EMPLOYMENT TRIBUNALS

Claimant: Russell Pearson

Respondent: Department For Work and Pensions

RESERVED JUDGMENT

Heard at: Remotely, by Cloud Video Platform ('CVP')

On: 25, 26, 27, 29 January, 1-5 and 8- 9 February 2021
(deliberations 10, 11, 24 February 2021)

Before: Employment Judge Sweeney

Members: Stuart Moules and Steve Wykes

Representation:

For the Claimant: Morgan Brien, counsel
For the Respondent: Antoine Tinnion, counsel

The unanimous Judgment of the Tribunal is as follows:

1. **The complaint of disability discrimination by way of failure to make reasonable adjustment is well founded and succeeds (**issue C of the list of issues in the Appendix and only to the extent set out in the Reasons).

2. **All other complaints of disability discrimination by way of failure to make reasonable adjustments are not well founded and are dismissed** (A, D, E and G of the list of issues in the Appendix)

3. **The complaints of harassment related to disability are dismissed (**issues B, F and G of the list of issues in the Appendix)**.**

4. **The remaining complaints of harassment related to disability are dismissed upon withdrawal** (see paragraphs 16(a) and (f) of the Reasons).

5. **The complaints of discrimination because of something arising in consequence of disability (section 15 Equality Act 2010) are dismissed upon withdrawal** (see paragraphs 16 (b), (d) and (e) of the Reasons).

6. **The complaints of indirect discrimination (section 19 Equality Act 2010) are dismissed upon withdrawal** (see paragraph 16 (c) of the Reasons).

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

REASONS

The Claimant's claims

1. By a Claim Form presented on 13 February 2019, the Claimant brought claims of disability discrimination, harassment and victimisation. The Respondent denied the claims. Following a case management preliminary hearing on 10 May 2019, directions were made for the filing of an Amended Claim Form and an Amended Response. The amended claim was served on 19 July 2019. It categorised the complaints under themes, A – H as follows:

1.1.1. Lifts and Parking: failure to make reasonable adjustments – sections 20-21 Equality Act 2010; harassment – *section 26 Equality Act 2010*;

1.1.2. Chariots of Fire: harassment – section 26;

1.1.3. LMA: discrimination contrary to section - *15 Equality Act 2010; indirect discrimination – section 19 Equality Act 2010*; failure to make reasonable adjustments – sections 20-21;

1.1.4. Alternative work issues: failure to make reasonable adjustments – sections 20-21; *discrimination contrary to section 15*;

1.1.5. Equality Move: discrimination contrary to section 15; failure to make reasonable adjustments – sections 20-21;

1.1.6. Warbreck House: harassment – section 26;

1.1.7. Grievance issues: failure to make reasonable adjustments – sections 20-21; harassment – section 26;

1.1.8. *Benefits: discrimination contrary to section 15; harassment – section 26*;

2. The complaints above in italics were subsequently withdrawn (see paragraph 16 below). An amended response was served on 18 August 2019.

3. The complaints were due to be heard at the Newcastle Employment Tribunal on 23 March 2020. However, the Final Hearing was postponed by order of Employment Judge Garnon on 14 February 2020. At a case management preliminary hearing on 26 March 2020, Employment Judge Martin directed that the parties seek to agree a list of the legal and factual issues to be determined at the re-listed Final Hearing. This had not been done by the start of the hearing on 25 January 2021.

The Hearing

4. The hearing was conducted remotely using Cloud Video Platform (CVP) technology. The Claimant gave evidence on his own behalf. The Respondent called the following witnesses:
   4.1.1. Karen Pescod: PIP Operations Manager, Wearview House and a former line manager of the Claimant;

