior to the weekend.

53. Despite that good news, on Monday 19 June the claimant sent an email at 12.53pm (page 212) saying that he had been certified unfit by his doctor until 2 July. He said he was extremely unhappy with the manner in which he had been treated and would be raising a grievance. He asked for written confirmation of the outcome of the investigation.

54. That was provided shortly before 2.30pm. The covering email appeared at page 213. Attached was a two page note of the outcome at pages 218-219. It gave a brief explanation of Mr Casey's views on the email response about business continuity and the claimant not having gone to Skelmersdale. On the latter point it said:

> **"Steve was requested to go to Skelmersdale but decided to work from home for a number of reasons. This is viewed as 'refusing a reasonable management request' and HR guidelines suggest this is dealt with by 'informal guidance'."**

55. This was a reference to the disciplinary policy which at page 1169 used those terms. The note concluded by saying that a file note would be made on the HR file and kept there indefinitely. This had not been conveyed in the telephone call on Friday.

56. Unbeknownst to the claimant, Mr Casey was also intending to discuss with him future expectations with a Personal Improvement Plan ("PIP") and the suspension for a short time of his privilege of being allowed to work from home.

57. The claimant responded to the outcome decision at around 9.30pm (pages 220-227). He said that he did not dispute that the request was "reasonable" (page 226) but he made clear that he was totally dismayed at the content. He took issue with the content of the report, the way in which the meeting had been handled, the failure to give any credence to his explanations for why he work from Skelmersdale, and he emphasised that it had been a request not an instruction to do so. He felt that his personal file was going to be unjustly tarnished on a permanent basis, and said that the process had been "soul destroying". He was going to lodge a grievance about it.

58. Mr Casey responded on 20 June (pages 228-229). He provided the claimant with a grievance policy and details of the employee assistance programme so that he could access support. He said he had not intended to cause any undue stress but the matter needed to be investigated. There was no right of appeal because it was not a formal sanction.

59. In the early hours of the next morning (page 230) the claimant emailed Andrew Young asking him to put a stop to it. He said it was making him extremely ill and he was not able to sleep. Mr Young replied on 22 June (page 232) saying that the claimant's health was the most important thing, but there was no intention to cause additional upset. He did not have any right to challenge the findings of Mr Casey's investigation. The file note would not be referenced again unless there was a similar issue.

60. The claimant responded to Mr Young on Sunday 25 June (pages 234-244). He enclosed a nine page document with points for discussion. He said that he could not recover his health whilst this matter was unresolved. Mr Young replied on 30 June (pages 246-247). He did not respond to every individual point but emphasised that he could not overturn what Mr Casey had decided. It was open to the claimant to pursue a grievance if he wished.

61. That same day Mr Casey emailed the claimant (page 248) to say that he had reviewed the additional information but it did not change his view that the claimant had refused a reasonable management request to go to Skelmersdale.

<u>July 2017</u>

62. On 3 July 2017 the claimant was certified unfit for work due to work stress until 16 July (page 250). His manager, Mrs Beard, responded on 4 July and made clear that there would be a PIP on his return to work (pages 252-253).

63. By a letter of 6 July she invited him to a sickness absence management meeting on 14 July (pages 257-258). After some discussion about the venue and who would be present the claimant said he was unable to attend (page 262) because he was not in a fit state to do so. Mrs Beard did not challenge that but asked him to contact her when he returned to work on 17 July.

64. On 12 July the claimant sent an email to Mrs Beard (page 270) saying that he was not able to return to work and would be seeing his doctor. He protested that he had been invited to a performance review meeting on 2 August which was to be his first day back after annual leave. His email ended by saying:

> **"It is clear to me that the direction Testing Services is heading does not hold true to those values [of the Bank] if they believe they can treat a colleague in the manner I am being treated. I will try and find myself another job within the Bank."**

<u>Grievance 17 July 2017</u>

65. The claimant followed this up with his grievance. His covering email of 17 July appeared at page 272. His grievance itself appeared at pages 273-286. He explained his decision to work from home on 24 May. He protested about the contact from Mr Casey on 2 June whilst he was off sick with stress. He raised his concerns about the way the meeting of 15 June had been arranged and handled. He explained how shocked he had been to hear that his half year rating had been "unacceptable". He recorded his shock at seeing the investigation outcome and how that matter had been handled. He requested his grievance be handled outside Testing Services. The

grievance ended by saying that he felt there was "no way back" for him in Testing Services.

66. The following day the claimant was certified unfit for work due to stress for 28 days (page 288). His grievance was acknowledged by the Director of Change, David Gemmell, on 18 July (page 290), and on 20 July Mr Gemmell informed him that an independent manager, Beverley Rogers, would deal with the grievance after he returned from annual leave.

67. On 2 August the claimant was invited to a grievance meeting on 18 August. At his request it was moved to 24 August. The notes of the grievance meeting with Beverley Rogers appeared at pages 313-322.

68. In the meantime there was a further fit note confirming he remained unfit to return to work.

<u>Grievance Outcome 6 September 2017 and Response</u>

69. The decision of Beverley Rogers was set out in an outcome email at page 336 and a letter of 6 September 2017 at pages 337-342.

70. Some of the claimant's points were upheld. Mr Casey should not have contacted the claimant whilst he was on sick leave in the way he did on 2 June on two occasions. The wording of the request for the informal meeting should have been better. The meeting could have been conducted at a time that gave the claimant a chance to prepare. There were some points on which Mrs Woods, Mrs Beard and Mr Casey would be advised, and outcome letters were sent to them individually (which I did not see). The half year rating should be reviewed in a further moderation discussion.

71. However, on certain issues the finding was against the claimant. The conclusion of the informal investigation by Mr Casey was upheld. The claimant had refused to follow a reasonable management request to work at Skelmersdale.

72. The claimant's immediate response on the morning of 6 September (page 343) was to say that he was really disappointed and "completely floored". He sent an email around the same time to his new manager, Mark Trowell, saying:

> **"I am mortified; I do not see any way back! Please discuss the options with Hazel [Woods] for me to return to work in another area as I have no confidence in returning to Testing Services."**

73. There were some internal emails about his request to move to a different department. Hazel Woods expressed the view that she was unable to offer any alternative assignment to him but he was free to apply for any internal vacancies for which he felt he was suitably qualified. On 7 September (page 350) Mr Trowell emailed the claimant to suggest that they discuss matters further at a progress review meeting about his sickness absence. That meeting was eventually arranged for 18 September. In an email of 8 September (page 366) the claimant said he had no future within Testing Services and possibly no future within the Bank. He emphasised the impact on his health. He said:

> **"I do not see any point in meeting to discuss my return to work in Testing Services but I do see a point in meeting to discuss my return to work in another area of the Bank (perhaps on a secondment whilst I try to get some form of normality back into my life). To this end, please can you discuss this option with HR."**

74. In the meantime (12 September - page 369) the claimant reiterated that his position in Testing Services was untenable, and he said:

- **"I do not trust Hazel Woods.**
- **I do not trust Paul Casey.**
- **I am shocked that Vitti [Beard] has failed to stand up for me when she has been aware of the work I have been doing and the issues I have been going through.**
- **I can no longer work for a team who fails to recognise the steps I took to both raise my concerns in relation to the project and who failed to recognise that I went "beyond" what is expected of my role in trying to bring the issues to the attention of a poorly performing Test Manager – I shouldn't have to work for free from home to try and make good on a poorly run project let alone when your half year performance is marked as "unacceptable"!**
- **I can no longer work in project testing…I care too much about doing a good job for my project and the manner in which I have been "rewarded" for this has made me ill…"**

75. He also said that he was open to a temporary secondment rather than a permanent role.

<u>Sickness Absence Meeting 18 September 2017</u>

76. The sickness absence meeting was held on 18 September. It was conducted by Mark Trowell with John Hannant of HR present. The claimant produced a further fit note to 8 October.

77. A spreadsheet of current vacancies was discussed (pages 376-392). Due to a technical issue the claimant had not been able to access these jobs to apply for them through his laptop and this was discussed in some detail. The note recorded Mr Hannant saying that the claimant was free to search for secondment/roles outside of Test Services, but the business wanted to help him come back to Test Services because there was no medical reason to look for other roles (page 399).

78. The meeting ended with discussion of the options if the claimant was not able to return to work. They were ill health retirement (which would need medical information in support), redeployment on medical grounds supported by medical information, making an income protection claim if unable to return to work, and termination of employment due to ill health.

79. There was also a sickness absence review form completed at pages 404-407.

October 2017

80. The documents from the meeting on 18 September were emailed by Mr Hannant to the claimant on 4 October (pages 410-434). The information included a vacancy list.

81. On 9 October the claimant emailed Mr Trowell (pages 435-436). He said there was a serious omission from the notes. The notes recorded discussion of the possibility of a "facilitated discussion" with colleagues to rebuild working relationships, but did not specify the steps which the claimant had said would be needed before he was willing to engage with such a discussion. He also pointed out that he still did not have his laptop back and therefore was unable to access the vacancy list.

82. On 9 October Mrs Woods emailed Mr Hannant to confirm that she had spoken to the relevant managers but the "unacceptable" mid-year rating would not be changed.

83. On 12 October Mr Trowell emailed the claimant with the amended one-to-one form. It appeared at pages 440-443. It recorded that the existence of the file note following the Casey investigation, and the "unacceptable" rating of the half year review, meant that there were colleagues he could not trust and therefore the "facilitated discussion" would not be able to happen. It could only happen if those colleagues aligned their positions to the claimant's reasoning. The covering email from Mr Trowell (page 438) recorded that the colleagues in question were willing to engage in a facilitated discussion.

84. There were a number of emails about the problems with the laptop and access to the vacancy list in mid October.

85. On 23 October the claimant supplied a further fit note to 5 November. In the covering email at pages 472-473 he referred to a planned sickness absence meeting on 1 November, and went on to deal with the two "stumbling blocks" of the Casey investigation and the "unacceptable" rating. He said he could no longer work with Paul Casey, but suggested a working arrangement which would avoid them coming into physical contact. It would involve him working in Skelmersdale on Mondays and at home on Wednesdays, and then in the office (now at Balloon Street) on Tuesday and Thursday when Mr Casey was either working at home or at Skelmersdale. He also asked for a new People Manager because Mrs Beard had left Testing Services.