   4.1.2. Pamela Little: PIP Team Leader Wearview House and a former colleague and mentor of the Claimant;

   4.1.3. Kathryn Hardman: HEO Manager,

   4.1.4. Joanne Johnston: PIP Case Manager, Wearview House, former line manager of the Claimant

   4.1.5. Naomi Carr: PIP Team Leader, Wearview House, former line manager of the Claimant;

   4.1.6. Darren Creighton: PIP Team Leader, Wearview House, current line manager of the Claimant;

   4.1.7. John Moore: former SEO, Wearview House;

   4.1.8. Edward Kane: PIP Case manager, colleague of Claimant;

   4.1.9. Josephine Obasohan: PIP Case Manager, colleague of Claimant;

   4.1.10. Steve Drummond: Senior Lead, Warbreck House, Blackpool – decision maker on Claimant's first grievance;

   4.1.11. Bernard Devaney: Senior Finance Manager, Newcastle – appeal officer on Claimant's first grievance;

4.1.12. Rob Baldwin: Service Leader, Leeds – appeal officer on grievances investigated by Mandy Williams

5. The Respondent had also intended to call Ms Mandy Williams, a senior Operations Lead based in Birmingham – who reinvestigated the Claimant's first grievance and was a decision maker in relation to his further 3 grievances. However, they were unable to do so as regrettably she contracted COVID-19 during the course of the hearing and was too unwell to give evidence. The Tribunal read her statement and gave it appropriate weight in light of the fact that she was not present to be challenged on it. In the end, very little turned on her evidence.

6. The parties had prepared a bundle of documents consisting of 801 pages. Some documents were added during the course of the hearing, bringing the total number of pages to 824.

7. The first day was set aside as a reading day for the Tribunal. The parties attended at 10am on the second day.

The issues

8. It was not until 22:08 on Friday 24 January 2021 that the Tribunal received a 'draft' list of issues from the Respondent's counsel, Mr Tinnion, most of which was said to be agreed. Counsel hoped that the outstanding issues could be resolved over the first two days of the hearing which were anticipated to be taken up by the tribunal reading into the case. However, the Tribunal had read enough (all the statements and enough of the documentation) to make a start on the evidence on the second day.

9. When the parties convened on Tuesday 26 January 2021, there was some initial discussion about the issues at the outset. The Tribunal expressed its dissatisfaction that in a case of this magnitude (listed for 15 days) where both parties were professionally represented and had been directed to agree a list of issues as far back as July 2020 (itself some four months after the initial final hearing date) there had still not been an agreed list of issues. The Tribunal also disagreed that the things to be addressed with regards to the issues were a matter of 'form'. There appeared to be matters of 'substance' with the initial draft. The Tribunal asked for a revised and agreed list by the end of Wednesday 27 January 2021. In the meantime, it would proceed to hear the evidence of the Claimant. The Claimant started his evidence at 10.25am on Tuesday 26 January.

10. At the beginning of the next day, Wednesday 27 January 2021, the Claimant's counsel, Mr Brien, made an application to amend the issues to add additional 'adjustments'. The Tribunal again expressed its dissatisfaction but directed that the Claimant's counsel send the list of issues as currently agreed to Mr Tinnion

together with the proposed amendment and to send this to the Tribunal. The Tribunal adjourned until 10.45am to allow this to be done and for everyone to read the document. The Claimant's solicitors emailed the Tribunal at 09.58am with the proposed amendments. Upon resuming, we were told that everything was agreed except for the items on page 4, paragraph 4 (e) – (h), namely the following adjustments:

10.1.1. To allow the Claimant further time to undertake the LMA;

10.1.2. To provide the Claimant with extended breaks during the LMA;

10.1.3. To provide the Claimant with a one to one mentor to support him with the LMA;

10.1.4. To permit the Claimant to speak to colleagues during the LMA process

11. Mr Tinnion objected to the application. He submitted that this was not simply an application to amend a list of issues but an application to amend the Claim Form. Mr Brien submitted that he did not require permission to amend the Claim Form but that, in any event, permission should be given. He submitted that most of these things were alluded to on the Claim Form. He took the Tribunal to **page 17** of the bundle, where he said, the Claimant had referred to paragraph 4 (h) (speaking to colleagues); to **page 20**, (relating to the issue of mentors), paragraph 4 (g). There was enough of a reference on the Claim Form such that this cannot be regarded as an additional complaint. Mr Brien accepted that paragraphs 4(e) and (f) are not specifically referred to but directed the Tribunal to page 18, where the Claimant referred to the issue of the LMA which was central to his claim. He should not be precluded from relying on these extra four suggested amendments, particularly in light of the observations of the EAT in the case of **Project Management Institute v Latif** [2007] IRLR 579 which suggests there is no legal duty on an employee to suggest particular adjustments. In any event, he submitted there is no prejudice to the Respondent in having to deal with these issues as they are all matters that relate to the LMA and all the relevant witnesses are present.

12. Mr Tinnion submitted that permission was needed to amend the Claim Form. The suggested amendments were not specifically referred to in the Claim Form. Even if it were right to indulge the Claimant on the basis that he had initially been an unrepresented litigant, he was not by the time Employment Judge Morris made his orders back in 2019. Mr Tinnion acknowledged that the Tribunal had a discretion to amend but observed that these amendments were extremely late; that they could not come at a worse time. No witness had addressed the specific issues in their statements and he had not prepared cross examination on them.

13. The Tribunal asked Mr Tinnion whether he was submitting that the case would have be adjourned to some point in the future if the amendment were granted.

He said that he was not, but that he would certainly need time to deal with them should the Tribunal permit the application. He submitted that his essential point was the lateness of the application and that it was unfair to move the goalposts at this stage. He invited the Tribunal to refuse the application as it was made too late in the day.

14. The Tribunal retired to consider its decision. We allowed the application to amend. The Claim Form already contained a complaint of failure to make reasonable adjustments. It was clear that the central complaint in this case was the issue of 'LMA' – that the process involved in passing the Claimant through this procedure put him to a substantial disadvantage and that it should be amended in some way. The Claimant was not seeking to add a new complaint. He was seeking to formalise, within the issues, adjustments which had not been set out before but which were within the general area of his complaint. Whether it was right to regard this as an amendment of the Claim or of the issues was not the main concern for the Tribunal. The main concern was fairness. Would the Respondent be able to deal with these points fairly in the time available? That was the question uppermost on our minds. We were content to regard it as an application to amend the Claim Form and to that extent we considered the well-known **Selkent** principles. We concluded that the Respondent was sufficiently aware of the broad nature of the Claimant's case. There was sufficient time available to enable it to engage with these specific points. All the relevant witnesses were present: the former and current line managers and the senior managers who looked at the LMA process. Although the amendment was very late, we were satisfied that there was no prejudice to the Respondent and that there would be prejudice to the Claimant should we refuse permission to amend: it would mean that important issues of substance in relation to an existing cause of action would not be examined by the Tribunal on the merits.

15. We discussed with Mr Tinnion how long he would need to prepare and respond to the additional issues. Having done so, at 12.10pm we gave permission for the Respondent to serve supplemental witness statements should it need to and adjourned until Friday 29 January 2021 agreeing to sit at 09.30am each morning to make up for lost time. We made it clear that if Mr Tinnion needed more time he must let the Tribunal know. As it turned out, he did not need any further time. Further statements were prepared and served on behalf of Ms Johnston, Ms Carr and Mr Creighton. The hearing resumed on 29 January 2021 with the Claimant. We then proceeded to hear the Respondent's evidence starting Tuesday 02 February the following week upon completion of the Claimant's evidence.

16. A final list of issues was agreed and sent to the Tribunal on 02 February 2021 together with an email from the Claimant's counsel withdrawing a number of complaints as follows:

*"The following complaints asserted in the ET1, as further particularised in the Claimant's Details of Claim (**DOC**), are dismissed on withdrawal by the Claimant:*

(a) DOC, para. 23 (parking/s.26 EqA 2010 complaint)
(b) DOC, paras. 42-43 (LMA/s.15 EqA 2010 complaint)
(c) DOC, paras. 44-47 (LMA/s.19 EqA 2010 complaint)
(d) DOC, paras. 63-64, 70-71 (alternative work/s.15 EqA 2010 complaint)
(e) DOC, paras. 90-93 (CSIB scheme/s.15 EqA 2010 complaint)
(f) DOC, paras. 94-95 (CSIB scheme/s.26 EqA 2010 complaint)"

17. It was agreed that those complaints be dismissed upon withdrawal. A copy of the final list of issues as agreed by counsel is attached to these reasons as an Appendix.