86. Mr Trowell wanted to discuss these matters on 1 November but the claimant pressed for a reply before then (page 478). On 30 October (pages 479-480) Mr Trowell confirmed that he had taken over as the People Manager for the interim, that Mr Casey remained the Task Manager, and that a business case would be needed for the working pattern proposed, although he thought the working from home element would not be a difficulty.

Sickness Absence Meeting 1 November 2017

87. The sickness absence management meeting of 1 November was recorded in notes at pages 485-489, with a review form at pages 490-494. The claimant said he

felt worse than at the previous meeting. The longer he was off work the worse the situation became. The trigger for his ill health was Paul Casey and having to work with him in the same location. Mr Trowell said that the proposal made about working in Skelmersdale was not possible because the claimant had wanted to be paid travel expenses for that.

88. There was a discussion of annual leave. Mr Trowell said the claimant was only allowed to carry over five days into next year. The claimant said it was exceptional circumstances. He had wanted to use his accrued annual leave to avoid working the one day that he would otherwise be in the office at the same time as Mr Casey.

89. It was clear during this meeting that the claimant would have to work with Paul Casey because he could not pick who he worked for. There was no resolution but discussion of a referral to OH.

<u>November 2017 Emails</u>

90. There were further emails in early November about how the claimant might return to work. On 8 November (page 497) the claimant took issue with an email from Mr Trowell but also said that the meeting on 1 November had been disastrous, and that he did not want John Hannant present at any future meetings because of Mr Hannant's "antagonistic attitude". He said that when he made that request at the meeting Mr Trowell had immediately replied with "no". The claimant reiterated his suggestion about a working pattern keeping him out of the office when Mr Casey was there, and alternatively suggested a temporary reduction to 26.25 hours per week (with reduced pay) which would mean he would not have to work on the day when Mr Casey was in the office.

91. Mr Trowell's response of 14 November (pages 501-503) drew attention to the right to make a flexible working request, and invited the claimant to a further sickness absence management meeting on 23 November. The claimant sent a brief reply (page 526) saying that he was "shaking" after reading the email and the notes of the meeting which were attached. He did not feel well enough to attend a further meeting in the following week.

<u>OH Referral</u>

92. In the event that meeting was postponed because the claimant signed the consent for the OH referral on 20 November (pages 534-535). The OH referral was made on 22 November (pages 541-545). It was to an external OH Provider called Health Management Limited ("HML"). The referral form said the reason for the referral was to understand whether absence was because of an underlying medical condition or due to perceived work related issues, and whether a return to work depended upon a medical improvement or resolution of work issues.

93. On 23 November Mr Trowell responded to the claimant dealing briefly with a number of points which had been raised. Working from home would not be possible upon his return to work because he would be on a development plan. There was no right of appeal against the mid year performance rating. There was no business requirement for him to work from Skelmersdale. He should be using his laptop whilst

off sick only to access internal vacancies. He could still take holidays even though he was off sick, and taking some holidays to cover the period when he was going onto half pay was an option for him. He was asked to confirm by return if he wanted to do that. Returning to work and working with Paul Casey would be discussed at the next sickness absence meeting following receipt of the HML report.

94. HML allocated the claimant an appointment date of 8 December, but the claimant was unable to attend as he was too ill. It was subsequently re-arranged for 10 January 2018.

December 2017 Emails re Annual Leave

95. In the meantime there had been further email exchanges about annual leave. On 5 December (pages 555-556), Mr Trowell explained that the claimant could use his remaining holidays for his period since he went onto half pay on 9 October and that would use them up by the end of 2017. Normally only five days could be carried over, but where a colleague had been on sickness absence statutory holidays could be carried over as well (excluding Bank Holidays). The maximum carry over would be 15 days but no payment would be made for holidays accrued but untaken which were not carried over. The email asked for the claimant to confirm by the morning of Thursday 7 December whether he wanted to use holidays for the period 9 October – 5 December 2017. That was due to the payroll cut-off date.

96. The claimant responded that evening (pages 557-559). He said he was getting a new fit note for a further month. He queried the limited accrual of days whilst he had been off sick and pointed out an error about Bank Holidays. After a close analysis of the position as he saw it, he accused Mr Trowell of making stupid comments.

97. Mr Trowell responded on Wednesday 6 December at 5.17pm (page 560) responding to the points and asking the claimant to keep his comments professional. He asked the claimant to confirm by midday the following day if he wanted to take holidays from 9 October for the rest of 2017 or just to the end of November. He reiterated that only 46 hours maximum could be carried over.

98. The claimant responded later that evening (page 561). Again he gave a detailed analysis of the position as he saw it. He concluded that he had 198 hours owed to him, which would enable him to upgrade 45 half days to full days of pay, putting him on full pay between 9 October and 25 December 2017. He accepted he would revert to half pay from 26 December.

99. He then made clear that he wanted this to be paid in his January 2018 salary not December for two reasons: to avoid any additional tax burden, and because it would relieve any pressure of time on Mr Trowell due to payroll cut-off dates.

100. The response at lunchtime the next day was at page 565. Mr Trowell said that the holidays needed to be taken in 2017. Only 20 days minus what had already been taken could be carried over. He asked for confirmation by 4.00pm that the holidays were to be taken in 2017 and therefore reflected in December pay.

101. Just less than an hour later (page 566) the claimant emailed David Gemmell, copying it to Mark Trowell. He said he would be making a formal complaint about Mark Trowell once he felt well enough to do so, and he no longer wanted Mark Trowell involved in trying to resolve the situation. To Mark Trowell he expressed himself disgusted that he had been contacted again, because each email left him unable to sleep until around 3.00am. It was for this reason that he was no longer fit to attend the OH appointment the following day.

Juliet Godfrey Emails December 2017

102. Juliet Godfrey had joined the Bank in May 2017, and at the request of Hazel Woods she assumed people management responsibility for the claimant in place of Mark Trowell. She introduced herself to the claimant in that role by email of 15 December at pages 568-569. Her email set out the background as she understood it, and confirmed that the claimant would be required to work with Paul Casey on his return to work. She understood he would be returning to work on 2 January.

103. The claimant responded within 20 minutes (page 570). His email began as follows:

> **"I am shocked by the tone of your email and disappointed to note that you have stated that you will be my People Manager.**
>
> **I am also disappointed that you have made various statement errors and I suggest you find out a little bit more about this sordid tale before supplying your synopsis.**
>
> **I currently have a note from my doctor for one month which confirms that I will not be returning to work on January 2 2018. I anticipate that my absence will be extended further."**

104. His email went on to say that he was waiting for a new date from HML, and that Mark Trowell's incompetence in not making a single offer of assistance in returning to work had only made matters worse.

105. Mrs Godfrey sought assistance from John Hannant, expressing surprise at how quickly the claimant had responded (page 571).

106. In the middle of the following week the OH appointment for 10 January 2018 was arranged (pages 574-575).

107. On 21 December (pages 580-581) Mrs Godfrey emailed the claimant inviting him to a sickness absence meeting on 24 January. That was to allow a couple of weeks after his OH appointment so the report could be received and considered. The meeting was to be what the sickness absence management policy termed an "options meeting" (page 362). If appropriate it would be followed by a "final options review meeting". The enclosed letter of invitation to the that meeting (pages 582-583) made clear that the options could include ill health retirement, early retirement, redeployment of termination of employment due to ill health.

108. The claimant responded three hours later (page 584). He acknowledged that Mrs Godfrey had apologised that she had got his return date wrong: it was 5 January not 2 January. He explained his disappointment that Mrs Godfrey was now his

people manager. She had been present at his meeting with Hazel Woods on the afternoon of 15 June 2017, and as a new member of the team he thought she would be concerned with self preservation rather than helping him. Further, she did not know him and was not the right person to try and help him. He expressed the view that the appropriate option was redeployment. He said (page 585):

> **"As I am sure you can appreciate, the best scenario for all concerned would be for redeployment. This is something I requested many months ago but in the meeting dated 18 September 2017, both Mark Trowell and John Hannant stated that 'it is not the responsibility of Testing Services to find me a new role'. I advised that would continue to look and I would consider a role on a secondment basis as this would be better for all in the short term. I stated that as John Hannant worked in HR, he should be in the perfect place to be able to consider a secondment option but he once again made it clear that he wouldn't be helping to find me a new role…as you can see, I haven't had much help!"**

109. His email ended by saying that he needed a response on all these points before Mrs Godfrey started her leave the next day. He said it could not wait until she returned in January.

110. Mrs Godfrey replied the next day, which was her last working day before 8 January. Her reply appeared at page 587. It said that she was disappointed by his comments about her and that she would not be responding via email. His points would be discussed at the options meeting. The claimant replied at just after 5.00pm on Friday 22 December (page 588). He said it had to stop and she had to tell him what steps Testing Services were willing to take to help him. He said:

> **"I have suffered for six months and I am not prepared to wait a further four weeks for you to answer my questions. I will expect a better response from you immediately upon your return to work."**

111. In December 2017 Mr Young left and Mrs Woods replaced him as Head of Department.

<u>January 2018</u>

112. On 8 January 2018 the claimant was unable to return to work. He sent an email to Mrs Woods at pages 591-592. He said he had a chest infection and had still not had any information about what was proposed. He was seeing HML on Wednesday and thought he would be off work for a further two weeks.

113. The claimant attended his OH appointment with HML on 10 January. He signed the consent form (page 595). The meeting with the doctor did not go well. The claimant later provided an account of events at pages 599-600 which recorded a number of concerns about how the doctor dealt with him. He considered that the meeting had been unprofessional and his particular circumstances had not been taken into account.