Findings of fact

18. The Tribunal heard a considerable amount of evidence. It is not our function to set out every piece of evidence or to make findings on every issue or dispute. We do not propose to resolve every dispute of fact between the parties, only those which we have considered to be necessary for the purposes of determining the complaints. Having considered all the evidence before it (written and oral) and the submissions made by the representatives on behalf of the parties, the Tribunal finds the following key facts.

A brief overview of the Claimant's employment history with the Respondent

The Claimant's place of work

19. The Claimant who remains in employment with the Respondent commenced his employment on 04 January 2016. Although currently working from home during the global pandemic, he was and still is based at Wearview House in Sunderland, which is a 5-minute drive from his home. Wearview House is a five-storey building (ground floor plus floors 1-4). It has an underground or basement car park, access to which is down a steep incline. There are some additional car parking spaces outside the building. Parking is on a first-come-first-served basis. There are some disabled parking bays both in the basement and in the outside car park. There is a wide disabled bay to the left of the main entrance and one to the right of the main entrance. The bay to the right of the entrance is at the beginning of the incline which leads down to the basement car park entrance. There are two lifts in the building. One lift gives access to all floors and to the basement car park. The other lift goes from the ground floor to the fourth floor but not to the basement car park. Access to the lift area from the basement car park is through heavy fire doors. There are also stairs leading from the basement car park to the ground floor.

Roles and line management

20. The Claimant commenced his employment on a fixed term contract as a Band AO Grade Telephony Agent working on Employment Support Allowance ('ESA') under the line management of Karen Pescod. He obtained a promotion to a Band EO Team Leader with effect from 30 August 2016, whereupon he moved to the PIP team (PIP stands for 'Personal Independence Payment') under the line management of Kathryn Hardman, a PIP Reassessment Manager, Band HEO. She was one of two HEOs, the other being Simon Jones. They each managed about half a dozen or so Team Leaders. Those team leaders each supervised a team of Case Workers. John Moore is a senior executive officer ('SEO') with the Respondent. He was responsible for the whole PIP team at Wearview House up until the end of 2018. Mr Moore had been on the interview panel which interviewed the Claimant prior to his employment commencing in January 2016. Mr Moore was keen to develop Wearview House as a centre of excellence. He would visit Warbreck House in Blackpool (where PIP originated) once a week, sometimes more than once a week. He would take people from Wearview House with him on these visits so that they could learn from those at Warbreck House.

21. Upon moving to the PIP team leader role in August 2016, the Claimant commenced a period of training following which he joined his team of Case Workers. Pamela Little, an experienced team leader, was appointed as his mentor. They had a good working relationship. The Claimant at one point brought a complaint to her which she addressed effectively and informally, as she outlines in paragraph 4 of her witness statement and which we accept. Other team leaders relevant to these proceedings are Edward Kane and Josephine Obasohan. Mr Kane moved from Blackpool (Warbreck House) to Wearview House on 01 November 2016. Ms Obasohan commenced employment at Wearview House in March 2016.

22. The Claimant and Ms Little came under Kathryn Hardman's line management. Mr Kane was initially line managed by Simon Jones but in about January or February 2017 he transferred to Ms Hardman's command. Ms Obasohan was line managed by Simon Jones. After a period of training, all three of the above team leaders and others worked on the 3rd floor of Wearview House. Ms Hardman was based on the 4th floor.

23. Ms Hardman encouraged each team to create a team 'brand' for the purposes of team building and to introduce some light-heartedness to the working environment. As part of this she suggested that the teams come up with a team name. It was for each team of case workers to come up with the name for their team. Some teams chose names which involved a play on the name of the team leader. Others would choose a name which they found humorous or with which they had some connection. Mr Jones did not have a similar approach and his

teams were not asked to and did not think up team names. Therefore, whereas the teams supervised by Ms Little, Mr Kane and the Claimant all came up with team names, the team supervised by Ms Obasohan did not.

24. In the summer of 2017, the Claimant and Mr Kane were selected by Ms Hardman and Mr Jones respectively to move to the role of PIP Case Manager, Band EO. Neither the Claimant nor Mr Kane had requested the move and neither was particularly happy about moving to this new role. Volunteers had been sought without success and senior managers had no option but to select two from the cohort of team leaders. Employees were appointed to a grade, not a role. The role of Case PIP Manager and PIP Team Leader, although very different roles, were on the same grade.