114. As requested Mrs Woods did not reply to the claimant until after his OH appointment. On 12 January (page 597) she responded to confirm that Mrs Godfrey would remain the People Manager. The meeting on 24 January would discuss how Testing Services would support his return to work. The claimant responded the same day (pages 598-600). He was disappointed there would be no change in People

Manager. He set out his concerns about what had happened at the OH appointment. He said he would hold little value in the OH report once it was received.

115. On 15 January 2018 (page 601) Mrs Woods emailed Mr Robertson as her current line manager to keep him briefed of the position. Her email said:

> **"Several grievances have been submitted against members of the [Testing Services] management team and various complaints against [Testing Services] management team and HR representatives resulting in stand down of several resources following his insistence.**
>
> **Please consider the ongoing feedback against individuals within my management team is completely unfounded and as advised by HR and Legal we will continue via the face to face options meeting rather than email debate."**

116. On 16 January the complaint made by the claimant about HML was forwarded to them by Mr Hannant (pages 602-603). The claimant was also sent an email for him to access the OH report. He did so and pasted its content into an email which he sent to Mrs Woods that day at pages 605-607. He included the link to the report itself but that was not accessible by anyone but him. His email said he was very disappointed to note that the OH report referred to a "potential placement". That had not been discussed with him.

OH Report

117. The whole report had been pasted into the email by the claimant, but Mrs Woods and Ms Godfrey could not be sure of this because they did not see the original. The original report appeared in the hearing bundle at pages 609-611. After an introduction the text of the report contained the following:

> **"Background**
>
> **We took some considerable time to understand the pressures he has found himself under, and the nature of his response to these issues. At the moment there seems little progress to get him back into the work environment. I note that there is some information sent to me very recently, looking at a potential placement; that of course will need to be directly discussed with Stephen.**
>
> **Opinion**
>
> **Having taken some time to understand his mental state, I believe he is unwell, and is suffering from a condition called an adjustment reaction. The best way of resolving this is to take him away from the pressure which is causing it. This would be by looking at something like a placement.**
>
> **I think it extremely unlikely, from the level of frustration that he has about the process, that both parties will be able to resolve anything, without some process in which he had more trust. I would suggest you look at some form of external resolution, possibly as formal as ACAS.**
>
> **Mr O'Boyle's concern is that he is not given information about what is going on, and this causes significant pressure to him.**
>
> **It is unlikely that his health condition would be considered a disability with reference to the Equality Act 2010. This is because the symptoms are not substantial in terms of day-to-day activities, although he has become preoccupied by the issue. It is of course**

> **something for the employer to decide as to whether he is covered by the disability provisions and what a potential adjustment may look like.**
>
> **Your specific question was to understand whether he is suffering from an underlying condition or if it is due to perceived work-related issues – the answer to this is that it relates to an underlying medical condition, an adjustment reaction.”**

118. It is unclear where the reference to a potential placement came from. It may have been derived from some additional information provided by Mr Hannant to HML on 9 January (pages 593-594) which referred to redeployment as being one of the five possible options.

Hazel Woods Emails January 2018

119. Having received the claimant's email pasting the test of the HML report, Mrs Woods replied on 17 January confirming that this would be discussed at the options meeting on 24 January (pages 618-619). Her email emphasised that Testing Services were supporting a return to work, but the Bank was not obliged to agree to a change of manager. It was not reasonable for the claimant to request that arrangements be made to avoid him having sight of Mr Casey.

120. The claimant responded briefly (page 620) saying that her email saddened him and reaffirmed that he had no future with Testing Services. He said he needed a response to the potential placement comment by close of business 18 January.

121. On 19 January Mrs Woods emailed the claimant (pages 626-627) to say that his fit note had arrived covering him to 19 January. She said that no specific potential placement had been referred to but the option of redeployment would be discussed at the options meeting. He was told that no payment would be made in lieu of holidays and only 15 days could be carried over to 2018.

122. The claimant responded that afternoon (pages 628-638. He set out why he thought she was wrong about holidays, him having given instructions to Mark Trowell about how the 2017 holidays were to be used. He said he was far from fit to return to work on 22 January but was still planning to do so. He thought he could only prove his fitness by being in work. He asked Mr Woods to accept that any return would be on that basis.

123. Mrs Woods responded promptly (pages 635-636) to say he should only return to work if he was fit to perform his role. Paul Casey would remain his Task Manager and Juliet Godfrey his People Manager, and he would be expected to behave in a professional manner. The claimant responded (page 637) saying that not everyone returning to work was 100% fit. This email chain ended with Mrs Woods replying (page 638) saying that only he could decide whether he was fit enough to return and perform his role.

124. On the morning of Monday 22 January at just before 7.30am the claimant sent an email at pages 639-640 saying he was not 100% fit, but in any event after a terrible weekend where he had hardly slept he was not in fact fit enough to return to work. He said he understood he would have to interact with Paul Casey, Mark Trowell, Juliet Godfrey and Hazel Woods herself, but said he was not able to give

any more than 100% as he had done in the past. He asked for the options meeting on 24 January to be postponed to Monday 29 January.

125. Mrs Woods refused that request. By email of 23 January at pages 651-652 she confirmed the meeting would go ahead, in the absence of the claimant if necessary. The claimant confirmed he was not fit to attend.

Options Meeting 24 January 2018

126. Mrs Godfrey and Mr Knowles of HR conducted the options meeting on 24 January in the absence of the claimant. The notes appeared at pages 669-677. The position was considered and the various options looked at. The note recorded that the Bank had an extract from the HML report, not the full report. On page 673 the note recorded the HML advice about looking at a placement. Alternative employment or disability redeployment was option 3. It recorded that a laptop had been given to the claimant to help him find other opportunities after the meeting on 18 September, and that Mrs Godfrey would provide details of three available opportunities at the same grade to the claimant. These roles were Executive Digital Tester, Customer Service Adviser based in Skelmersdale, and Customer Service Adviser based in Stockport. These roles would be subject to a successful application from the claimant i.e. in competition with other candidates.

127. There was also a discussion about the support the claimant could get on a return to work. Details appeared at the top of page 676. He would be assigned no project work during the first week, but instead could carry out the mandatory training he had missed whilst off sick. There would be work on his development plan and he could use the first week to reintegrate with managers and feel at ease. Project work would be allocated from week two onwards.

31 January 2018

128. In the early hours of 31 January 2018 (page 660) the claimant emailed the Chief Executive, Mr Coleman, asking to meet as a matter of urgency about his return to work. He described the approach of Mrs Woods as “disgusting”. He had still not heard about the outcome of the meeting.

129. That afternoon Mrs Godfrey emailed the claimant the notes from the meeting and asked him about returning to work on 5 February. Her email appeared at pages 667-668. He was encouraged to make an income protection claim if he was not fit to return then. If he did not make any such claim, but was not fit to return on 5 February, there would be a final options meeting on 9 February.

130. The claimant responded shortly before 11.00pm (page 678). He attached a version of the notes to which he had added extensive comments (pages 679-695). He asked for a response by 2 February if he was going to be able to return to work on Monday 5 February. In the comments made at page 688 he asked for details of the Executive Digital Tester role, assuming it was based in Manchester. His contract of employment said he was based there so he did not want to work in Skelmersdale or Stockport.

131. In his comments on the return to work section (page 691) he said that placing him on project work too soon (i.e. in week two) could be damaging, and he said that:

> **"Any 'false attempt' to force 'unnecessary integration' with certain managers will be detrimental and…this idea [should] be reconsidered to only include a 'business need' scenario."**

1 - 2 February 2018

132. At just after noon on 1 February Mrs Godfrey emailed to Mr Knowles in HR her intended response to the claimant. She referred to Mrs Woods' concern that if the claimant was not fully fit the Bank should not accept a return to work. Her email ended with the following:

> **"Please can you escalate this within HR (and Legal) to advise today whether there is anything further that the Bank can progress without due risk whilst still following process e.g. progress immediately with option 5."**

133. Option 5 was termination of employment.

134. The response from Mrs Godfrey to the claimant was sent shortly before 4.00pm on Thursday 1 February (pages 717-718). His feedback was noted but it did not change the options available to him. It was unreasonable to expect a detailed response by 1.00pm on 2 February 2018. He was asked to confirm whether he would be returning to work on the understanding he was fully fit, not returning but seeking income protection (for which purpose the relevant brochure was attached), or not returning to work but not seeking income protection. That would lead to a final options meeting on 9 February. The email ended as follows:

> **"With regards to the job roles referenced in the minutes, it is for you to consider whether you wish to apply for roles, considering the job details, role description and location, etc. All roles are available on the intranet portal which you have access to via your Bank laptop."**

135. At almost 1.00am on Friday 2 February the claimant sent an email to Mrs Woods at pages 730-731. His email began with the following paragraphs:

> **"I refuse to be threatened by this woman!**
>
> **I have made it extremely clear to both Juliet and yourself that she is not the right person to help me; I simply cannot accept her as my People Manager. I have also made it clear to both Juliet and yourself that any return to work will not be at 100% fitness; the last seven months have had a devastating effect on my wellbeing and in the short period of time that she has been involved, Juliet has made the situation ten times worse! I simply cannot 'flick a switch' and pretend that everything is okay; I have been treated atrociously!**
>
> **It is extremely difficult for me to return and this is made impossible with your insistence that Juliet is to be my People Manager. I will return on Monday 5 February but sadly I have to advise that I will not be able to accept Juliet as my People Manager. I do not trust her and I think it is quite clear that her chief objective is to have my employment terminated as quickly as possible. How can anybody return to work when faced with that? Please understand that my hand has been forced and from this point onwards, I will not be including her in any correspondence…"**

136. The email concluded with a further request:

> **"Please remove this woman from any role in my rehabilitation; it simply won't work if this isn't done. I fear my employment will be unjustly ended and the matter will end up in an Employment Tribunal. I sincerely hope that this can be avoided."**

137. Mrs Woods responded at just before 1.00pm noting the comments and saying they would be discussed on Monday (page 733).