25. Initially, the Claimant had no real interest in the role of PIP Case Manager. Prior to joining the DWP his employment in the private sector had been in a team leader role. When he was first interviewed by the DWP for employment in January 2016, he had expressed a preference for a team leader role. That was the sort of work he was experienced in and enjoyed and felt confident in. He had been enjoying the team leader role since he had moved to it in August 2016. The role of Case PIP Manager was a very different role. It involved assessment of applications and required a technical understanding of the forms and rules associated with personal independence payments, in respect of which the Claimant had no previous experience.

26. He moved to the new role, commencing his training to be a PIP Case Manager in November 2017 under the line management of Susan Anderson. On coming out of Case Manager training, he was line managed by Joanne Johnston with effect from 20 February 2018. Aside from a short period between 20 July and 09 August when he was managed by Angela Thurlbeck, Ms Johnston line managed the Claimant until 19 October 2018. From then the Claimant was line managed by Naomi Carr until 26 April 2019 at which point she was replaced by James Souter. Mr Souter acted as the Claimant's line manager for a short period until the end of June 2019 when he was replaced by Darren Creighton. As at the date of this hearing, Mr Creighton remained the Claimant's line manager.

Disability

27. It is not disputed that the Claimant is a disabled person within the meaning of section 6 Equality Act 2010 in terms of both his physical and mental disabilities. He has psoriatic arthritis (a type of arthritis which develops in some people with the skin condition psoriasis) which from time to time can and does flare up, causing pain and inflammation in his joints, making it difficult for him to walk. In addition to his physical disability, the Claimant was diagnosed with a mental impairment of depression.

28. Due to the extent of the physical impairment, the Claimant requires a wheelchair. Over short distances and for short period he can walk with the aid of a walking stick. When in the office, he would use his stick for moving say from his desk to the photocopier or to another desk, if reasonably close by. For anything longer, such as going from one floor to another he would have to use his wheelchair. The Claimant's physical disabilities adversely affect not only his mobility but also his cognitive functions of concentration and memory. The pain of his condition can and does give rise to fatigue which has an adverse effect, particularly in stressful situations, on his ability to concentrate and retain information.

29. Although his mobility is restricted, generally speaking the Claimant has good upper body strength. He does not lack physical strength in his arms, although his ability to propel his wheelchair will from time to time be adversely affected by a flare up of the psoriasis on his hands.

30. Whether as a result only of his physical impairments or due to a combination of his physical and mental impairments, it is accepted by the Respondent that his ability to carry out normal day to day activities is and was at all material times substantially adversely affected. The effects on his day-to-day life would vary as his symptoms varied. Most relevant to these proceedings is that from about summer of 2018 and certainly by Autumn 2018 his psoriatic arthritis and mental health symptoms had got worse. He suffered from insomnia, tiredness, poor concentration and memory loss brought about by pain. Thus, his condition brought on what is described as 'brain fog' (**pages, 241, 257, 258, 259, 291, 313, 350**).

PIP Case Managers and LMA

31. The primary component of the Case Manager role is and was to assess an individual applicant's entitlement to claim a Personal Independence Payment ('PIP'). The Case Manager must make a decision on the level of entitlement, if any, to the PIP benefit. The Case Manager must consider all the available evidence before making a decision and must write an explanation of the decision to be sent to the applicant. The evidence to be considered comes largely from an assessment prepared by a medical assessor, known as an Assessment Provider ('AP'). Sometimes there may be additional evidence provided by the Applicants themselves.

32. A newly appointed case manager starts with a period of classroom based training which lasts about 4 weeks. Following this, they enter a period or phase of 'consolidation'. During this phase, which lasted 20 days, they are to put what they learn into practice. They assess real cases with the assistance of a mentor. During the consolidation phase, the 'trainee' case managers sit together at a bank of desks, where they discuss the cases they are working on with each

other and with their mentors. The practice is to share mentors. However, the Claimant came to be allocated a dedicated mentor, which we come on to later.

33. After consolidation, they then commence the Line Manager Assessment ('LMA') process. It is necessary for a Case Manager to pass the LMA in order for them to be able to carry out the role. During LMA the 'trainee' case managers are given a number of cases for them to assess. The assessments are passed to a member of the Quality Assurance Team to be assessed. For the purposes of these proceedings, Kay Farrier had been the quality assurance manager in 2018 and she was replaced by Clare Mather later in that year. The cases given to the trainee during the LMA process are sifted. Some specific health conditions are considered complex and the cases are and were checked in advance to ensure that the trainees were not asked to assess complex cases in the LMA phase. The quality assurer either passes ('standard met') or fails the assessment. The trainee case manager is able to challenge an assessment if he or she disagrees with it.

34. The LMA process lasted for a period of 10 working days. During that period, the trainee case manager could speak to his mentor or colleagues but not about the particular application they were assessing. Once they completed an assessment they would submit it and await feedback, during which time they could talk to their mentor about the completed assessment and could commence work on the next assessment. However, they were limited to discussions about completed assessments only and they could not ask any questions, even of a general nature, about the current assessment they were working on.

35. Once the trainee case manager passed the LMA they became certified and were able to carry on in their role as a PIP Case Manager, assessing applications. Invariably a fully-fledged case manager, so to speak, will discuss applications with a colleague or a manager as they come it; they will share views and ideas with each other and seek each other's views in complex cases. That is normal day to day interaction which is to be expected in any work environment. The Respondent's quality assurance team would also carry out regular random percentage checks on assessments by the certified case managers in order to ensure that the quality of assessments was maintained. If there are any issues coming out of these random checks, they are managed appropriately by the managers.

36. Up until 25 July 2018 the Respondent required a case manager in LMA to secure 5 consecutive passes. With effect from that date, it changed its requirement. From that point, the requirement was to be 3 consecutive passes. The 'new' LMA process is set out on **page 262**. The third bullet point refers to LMA cases having to be 'a full disallowance and 2 awards'. A disallowance is where the case manager has, for want of a better phrase, not approved an application. These are considered to be more challenging and they come with

the challenging feature of having to explain the disallowance to a disappointed and potentially vulnerable benefits applicant.

37. The new process was such that each case manager was guaranteed to have a disallowance. Under the previous practice, where the requirement was for 5 consecutive passes, it was likely that one of those 5 would be a full disallowance but it was not guaranteed that one would be. Once the trainee secured the requisite number of passes the LMA process came to an end and they were certified.

38. The Claimant passed his LMA in July 2020 securing 3 consecutive passes, under the line management of Darren Creighton. However, he had attempted it a number of times before then and had failed. Those attempts and his request for the Respondent to adjust its requirements are central to these proceedings and acknowledged to be so by the Claimant.

39. The Claimant made four attempts in 2018 as follows (see **page 263-264**):

    39.1.1. 26 February 2018 – 09 March 2018. In this period he undertook 13 assessments, securing 7 passes, 4 of which were consecutive passes;

    39.1.2. 02 April 2018 – 18 April 2018. In this period he undertook 10 assessments and passed 1.

    39.1.3. 04 May 2018-17 May 2018. In this period he undertook 8 assessments and passed 2 although there was a question mark against one.

    39.1.4. 19 October 2018-16 November 2018. In this period he undertook 13 assessments and passed 4. He was also off on paternity leave during this period, which is why it appears to be longer than the other periods.

40. It can be seen from this that the Claimant failed to secure the requisite number of passes when the requirement was 5 (the first 3 attempts) and then when the requirement was 3 (the 4th attempt). He is an intelligent man and all those who have line managed him believed to be equipped with the necessary skills and intellect in order to undertake the role of PIP Case Manager. No-one who gave evidence on behalf of the Respondent believed that the Claimant was not up to the role or that it was beyond his capabilities. Indeed, since July 2020, as confirmed by Mr Creighton, he is performing reasonably as a case manager.