138. Mrs Woods conveyed the terms of the claimant's email to Mrs Godfrey, including the fact he had referred to her as "this woman" on more than one occasion. Mrs Godfrey was upset and concerned by this and she made a verbal complaint to Mrs Woods following up by a written complaint. The written complaint appeared at page 1233-1234. She was told by Mrs Woods that HR would deal with it. In the following week she was told that she would no longer be the claimant's People Manager, although she was not told that he had been dismissed.

139. That evening Mr Hannant sent an internal email saying there had been further communications from the claimant, and including the following:

> **"Given this further instance of him demonstrating unreasonable behaviour it appears the working relationship has completely broken down [and] we are looking at terminating for 'for other substantive reason'. On his arrival on Monday the Lead in the area he works in [i.e. Mrs Woods] will have this conversation with him and place him on garden leave and a decision will then be confirmed to him in writing. Given the nature of the discussion Ged [Knowles] has agreed to attend, however it will be the Leader that will drive the discussion."**

140. Pausing there, it appeared that a decision had been taken by close of business on 2 February that the claimant would be dismissed in the following week.

<u>5 February 2018</u>

141. On Monday 5 February 2018 the claimant attended for work for the first time since June 2017. He sat at his desk facing Mr Casey. He was almost immediately called into a meeting by Mrs Woods and Mr Knowles.

142. Mrs Woods told him that his behaviour had been unacceptably and unjustifiably offensive, and that he was being placed on garden leave. A letter would follow. The meeting lasted only a few minutes.

143. The claimant sent an email within a couple of hours to Tracey Kneller, who was looking into his complaint to Mr Coleman, giving the sequence of events. It was clear from that email that understood he was on garden leave, not that his employment was to be terminated.

<u>Dismissal 8 February 2018</u>

144. Termination was confirmed by a dismissal letter of 8 February 2018 (pages 743-745) emailed by Mrs Woods at just after 1.00pm (page 742). The letter referred to the lengthy and protracted exchanges over the last seven months. It said he had raised repeated and increasingly unreasonable objections to the point where he would not now accept any management instruction. Reference was made to the following matters:

(a) His original refusal to work at Delf House in Skelmersdale after the Manchester bomb;

(b) His refusal to work with Paul Casey and his requests for unrealistic working patterns;

(c) A refusal to engage with Mark Trowell and John Hannant in the sickness absence management procedure;

(d) An expectation that on return to work there would be minimalistic interaction with management and a caution about any false attempt to force unnecessary integration, contrary to the Bank's values of working as a team;

(e) His unjustifiable recent criticism of Juliet Godfrey;

(f) He had stated he was not willing to engage in any return to work interview;

(g) The fact the claimant did not really wish to return to work in Test Services;

(h) The fact he had not found anything to suit him despite having had access to other vacancies for several months.

145. The letter concluded with the following:

> **"We are at an impasse in terms of your line management. The Bank has therefore in the circumstances concluded that it is time to part ways and is terminating your employment. We have considered discussing this at a meeting with you, but we do not think this will be beneficial, given the exchanges that have already taken place have rehearsed relevant arguments in great detail. It is also noted that although you have said that you would return to work, you do not genuinely believe yourself to be fit and the conditions you have previously stated to facilitate a return to work are unreasonable and cannot be agreed to. In addition to this you have repeatedly referred to having a lack of trust in the business, stating in your email dated 22 January 2018 'the two difficulties in my return are the total lack of trust I have for you and your management team', 'and the fact that ALL confidence in the workplace (which greatly affects my decision making capabilities) has been lost."**

146. The letter confirmed that dismissal took effect on 9 February and the claimant was paid in lieu of 12 weeks' notice. He was also to be paid holiday pay of 15 days carried over from 2017, and 23 hours accrued in 2018. He had the right of appeal to Luke Robertson, the Chief Technology Officer.

147. The letter was reissued later that day giving seven calendar days for the appeal (page 751). The claimant made Tracey Kneller aware of what had happened.

<u>Appeal</u>

148. The claimant lodged his appeal on 9 February by email to Luke Robertson (pages 754-755). Mr Robertson forwarded the email to some senior colleagues. One of them was Mike MacFarland, who was senior to Mrs Woods. He responded to Mr

Robertson asking that HR/Legal should let Mrs Woods know that she had been “completely in the right”. He emphasised the duty of care to Mrs Woods.

149. After further emails the claimant supplied on 14 February a number of documents for his appeal. They included a 65 page appeal document at pages 786-850. There were seven emails attaching the various documents that were relevant.

150. Mr Robertson acknowledged those documents on 16 February (page 851). He asked for a two page summary of the specific appeal points to be discussed. The claimant's reply at page 852 said he was in tears and shaking but would look at that over the weekend. He emailed Mr Robertson again on 16 February (page 853) saying that he did not know the reason he had been dismissed. Mr Knowles replied on 20 February (page 862) saying that the reason was the breakdown in the employment relationship as set out in the dismissal letter.

151. The claimant supplied a much briefer appeal document on 25 February (pages 873-875). He said his health had been for the most part ignored, and that Hazel Woods had been determined to assassinate his character and had not been impartial. He said the decision to dismiss him had been procedurally unfair because there had been no meeting, and that he still had something to offer the Bank and wanted to work for it.

152. After correspondence about the date for the appeal meeting it took place on 4 April 2018. The notes appeared at pages 963-997. The meeting had been recorded. The claimant later supplied an amended transcript which was complete and which appeared at pages 1006-1042. There was a full discussion of the points raised in his appeal. At page 966 the initial transcript recorded the claimant agreeing that it was not in dispute that the relationship with the Bank had broken down, but the claimant pointed out that the complete transcript at page 1009 showed that this was a quick exchange in which two people were speaking at the same time and that he should not be taken to have agreed that that was the case.

153. The appeal outcome was contained in a letter from Mr Robertson of 17 April 2018 at pages 1000-1004. He concluded that the decision to dismiss was fair and reasonable. There had been a loss of trust in the management on the part of the claimant, although he did not accept that loss of trust was justified. The claimant had been unwilling to be managed by a number of individuals in the Test Service management team. The reasons for dismissal were clear from the letter, and the claimant's approach in correspondence had significantly contributed to the gradual breakdown in the working relationships. The ACAS Code of Practice on Disciplinary and Grievance Procedures had not been followed because it was not a misconduct dismissal, even though the claimant had contributed significantly to the breakdown in working relationships. His health had not been ignored and there had been character assassination. The appeal was rejected.

Submissions

154. At the conclusion of the oral evidence each party made a submission to the Tribunal summarising its case. Helpfully both sides took the trouble to prepare a written submission. I will not summarise here every point made in those written

submissions, and the brief oral submissions that accompanied them, but simply summarise the main thrust of each side's case.

Claimant's Submission

155. The claimant's written submission ran to 114 paragraphs over 22 pages. He emphasised that he had been dismissed due to the consequences of his health condition. There had been a failure by the respondent to recognise its effects or to see it as a valid reason for moving him to a different department. He strongly emphasised paragraph 15 of the witness statement of Mrs Woods where she said that with hindsight the management team should have dealt with the issues he presented more robustly through disciplinary and/or performance management proceedings. She said there had been a "lighter approach" as a consequence of a general reluctance to tackle issues head on with the claimant for fear that doing so would make a difficult situation even worse. The claimant submitted that this approach fundamentally undermined the respondent's case because he had been denied proper feedback about how his behaviours were affecting managers, and therefore had been denied a fair opportunity to modify his behaviour. He suggested that legally he should not be held accountable for his subsequent actions. He relied on **Lund** in support of the proposition that a failure to advise him of the consequences of his behaviour would lead to an unfair dismissal if he was subsequently dismissed because of that.

156. He contended, however, that this was a dismissal because of a breakdown in trust and confidence, and not a misconduct dismissal. He did not seek any uplift under the ACAS Code of Practice. He accepted with hindsight that some of his communications during his sickness absence had been challenging, but he had not been able to see that at the time because of his health condition.

157. The claimant also emphasised strongly the lack of information about what would happen upon his return to work, the failure to give him any reason for not allowing him to be people managed by Debbie Simcock as he requested on a number of occasions, and the fact he was left to find his own alternative position rather than being helped to do so by the respondent.

158. The claimant submitted that the appeal was unfair. Mr Robertson had not been independent. Not only was he the line manager of Mrs Woods, but he had also received comments about the appeal supportive of her position before hearing it. The claimant had not known of these comments at the time and so had not been able to raise this point.

159. Overall the claimant submitted that the dismissal was unfair. There were no reasonable grounds for the conclusion that trust and confidence had broken down in the Bank, as opposed to confidence in managers in Testing Services. The simple answer was to redeploy him rather than dismiss him. The respondent failed to take reasonable steps to consider this. Insufficient weight had been given to the impact of his health condition on his behaviour whilst on sick leave. It was outside the band of reasonable responses to dismiss him and he had not been given a fair appeal.

160. In relation to holiday pay, the claimant submitted that he had asked for his 2017 holidays to be taken in that calendar year, even though he had suggested that

payment could be delayed until January 2018. It was not his fault that this request had been misunderstood by Mr Trowell. Mr Trowell had been giving him incorrect information in the email exchanges that led up to that point, and there was ample time before the payroll deadline for Mr Trowell to have implemented payment in December, let alone in January. He therefore claimed that there had been a breach of his contractual entitlement in respect of holidays and that his claim should succeed.

161. In addition to the cases summarised above, the claimant also referred me to the decision of the Employment Tribunal in **Lund**, a copy of an Employment Tribunal decision in **Hegg v Co-op Group Ltd** (case number 2403125/2016) from January 2017, and copies of two Employment Tribunal decisions in **Stockman v Phoenix House Ltd** from April and June 2017.

162. As to the remedy issues, the claimant submitted that he could not have been fairly dismissed in the light of the information available to the respondent and therefore there should be no reduction to the compensatory award. He also suggested that no reduction for contributory fault would be appropriate given the failure to advise him properly about the impact of his behaviour, and given that there were never any misconduct proceedings taken against him.

Respondent's Submission

163. Ms Niaz-Dickinson had prepared a written submission which ran to 38 paragraphs over 14 pages. In addition she made some oral submissions.

164. Although the response form pleaded misconduct as an alternative to SOSR as the reason or principal reason for dismissal, Ms Niaz-Dickinson accepted that the evidence showed it was a trust and confidence dismissal, not misconduct.

165. After reviewing the authorities on trust and confidence dismissals, including the cases summarised above and **Harper v National Coal Board [1980] IRLR 260**, **Phoenix House Ltd v Stockman [2016] IRLR 848**, and the decision of the Court of Appeal in **Perkin,** Ms Niaz-Dickinson addressed the 22 matters in the dismissal letter under several main themes.

166. She submitted that on each matter there were reasonable grounds for the conclusion reached by the respondent, and that taken overall dismissal was within the band of reasonable responses. She suggested that the respondent acted reasonably in viewing the advice of HML as recommending not simply a placement but also some form of external resolution, a point which the claimant did not accept as he saw these as alternatives depending on whether he returned to Testing Services or not. She highlighted the claimant's interactions with Mr Casey and the refusal of a facilitated discussion. She reminded me of the numerous occasions on which the claimant said he had no trust or confidence in managers in Testing Services and submitted that the conclusion that the working relationship had broken down was eminently reasonable.

167. The appeal was said to be fair. No challenge had been raised to the independence of Mr Robertson. The fact he was a line manager was entirely

common. He had made his own decision based on a review of the decision of Mrs Woods and on considering the information for himself.

168. In relation to the procedure concerning dismissal, Ms Niaz-Dickinson submitted that this was one of those cases where the respondent acted reasonably in concluding there was no point in having a formal meeting with the claimant. That was a reasonable conclusion given the events leading up to the decision.

169. In relation to remedy issues, Ms Niaz-Dickinson submitted that if the dismissal were to be found unfair there should be a 100% reduction for contributory fault because the breakdown in working relationships was attributable to the claimant's actions. She also suggested that the compensatory award should be reduced because a fair dismissal would have ensued in a very short space of time. To hold a meeting with the claimant about the breakdown in trust and confidence would only have taken a further week or so, or in the alternative the claimant might have been subjected to misconduct proceedings which would only have taken a few weeks. If a lack of clarity in the OH report was the issue, getting that clarity would not have taken more than week or so.

170. In relation to holiday pay, Ms Niaz-Dickinson submitted that the respondent had acted in accordance with the policy. The claimant had been asking to carry over holiday and to be paid for it. There was no breach of contract in the position taken by Mr Trowell.

171. Having heard the submissions on both sides I reserved my judgment.

Discussion and Conclusions – Unfair Dismissal

Reason

172. In any unfair dismissal case where it is common ground that the claimant was dismissed, the first question is the reason or principal reason for dismissal. A reason is a set of facts or beliefs in the mind of the decision maker which causes her to dismiss the claimant.

173. In this case I was satisfied that the decision maker was Mrs Woods, even though she relied on advice from HR. She was the author of the dismissal letter of 8 February 2018, and was the senior manager actively dealing with the claimant throughout the events with which this case was concerned. It was not suggested by the claimant that someone else made the dismissal.

174. I was satisfied that the dismissal letter accurately recorded the belief of Mrs Woods that the working relationship with the claimant had completely broken down. The claimant did not suggest that there was any other belief in her mind which caused her to dismiss him. He recognised that in his submissions.

175. A belief that the working relationship has broken down because mutual trust and confidence no longer exists is a potentially fair reason for dismissing an employee. The question of fairness under section 98(4) therefore arose.

176. It is important to note, however, that although this was a dismissal for "some other substantial reason" rather than for a reason relating to the claimant's conduct, in this case the distinction was a fine one. It was clearly the view of Mrs Woods that it was the claimant's conduct which had caused the breakdown in working relationships. This was not a case where the employer was using a breakdown in working relationships as a pretext to avoid having to pursue disciplinary proceedings; this was genuinely a dismissal for SOSR, not for misconduct. However, the close relationship between the employer's belief that working relationships had broken down and the conduct of the claimant meant that a reasonable employer would apply standards of fairness broadly equivalent to those which would be expected in a misconduct case. Further, both sides adopted the approach that the Tribunal was entitled to look at how the parties had reached the position as it appeared in early February 2018, in line with the decision of the Employment Appeal Tribunal in **Governing Body of Tubbenden Primary School**.

Fairness - General

177. In approaching the question of fairness under section 98(4), therefore, I adopted the following approach based on the legal framework summarised above:

(a) The test of fairness has to have regard to the reason shown by the employer, namely a belief that the working relationship had broken down;

(b) The size and administrative resources of the respondent are relevant;

(c) The question of whether the employer acted reasonably or unreasonably in treating its belief that working relationships had broken down as a sufficient reason for dismissing the employer had to be determined in accordance with equity and the substantial merits of the case;

(d) Because the reason for dismissal was so closely related to the claimant's conduct, it was appropriate in broad terms to expect an employer acting reasonably to apply standards of procedural fairness comparable to a misconduct case;

(e) It was convenient, therefore, to use the **Burchell** test as a tool to analyse fairness under section 98(4); and

(f) At all stages of the **Burchell** test, and in considering the reasonableness of the dismissal itself, the test for the Tribunal was whether the employer fell within the band of reasonable responses. It would be an error of law for the Tribunal to substitute its own decision or simply to adopt the claimant's perception of what would have been fair or lawful.

178. It is appropriate here to say something about the claimant's perception of events. He worked in a specialised IT role. He described himself as somebody "good with numbers and words". He said he saw things as "black or white". Throughout the events with which this case was concerned he adopted an extremely detailed and precise approach to matters. That was reflected not only in the contemporaneous documents, such as emails or amendments to notes of meetings, but also in his

approach to this litigation. His witness statement contained almost 2,000 paragraphs and ran to over 200 pages. I record this not to be critical of the claimant in any way. It seems likely that these qualities made him particularly suited to his area of work. However, an Employment Tribunal hearing a complaint of unfair dismissal has to approach matters in a different way. Nor is management a science capable of analysis by reference to a simple question of whether what was done was right or wrong. There is a significant element of discretion in management, accounting for the requirement that Tribunals adopt the test of the band of reasonable responses. This recognises that in any given situation reasonable employers might react in different ways.

179. It is also appropriate to recognise that the claimant's approach after June 2017 was affected by his state of health. He gave a compelling account in his oral evidence to my hearing of how he was affected as matters unfolded, and the impact upon him of what he saw as a failure to manage him properly. To his credit he also recognised that his perception of events was at times affected by his medical condition. However, for the purposes of an unfair dismissal complaint a Tribunal must recognise that the employer's perception or understanding of the medical position can only be based on information which is available to it, and cannot be based on the subjective experience of the claimant if that has not been communicated. Further, there may be circumstances where it is reasonable for an employer to go by the medical evidence as opposed to what the individual employee says, particularly where the employee has no medical qualifications.

180. These are points to which I will return below, but I make them at the outset in order to emphasise that the role of the Tribunal is to assess the actions of the employer by reference to the band of reasonable responses, rather than by reference to the subjective perception of the claimant.

Fairness – Genuine Belief

181. Turning now to the elements of the **Burchell** test, the first question is whether the respondent had a genuine belief in its reason for dismissal. It follows from what I said above that I was satisfied that the respondent did genuinely believe that the working relationship with the claimant had irretrievably broken down. The real dispute between the parties in this case was about the three additional issues: was that belief based on reasonable grounds, had the respondent carried out as much investigation into the matter as was reasonable, and if so was the decision to dismiss the claimant rather than take some other form of action within the band of reasonable responses?

Fairness – Reasonable Grounds

182. The grounds on which Mrs Woods had formed the view that there was an irretrievable breakdown in the working relationship were set out in some detail in the dismissal letter of 8 February 2018. It was possible to identify some 22 different component parts to that, as helpfully set out in the draft List of Issues prepared prior to the hearing. It is not necessary for me to undertake a minute analysis of each of those 22 matters in order to reach a reasoned conclusion on whether reasonable grounds for that belief existed. Some matters weighed more heavily in the

respondent's considerations than others, and I will concentrate on what I concluded had been the seven main issues leading to that conclusion:

- working from home on 24 May 2017;
- concerns about working with Paul Casey;
- refusal to work with other managers;
- lack of commitment to rebuild relationships;
- offensive criticism of Juliet Godfrey;
- his attitude towards returning to work in Testing Services, and
- his attitude towards vacancies for other roles.

183. The first main issue was the view that the claimant had unreasonably refused to work at Skelmersdale in the aftermath of the bomb at Manchester Arena. The claimant's case that the negative view of his actions taken on this occasion was misconceived was based on three key propositions.

184. The first proposition was that he had taken his decision in the best interests of the business, because he had better tools to carry on work on his project at home than existed for him in Skelmersdale, and because by working from home he was still achieving the objective of freeing up his desk in Manchester for other colleagues to use. I was satisfied that he was right about that. He was doing what he genuinely thought was best for the business. However, he had not communicated to the respondent that he thought he could better work at home than in Skelmersdale. All he said was that he had the tools to work at home.

185. The second proposition was that the request was unreasonable. Although he acknowledged the exceptional nature of the aftermath of the Manchester bomb, and the issues it raised for senior managers in terms of deployment of resources, he maintained in my hearing that a close analysis showed that the request was not a reasonable one. The difficulty with that argument is that he did not say that at the time. In his response sent to Mr Casey on 19 June 2017 (page 226) he said:

> **"I do not dispute that the request was 'reasonable'…"**

186. Accordingly it was within the band of reasonable responses for the respondent to take the view that the request to work from Skelmersdale was a reasonable one.