41. Something other than a lack of intelligence was, therefore, causing the Claimant to fail to meet the requirement for consecutive passes. It is possible that it may have been an error of judgement on a given application. It is possible that it may have been the stress of the situation, which all agreed, was experienced by all those who undertake the process. It may have been due to the Claimant's

disabilities. It may have been a combination of these things. In the first half of 2018 there was no clear picture, as the understanding of managers was developing

42. We can confidently say from our analysis of the evidence that the Claimant's line managers, Ms Johnstone, Ms Carr and Mr Creighton all wanted the Claimant to succeed. That extends to other more senior managers such as Mr Moore, Mr Drummond and Mr Devaney. This is not a case, we find, where management thought ill of an employee or believed that the employee was incapable or that he was not performing to the best of his abilities.

43. Had the new LMA process been in place in February 2018, as opposed to July 2018, the Claimant would have passed his LMA – as he had secured 4 consecutive passes, subject to one of those being a full disallowance. But of course, it was not 3 at that time but 5. In relation to that first attempt, the Claimant challenged one of the assessments on the basis that it was too complex and should not have been given to a trainee. However, when explained to him why he had failed, he accepted that and took the challenge no further.

44. Having failed his first attempt that had an effect on the Claimant's confidence. We find that stress began to build gradually over the coming months, which had a knock-on effect on his health. His mental wellbeing deteriorated, which had a knock-on effect on his stress levels, which aggravated his physical condition. The Claimant knows his condition very well – better than anyone. Due deference must be afforded to him when he describes the effects of his disabilities on him. We accept his evidence that with increased anxiety this caused his physical condition to flare, aggravation to his skin causing sleepless nights and resulting in pain and fatigue. He was prescribed medication (methotrexate). All of this affected his concentration levels and his ability to retain information.

45. Mr Creighton was familiar with the concept of brain fog. We shall come on to what he did in due course. However, staying with the events of 2018, we find that the brain fog built up during 2018 as the Claimant's anxiety and physical conditions deteriorated. The description of brain fog is apt to describe what happened to the Claimant during the LMA process. It is not to say that his mind was clouded by fog continuously. It would descend and ascend as his mental and physical wellbeing changed. It was at its worst during the LMA process. What he needed was an opportunity for the fog to lift so that he could see and think clearly again. However, faced with the requirement of having to secure 3 consecutive passes within a period of 10 working days, the stress built up, the brain fog did not lift and the Claimant failed his LMA on multiple attempts.

46. After his second failed attempt, Ms Johnston introduced a stress reduction plan (**pages 221-227**).

47. Immediately after the third failed attempt the Claimant was placed on an informal Performance Action and Learning Plan ('PAL'). It commenced on 19 April 2018 (**page 227A**). Whilst it was hoped that the Claimant would succeed on the PAL, on 15 May 2018, he was made aware that if he did not, the Respondent would have to look at poor performance procedures in line with DWP policy (**page 227D**). That of course, brought with it the real risk of dismissal. Ms Johnston accepted in evidence that this was the case, although she added that a lot of support would be given before that point and she was not aware of anyone having been dismissed following a PAL. The Claimant was distressed in May when he learned that a trainee had come out of training (the 'nursery') and pass within a week, whereas he could not after five months. He said he could not handle the pressure of the LMA (**page 236**).

48. On 26 June 2018 the Claimant commenced a period of sick leave. He returned to work on 14 September 2018 on 'Part Time Medical Grounds' or 'PTMG'. His fit notes all referred to 'stress related problem'. In between those dates he was contacted by Ms Johnston (his then line manager) a number of times in keeping with the Respondent's 'Keeping In Touch' ('KIT') policy. The key stressor for the Claimant was the situation surrounding the LMA. On 09 and 13 July 2018 he told Ms Johnston about his brain fog (**page 257-258**), something he had mentioned to her in his email of 01 June 2018 (**page 241**).

49. On 19 July 2018 Occupational Health reported (**page 259**). It says little about brain fog other than to state that the Claimant regards his main problems as pain, fatigue, brain fog and unable to concentrate. However, it does add that owing to the complexities raised by the Claimant his case requires escalation to a senior PAM Clinician. The occupational health nurse said she would make the necessary arrangements.

50. It was during this period of absence that the Respondent's requirement for 5 consecutive passes changed. Whether 5 or 3, it was failure and the fear of repeated future failure and the associated stress that led the Claimant to look at things such as a move away from PIP or to be allowed to work at home or to do 'tasks'. These were the things he discussed at a meeting with Ms Thurlbeck on 26 July 2018, when assisted by Mr Kerr his trade union representative (**page 265-267**).