187. The third proposition on which the claimant relied was that this had been a "request", not an "instruction". He was not aware at the time that Mrs Beard had spoken to Mr Young, and therefore he thought that when she used the words "as instructed" in her text message (page 130) she was offering her interpretation of what Mr Young had said, which was actually only a request. However, it was reasonable of the respondent to reject this argument. Firstly, Mrs Beard was in a position of line management authority over the claimant and she was using the word

"instructed" herself. Secondly, in his response the claimant referred to this as a "decision". Thirdly, there may be situations in which managers phrase matters as a request in order to be courteous when an employee alive to the nuances will perceive that in reality it is an instruction. Fourthly, the disciplinary policy in any event (page 1169) refers to refusing a reasonable management request as being an instance of misconduct. Although the claimant had not realised this, it was still reasonable of the respondent to take it into account.

188. It follows that I was satisfied that there were reasonable grounds for concluding that the claimant had refused to follow a reasonable management request by working from home on 24 May 2017, and that therefore some form of action under the disciplinary policy was appropriate. The suggested disciplinary action, according to the policy on page 1169, ranged from no action at all up to a level 2 warning. A level 2 warning is live for disciplinary purposes for nine months. More serious sanctions include a final written warning at level 3 or dismissal. Mr Casey chose to go for the "informal guidance" option, a matter which was plainly within the band of reasonable responses. Although the claimant took great exception to the file note which was prepared and which was to remain on his file indefinitely, that was still an action of a reasonable employer. I rejected Ms Niaz-Dickinson's contention that the file note did not have any impact upon how any future misconduct would be view. It would plainly be relevant and might affect the view taken, otherwise there would be little point in retaining it on file. However, that was a reasonable way to deal with the matter even though the claimant from his subjective perspective took it as an unwarranted slur on his integrity.

189. Accordingly there were reasonable grounds for the view taken by Mrs Woods in February 2018 that the claimant had refused to follow a reasonable management instruction in May 2017.

190. The second main issue was the claimant's concerns about his interactions with Paul Casey. It is right to recognise, as the claimant emphasised, that he never said he would not work with Paul Casey at all. His concern in the relevant period was with the practical arrangements for contact between them. Prior to Paul Casey moving to sit at a desk next to the claimant, he had acted as the claimant's task manager for some time from a different location, with there being minimal contact between them. Essentially Paul Casey would allocate the claimant work on a project, but the claimant's actual work thereafter would be supervised by someone else as part of the project. The concern of the claimant was to minimise any face to face interaction. If that could not be achieved by moving him to a different role altogether, he suggested a working arrangement when he would only be in the office in Manchester on days when Mr Casey was working at home or in Skelmersdale. His proposal included that he be paid for the expenses of travelling to Skelmersdale.

191. For two reasons managers were entitled to view this situation as unsatisfactory. The first was that the claimant's feelings towards Mr Casey were an over-reaction to the outcome of Mr Casey's investigation into the issue of working from home after the Manchester bomb. The claimant refused to accept that the informal action and the retention of the file note on his file were reasonable management actions, even when his grievance about such matters was rejected. He was justifiably concerned about the way Mr Casey had handled the discussion

about those matters on 15 June 2017, but that was a concern recognised in the grievance outcome. The second reason was their view that the claimant's proposals that there be minimalistic contact with his line manager were unworkable. Looked at broadly, it was reasonable for senior managers to take the view that a situation where there was to be no unavoidable physical contact between the task manager and the employee was unworkable and not in line with the respondent's values.

192. Overall, therefore, it was reasonable to regard as unrealistic the claimant's requirements for him to return to work, although it must be recognised that he had put these to one side by the time he returned to work on 5 February 2018.

193. The third main issue was the refusal to work with other managers. It was reasonable to take the view that the claimant had repeatedly refused to deal with or to be managed by individual managers as a consequence of his perception about shortcomings in the way they handled his case. I dealt above with his concerns about Mr Casey. By 12 September (page 369) he had added Hazel Woods as a person he did not trust, and had expressed his shock that Mrs Beard had failed to stand up for him. Following the sickness absence meeting on 1 November 2017 he requested that John Hannant not attend any further meetings because of what the claimant saw as an antagonistic attitude, and on 7 December 2017 (following the extensive exchanges about holiday pay) the claimant emailed David Gemmell saying that he would be making a formal complaint but could no longer allow Mark Trowell to be involved in trying to resolve the situation he found himself in. Following email exchanges with his new manager, Mrs Godfrey, he expressed his disappointment that she was now his People Manager in an email of 21 December 2017, subsequently making clear in his email of 2 February 2018 that he simply could not accept her as his People Manager.

194. The claimant provided a detailed explanation in his evidence for this hearing of why he reached those conclusions, which from his subjective perspective appeared entirely warranted and justified. What he failed to appreciate, however, was that from a management point of view it was reasonable to consider that he was falling into conflict with a succession of managers, and repeatedly expressing in very strong terms that he did not to engage with those people any longer. Further, although on the evidence I heard I was satisfied that this was at least in part attributable to the claimant's poor state of mental health during this period, there was no medical evidence to that effect available to the respondent. The HML report did not suggest that this might be a consequence of the adjustment reaction. I will consider below whether the respondent should have undertaken further medical investigation, but on the information available there were reasonable grounds to conclude that this was a significant factor contributing to a breakdown in the working relationship.

195. Turning to the fourth main issue, in the dismissal letter Mrs Woods went on to express her concern about the commitment of the claimant to build relationships. That concern was reasonably held. It was a combination of the repeated expressions of a lack of trust in managers, and the reference to concern about false attempts to force unnecessary integration. It was reasonable for a manager to take the view that this is not encouraging in terms of rebuilding working relationships.

196. The fifth main issue was the criticism of Juliet Godfrey. Mrs Woods was entitled to conclude that the latest criticism was unreasonable and that it had caused her significant offence. The claimant himself accepted with hindsight that referring to her as “this woman” in the opening line of his email of 2 February 2018 was inappropriate and caused offence. It resulted in the written complaint from Mrs Godfrey at page 1233. She recorded that the claimant had already accused her of thinking of “self-preservation empire building”, and that she regarded him as guilty of disrespectful and bullying behaviours. It was reasonable for Mrs Woods to conclude that the claimant had behaved unacceptably in this respect. He had taken great exception to her introductory email of 15 December 2017 at pages 568-569, not least because she said in that email that she was expecting him to be able to make a return back to work on 2 January 2018. Leaving aside her error over the date on which his current fit note expired, he saw this as an instruction (despite the language of “expectation”). It was reasonable to take the view that he had overreacted badly to this email and had read into it things which were not there. The position was compounded by his reservations about her ability to manage him correctly which derived from her lack of knowledge of him. He was not willing to give her the benefit of the doubt. It was reasonable to take the view that his criticisms of and approach towards Mr Godfrey in their first dealings by email between December 2017 and February 2018 were unreasonable and a significant factor evidencing a breakdown in working relationships.

197. Turning to the sixth main issue, in her dismissal letter Mrs Woods went on to suggest the claimant was not willing to engage in any return to work interview. I concluded there were no reasonable grounds for that conclusion. The claimant had asked for the return to work interview to be delayed until he had the options meeting. When unable to attend the options meeting on 24 January he suggested a new date of 29 January 2018. Further, the view that he did not really wish to return to work in Testing Services was also an unreasonable view insofar as it was intended to be critical of the claimant. He genuinely felt that it would be adverse to his health to interact with the relevant managers. All things being equal he would have wanted to return to his role in Testing Services. However, it was reasonable to take a dim view of him reiterating that he would not be able to trust Juliet Godfrey as his People Manager when returning to work on 5 February 2018.

198. The dismissal letter went on to address the seventh main issue, the question of vacancies in other departments. It is clear that the claimant was given access to the vacancy list and was told that he could express an interest and apply for any vacancies that he considered might be suitable. It was also clear that he did not regard any of the vacancies as suitable ones and made no application. The real dispute between the parties was whether the respondent acted unreasonably in failing to be proactive in helping to find an alternative role for the claimant, either as a temporary secondment or as a permanent redeployment, to enable him to return to work at an earlier stage. The respondent argued that this was not a situation where the claimant was disabled under the Equality Act 2010 and required a reasonable adjustment by way of redeployment. It was also argued that a placement itself was not the answer as the HML report also recommended that there be some form of external resolution, possibly as formal as ACAS.

199. I considered the claimant to have good arguments on this point. It did seem to me that he was left to identify a possible alternative role himself and given no real assistance by management. His ability to do so was also hampered by the problems with his laptop which resulted in his access being curtailed at certain times. It was clear from the web browsing records provided by the respondent that between mid October and 21 September 2017 the claimant did look at a number of possible vacancies in addition to the ones which were provided to him. However, the test is not whether the employer did everything it possibly could, but whether its actions fell within the band of reasonable responses. On that point three matters seemed to me to be significant by the time the dismissal decision was taken. The first was that the claimant had not expressed any interest in any of the numerous vacancies whose existence had been made known to him since October. Indeed, the areas in which he appeared most interested (finance and communications) were areas where he had no formal qualifications, although he had had substantial experience outside the respondent. Secondly, this was indeed not a case where the respondent was under a legal duty under the Equality Act 2010 to consider making a reasonable adjustment for the claimant by moving him to a different role. It is reasonable for an employer to take that into account in deciding what course of action to adopt. Thirdly, it was a reasonable interpretation of the HML report to consider that both a placement and some form of external resolution would be required in order to restore working relationships generally, and to take the view that this was unlikely to be achieved where the claimant had declined to engage in a facilitated discussion. Although the claimant made clear in his evidence to my hearing that his refusal of the offer of a facilitated discussion was influenced significantly by the fact that it would be a group discussion rather than a one-to-one, he did not articulate that to the respondent at the time. Instead the reason he gave for not agreeing to a facilitated discussion was recorded as being that the other colleagues would need to change their position first. He also refused to meet with Paul Casey in a one-to-one meeting (page 487). Putting these matters together I was satisfied it was within the band of reasonable responses for Mrs Woods to regard the possibility of a different role as not practicable by the time her decision to dismiss the claimant was taken.

200. Putting those seven main issues together, in my judgment Mrs Woods had reasonable grounds for regarding this as an impasse in terms of management of the claimant because the working relationship had irretrievably broken down. Not every point she made in her dismissal letter was well-founded, but on a number of substantial matters her conclusion was reasonable. Those matters included the initial refusal to work from Skelmersdale in May 2017, the claimant's attitude towards Paul Casey following the way Mr Casey dealt with that matter, the repeated refusal to engage with different managers when unhappy with the way they had dealt with him, the repeated assertions of a lack of trust in individual managers or the Testing Services department, the attack on the ability of Mrs Godfrey to manage him and the language in which they was expressed, and the fact that the claimant had not pursued any of the possible opportunities for different roles which he had accessed in the months preceding the dismissal decision.

201. I reached that conclusion acknowledging two points which the claimant made more generally about the dismissal decision. The first was that he had actually returned to work on 5 February and had sat opposite Paul Casey. His argument was that this showed the position had moved on. The barriers to a return to work which

had previously appeared so insurmountable had in fact been overcome. Mrs Woods explained that her decision to dismiss the claimant had been made before he actually returned to work on that Monday morning. She had prepared a script which she used when meeting with him a few minutes after his arrival. She had concluded that there was no point in seeing how that return to work went before taking the decision. Leaving aside the procedural consideration to which I will return below, I was satisfied that was within the band of reasonable responses. There were a number of concerns about the claimant's behaviour and attitude which had nothing to do with a physical return to work and/or his interaction with Paul Casey. It was also clear that he was returning to work when he did not regard himself as fully fit to do so. An insistence that an employee be 100% fit to do the full range of duties before a return to work is not a reasonable position for an employer to take. Common sense alone tells us that there will be occasions in any organisation where people are at work when not 100% for medical reasons. However, the view that there were still serious issues and that the claimant was returning to work because of pressure to do so rather than because he was genuinely recovered was a reasonable one given the circumstances leading up to that return to work.

202. The second point made by the claimant was based on paragraph 15 of Mrs Woods' statement where she explained that management had taken a "lighter approach" to managing the claimant because of a concern that things would be even worse if he was robustly managed through discipline and/or performance measures. The claimant suggested that the failure to tell him about the concerns about his behaviour meant that he could not reasonably be regarded as accountable for that behaviour later on. Insofar as he suggested that this was a proposition of law (based on legal advice which he said he had received), I rejected it. At best it is a factor to be taken into account in assessing reasonableness overall. As to that point, there were two difficulties for the claimant. The first difficulty was that it was reasonable to think he was likely to reject and challenge any attempt to take issue with his behaviour. He did exactly that in relation to Mr Casey's actions in the aftermath of the May 2017 Manchester bomb. He refused to accept that there was a different perspective which management could reasonably hold. There were other examples of him consistently challenging decisions with which he did not agree rather than accepting that management could reasonably have a different view from his own. The second difficulty was that management were entitled to take the view that there were some aspects of his behaviour which anyone would know would be unacceptable, whether there had been a previous warning or not. They included, for example, the terms in which he responded to Mrs Godfrey's emails to him in December 2017, culminating in his email of 2 February 2018. I therefore rejected the claimant's contention that the decision that working relationships had broken down was fundamentally flawed by a failure to advise him about the consequences of his behaviour over the period with which this case was concerned. He was told on a number of occasions that his behaviour was not appropriate but it continued nonetheless.

203. For those reasons I concluded that there were reasonable grounds to support Mrs Woods' belief that the working relationship between the claimant and the respondent had irretrievably broken down.

Fairness – Reasonable Investigation/Procedure

204. The second question under the **Burchell** test was whether the respondent had carried out such investigation into the matter as was reasonable. That can include procedural concerns as they can overlap.

205. Many of the concerns arose out of recorded communications in emails and meeting notes, and required no further investigation. However, there were two areas where an issue arose about this: the medical position, and the absence of any meeting with the claimant at the point where dismissal was being considered.

206. I considered the medical position. The respondent had medical information of three kinds. The first source was the succession of fit notes. Some at least (I did not see all the fit notes) referred to him having an acute stress reaction. However, they offered no proactive advice about steps that could be taken or the effect of that reaction on his behaviour. The second source was what the claimant said about an adjustment disorder. He provided information about that which he took from internet research in his appeal document sent to Mr Robertson on 14 February 2018. I will consider the appeal decision below, but that information suggested that an adjustment disorder can result in significant impairment in social or occupational functioning. The symptoms included not only that but also disturbances in conduct as well as anxiety, worry, stress and tension. The condition could become chronic if symptoms lasted for more than six months when the stressors remained in place. None of this information, however, was before Mrs Woods at the time she made her decision.

207. The third source of medical information was the extracts from the HML report which the claimant provided on 16 January at pages 605-607. Mrs Woods had not seen the actual report itself. Production of it was delayed following the claimant's concerns about how his HML appointment had been handled. Due to a miscommunication for which one of the respondent's managers appears responsible, HML were told that there were inaccuracies in the report when that was something the claimant had never said. Mrs Woods notified the claimant in her email of 23 January 2018 at page 651 that he had to email HML to confirm some details and whether there were any inaccuracies in the report, but the claimant did not do that. The consequence was that the HML report itself was not before Mrs Godfrey and Mr Knowles at the meeting on 24 January 2018 conducted in the claimant's absence, or before Mrs Woods when she decided to dismiss the claimant between 2 and 5 February 2018. It was reasonable for managers to have some reservations about whether the full report had been pasted into the claimant's email without having seen the original.

208. That aside, the report did supply advice in broad terms and there were some specifics that could have been addressed. For example, Dr Helliwell could have been asked to clarify whether there would be any need for external resolution via ACAS if the claimant was placed in a role out of Testing Services dealing with different managers. He could also have been asked whether he considered that the claimant's behaviours in email exchanges in recent months had been a consequence of his adjustment reaction. Those were enquiries which could reasonably have been made of the OH provider.

209. However, I was satisfied it was equally reasonable of the respondent not to pursue those enquiries. It was not suggested to the respondent that this was the case. It had not by then seen the actual report but only the version provided by the claimant. The respondent was not suggesting that the claimant's sickness absence had not been genuine. He was not accepting that his behaviour had been inappropriate but saying that was only due to his medical position. In those circumstances I was satisfied it was within the band of reasonable responses to take the HML report at face value as part of the picture before Mrs Woods after 2 February 2018.

210. I then turned to the failure to invite the claimant to a meeting to discuss the proposal that he should be dismissed because working relationships had irretrievably broken down. The parallel with a misconduct case was appropriate here. There may be circumstances in which an employer can reasonably conclude that there is simply no point in having a meeting to discuss matters. In my judgment this was not one of those cases. There were two important reasons which would have led an employer acting reasonably to conclude that the claimant should be invited to a meeting to discuss the position as the employer saw it.

211. Firstly, he had never been advised that he was at risk of having his employment terminated for that reason. Any references to employment ending had been by way of ill health retirement or a capability dismissal if long-term sickness continued. It was unfair to deprive him of the chance of reconsidering his position knowing that his continued employment was at risk.

212. Secondly, he had actually returned to work on 5 February and was sitting opposite Mr Casey. Part of the concerns about his behaviour which had led to the conclusion that the working relationship had irretrievably broken down had plainly fallen away.

213. In those circumstances it was outside the band of reasonable responses and unfair not to adopt a procedure which would have involved providing the claimant with the concerns held by management underpinning the view that the working relationship had irretrievably broken down, and allowing the claimant to attend a meeting to have his say on those matters prior to any decision being taken. In **Ezsias**, for example, the employer asked an external HR adviser to investigate the matter before taking a decision. There was no semblance of any such procedure here. That was unfair.

Fairness- Appeal

214. The remaining question about fair procedure concerned the appeal. I rejected the claimant's contention that Mr Robertson was not independent simply because he was the line manager of Mrs Woods. It is reasonable for a more senior manager to hear an appeal against a subordinate manager's decision even though they are in a line management relationship. In a misconduct situation the ACAS Code suggests only that an appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case. I was satisfied that Mr Robertson was impartial in that sense and able to overturn Mrs Woods' decision had he thought it appropriate to do so.

215. The claimant also argued, however, that Mr Robertson was not impartial because he had already been told on two occasions that Mrs Woods had made the right decision. The first was on 15 January 2018 when Mrs Woods emailed him to say that the ongoing feedback by the claimant against individuals within her management team was completely unfounded. The second was on 9 February 2018 (page 756) when Mr MacFarland told Mr Robertson that Mrs Woods was completely right in her decision. However, both these managers were subordinate to Mr Robertson. It was not a case of him being influenced by someone on the same level or above in the management hierarchy. I was satisfied that he still retained sufficient impartiality and had not been previously involved in the detailed events leading up to the decision to dismiss.

216. However, I rejected the contention of Ms Niaz-Dickinson that the appeal hearing attended by the claimant effectively cured the procedural failing of Mrs Woods in not holding a meeting with the claimant before deciding whether to terminate his employment. It was clear to me that Mr Robertson was essentially conducting a review rather than a complete re-hearing. His letter began by saying he was reviewing the appeal, and his decision was that the decision to terminate employment was fair, reasonable and appropriate in the circumstances. He suggested that the appeal meeting had been a chance for the claimant to raise his concerns, but he did not engage, for example, with the additional medical information supplied by the claimant about the nature of an adjustment reaction. In any event matters had moved on by the time of the appeal because after dismissal the claimant learned that Mrs Woods had told the team that the claimant had left the Bank. He felt by the time of the appeal this made it impossible for him to return to Testing Services.

217. Accordingly I was satisfied that the appeal was handled in a way which fell within the band of reasonable responses, despite the concerns of the claimant about lack of impartiality and delay, but because it was essentially a review rather than a re-hearing it did not cure the procedural failing of not having a meeting with the claimant prior to taking the decision to dismiss him.

Fairness – Decision to Dismiss

218. The final question was whether dismissal fell within the band of reasonable responses. Leaving aside the procedural point, my judgment is that there were reasonable grounds for the conclusion that the working relationship with the claimant had irretrievably broken down. I was also satisfied that it was a reasonable conclusion that there was no sustainable future for him in Testing Services even though he had returned to work on 5 February 2018. The issue with Mr Casey had plainly been ameliorated but not the concerns about other managers expressed more recently in the email correspondence in late 2017 and early 2018. The question is therefore whether a reasonable employer would have explored an alternative placement rather than terminate employment.

219. I addressed above the question of alternative roles. It would have been reasonable for the respondent to have looked at this more proactively, but for the reasons set out above I was satisfied that the approach taken was also within the band of reasonable responses. I was also satisfied that it was reasonable to have a

concern that even if the claimant moved to an entirely different department there might be similar problems in future when he was challenged or decisions taken about his behaviour or performance with which he did not agree.

220. I was therefore satisfied that the decision to dismiss the claimant rather than deal with matters in a different way was within the band of reasonable responses, subject to the failure of the respondent to hold a meeting with the claimant before taking the final decision.

Discussion and Conclusions – Unfair Dismissal - Remedy

221. There were two remedy issues which were canvassed during evidence and submissions and on which I was able to make a decision which will affect the final determination of remedy for this unfair dismissal.

Contributory Fault

222. The first question was whether the claimant had contributed to the dismissal in a way which would justify a reduction either to the basic award or to the compensatory award for unfair dismissal. The basic award can be reduced under section 122(2) of the Employment Rights Act 1996 where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the basic award. Similarly, the compensatory award can be reduced where the Tribunal considers it just or equitable having regard to any finding that the dismissal was to any extent caused or contributed to by any action of the claimant (section 123(6)).

223. The leading case on the approach to these provisions remains **Nelson v BBC (No. 2) [1980] ICR 110** to the effect that the conduct of the claimant has to be culpable or blameworthy, although that does not necessarily involve a breach of contract but can extend to conduct which is unreasonable in all the circumstances. If that is established, the Tribunal must still be satisfied that the conduct in question caused the dismissal, and that it would be just and equitable to reduce compensation because of it.

224. In evaluating the claimant's conduct I was entitled to make my own decision based on the evidence before me in this hearing. I was not simply considering whether the respondent's view fell within the band of reasonable responses. I took into account that the respondent had chosen not to pursue misconduct proceedings against the claimant, although that is no bar to a finding of contributory fault.

225. I was satisfied that this dismissal was in large part due to the claimant's own actions driven by dissatisfaction at management's behaviour. I recognised that some degree of dissatisfaction was understandable and justified, not least at the events of mid June 2017 when he returned to work for an interview about the aftermath of the Manchester bomb and was informed that his half year moderation rating would be reduced on account of that before any investigation into that incident had taken place. It was clear that these events caused a significant deterioration in his health. It was also clear that his health affected the way he dealt with matters in the months that followed, not least because the claimant accepted in relation to some matters that with hindsight he had behaved inappropriately.

226. Nevertheless I was satisfied that his conduct overall passed the threshold of being sufficiently unreasonable to justify a reduction in compensation. It seemed to me that there had been repeated unreasonable overreaction on his part to management actions with which he disagreed. That had been the main cause for the dismissal. It was just and equitable to reflect that by reducing compensation.

227. I considered the impact of his health and accounted for that in rejecting Ms Niaz-Dickinson's contention that the appropriate reduction should be 100%. I concluded that a reduction to both the basic award and the compensatory award of 75% would be appropriate to reflect the claimant's contribution to his unfair dismissal by his own unreasonable conduct which caused the breakdown in the working relationship.

"Polkey" Reduction

228. The final question was whether it would be appropriate to reduce or limit the compensatory award under section 123(1) which provides as follows:

> **"Subject to the provisions of this section and sections 123 and 126, the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."**

229. It has been established since **Polkey v A E Dayton Services Limited [1988] ICR 142** that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the compensation by a percentage to reflect the chance of that happening. Although this inherently involves a degree of speculation, the Tribunal can be assisted by the guidance given by the Employment Appeal Tribunal in paragraph 54 of **Software 2000 Limited v Andrews [2007] IRLR 568**, although noting that the burden placed on the employer by the now repealed statutory dispute resolution procedures no longer applies. I took into account that guidance in considering the position.

230. In my judgment had Mrs Woods invited the claimant to a meeting after informing him of the concerns about the working relationship, and given him a chance to respond before taking a final decision, the outcome would have been the same. A realistic chance of the claimant avoiding dismissal following such a meeting would have arisen only if he were to have accepted that his behaviour had been inappropriate and taken a different view of the feasibility of working with the managers involved. In my judgment there was no real chance of that happening. He would have continued to maintain strongly that his perception of events was the correct one and that he had been treated in a way which justified the position he was taking. He would have maintained (as he did in this hearing) that his actions were warranted given the treatment he had received. Dismissal would inevitably have ensued.

231. Accordingly it seems to me that the just and equitable compensatory award in this case should be limited to the period for which the claimant would have remained in employment had Mrs Woods invited him to a meeting to discuss her concerns

before making a decision in light of his response. A detailed invitation to such a meeting providing details of the concerns would have taken a little time to put together, but the dismissal letter was already prepared by 8 February. There might have been some delay whilst the meeting was arranged and took place, and then Mrs Woods would have had to have considered matters and made a decision. In my judgment the likelihood is that this would have taken a period of a further month, and therefore any compensation for financial losses resulting from dismissal should be confined to the period of one calendar month on the basis that the claimant would fairly have been dismissed at the end of that period if the respondent had adopted a fair procedure.

232. For the avoidance of doubt, that compensatory award will itself be reduced by 75% because of the finding of contributory fault. The compensatory award will essentially be limited to 25% of a month's net pay. I do not consider that the application of both contributory fault and **Polkey** to the compensatory award leads to a result which is unjust or inequitable. This was an unfair dismissal only by reason of one procedural failing which would have made no difference to the outcome. It is unlikely I would be persuaded at a remedy hearing to make any award for loss of statutory rights as on my findings these would have been lost fairly a month later.

Discussion and Conclusions – Holiday Pay

233. The respondent's policy on holidays at pages 1158-1170 of the bundle provided that a maximum of 35 hours could be carried forward to a new holiday year. A person on sick leave could apply to take accrued holiday whilst on sick leave, for which the approval of management was required. Once an employee had been continuously absent for 13 weeks, only the statutory holiday entitlement under the Working Time Regulations 1998 would accrue thereafter: contractual holiday entitlement beyond that would be lost.

234. It is unnecessary to rehearse the full sequence of exchanges between the claimant and Mr Trowell about holiday pay in November and December 2017. Broadly, the claimant had gone onto half pay during sick leave with effect from 9 October 2017, and Mr Trowell explained that he could choose to use his remaining holidays in 2017 to restore him to full pay in that period. The communication between the two of them was hampered by some errors made by Mr Trowell in the figures and the claimant's negative reaction to those errors.

235. Matters came to a head on 7 December 2017. The cut-off for the December payroll run was 4.00pm that day. On the afternoon of 5 December 2017 Mr Trowell emailed the claimant setting out the position and saying he needed to know by Thursday morning if the claimant wanted to use any holidays for that period. The claimant's reply that same evening (pages 557-559) took issue with the calculation of the figures and some other matters but asked for an urgent reply. That reply came at just after 5.00pm on 6 December at page 560. The deadline for the claimant to confirm the position was midday on 7 December. The claimant responded that evening (pages 561-564), again taking issue with a calculation of the figures and the number of days to which he was entitled and which could be carried forward. He calculated that he was left with a balance of 198 hours which would enable him to allocate 45 days as half day holidays in 2017, returning him to full pay for those

days. He said this should cover the period between 9 October and 25 December 2017 inclusive, so that he would revert to half pay from 26 December 2017. His email then asked Mr Trowell to arrange for 196.875 hours of the outstanding 198 hours to be included within his January 2018 payroll. He explained he did not wish it to be paid in December for tax reasons, and because it left Mr Trowell with more time to understand the position correctly rather than being pressured into the December payroll date.

236. I was satisfied that the claimant was not asking to carry over those holidays into 2018. He wanted (retrospectively) to be taking them in 2017, but for the payment resulting as a consequence to be made the following month, not in December. That request was misunderstood by Mr Trowell and he did not action payment for either December or January. The respondent therefore took the position that these holidays had not been taken, and some of them were lost because of the limit on carrying over. As a consequence, the payment received by the claimant upon termination for accrued but untaken annual leave was lower than the payment he would have received had his request been actioned by Mr Trowell.

237. Although this was a misunderstanding by the respondent, I was satisfied that the claimant had requested to take that leave in 2017 and this had not been allowed in circumstances where it had been agreed in principle. The claimant therefore succeeded on this point. The payment made to him when his employment terminated was both in breach of contract and an unlawful deduction from his pay.

238. The measure of the unlawful deduction is the difference between the amount he should have received on the basis that those days were taken during 2017 and he was restored to full pay for the relevant period, and what he actually received upon termination in respect of accrued but untaken annual leave.

Remedy Hearing

239. My findings as to contributory fault and the compensatory award suggest that the financial value of this claim is something which could be agreed. Similarly, the figure for holiday pay should be capable of agreement given the decision set out above.

240. I therefore invite the parties to confirm within 21 days of the date on which this Judgment and Reasons is sent out to them whether they have been able to reach agreement on the appropriate figures for the basic award, compensatory award and in respect of the holiday pay claim. The latter claim should be a gross figure as I propose to make an award in respect of unlawful deductions from pay, from which tax and national insurance should be deducted by the respondent. That will mean that no award for breach of contract will be appropriate because the loss will already have been remedied.

241. If the parties have not been able to agree remedy they should confirm in writing where the difference between them lies and their view of the appropriate time estimate for a remedy hearing, together with dates of availability for the four months that follow.

242. A remedy hearing will then be listed if appropriate.

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Employment Judge Franey

1 April 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

05 April 2019

FOR THE TRIBUNAL OFFICE

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