51. On 02 August 2018 the Claimant was contacted by occupational health physician, Robert Wiggins. Mr Wiggins described how the Claimant had reported that a large proportion of his body was covered in skin lesions and that most of his small joints and major joints were swelling up along with soft tissues welling around the joints. He reported problems propelling his wheel chair due to skin and hand pain. He reported significant pain levels. In providing his clinical opinion, Mr Wiggins – referring to the Claimant's psoriasis – said that this is thought to be linked to auto immune issues; that it can be aggravated by

a number of things including adrenalin that is released in the body when people become stressed or frightened. He went on to say:

"it is my clinical opinion that Russell has reduced mobility, significant pain levels that are currently not controlled. Poor sleep due to pain and poor cognitive functions such as poor memory and poor concentration due to fatigue from pain and poor sleep."

52. The doctor advised that on returning to work he would require low stress work roles.

53. On 02 August 2018 Ms Thurlbeck wrote to the Claimant (**page 277A-277B**). She said that she would not consider dismissal or demotion at this point but she would continue to review his absence regularly and may review her decision at any time if it becomes unlikely that he will return to work in a reasonable period of time Ms Johnston subsequently wrote to the Claimant on 30 August 2018. She said the same thing with regard to dismissal or demotion (**page 286**).

54. In anticipation of returning to work, the Claimant had spoken with Ms Johnston on 21 and 22 August 2018 by telephone. There was a further letter to the Claimant on 21 August 2018 from Ms Johnston saying that, while she would support him to meet the attendance standards expected, his employment with the Respondent could be affected if they were no longer able to support it (**page 281**). They then met on 24 August 2018 (**page 284-285**). During a discussion about the Claimant's brain fog it was agreed that he would return to work under PTMG; that if there was to be a discussion regarding working from home he would have to make a formal application but in the meantime he needed support to build him up to be in a position to undertake the role of case manager; that supporting the task team with less demanding tasks was reasonable in the short term but she would be looking to build him towards carrying out the full case manager role.

55. It was not unreasonable of Ms Johnston to expect the Claimant to undertake the full case manager role, provided that in doing so she adhered to the advice and recommendations of Mr Wiggins who had suggested a low stress role. The role itself was not the stressor – it was the LMA process. That was the 'elephant in the room'.

56. We pause at this stage to take stock of the time-line and to consider what the Respondent knew. It knew about the Claimant's physical disabilities. It knew about his brain fog. It knew that he had failed his LMA three times. It knew that he had passed 4 consecutive assessments back in February 2018. It knew that he suffered from stress and anxiety and that his disabilities were adversely affecting his cognitive functions. It knew that the occupational health doctor was advising a return to low stress role. It knew that the LMA process had to be

undertaken if the Claimant was to continue in his case manager role. It knew that it was a stressful situation.

57. The Claimant returned to work on 14 September 2018 on PTMG. He would gradually increase his working hours by 1 hour a week. Ms Johnston agreed to extend the length of the consolidation phase from 20 to 25 days. On 25 September 2018 the Claimant completed a 'Workplace Adjustment Passport' (**page 302-306**). On page 304 of the Passport he wrote:

"The effects of my conditions make it very difficult for me to retain new information and concentrate fully. When I am having a flare which can happen to me at any time but can also be more easily brought about through increased stress or illness my ability to function is further impaired and I can take much longer to complete tasks both due to my reduced mobility but also due to the fatigue and concentration issues."

58. He identified elements of his role which he felt required adjustments. One thing was to have additional time to complete tasks and reduced productivity expectations due to the effects of his condition and to be able to take regular breaks as required throughout the day. On **page 305** he wrote as an agreed adjustment '*Extended LMA completion timescales to allow me to reach the required standard and to enable me to be able to process information held in individual terms*.'

59. The Respondent said that it had never agreed to this last point – extended LMA completion timescales. It may not have agreed to this as of September 2018 but we find that, in fact, that is precisely what Mr Creighton did after **he** became line manager, which we address below. He referred to it as 'stopping the clock'. In other words, under his line management, the Claimant when in the LMA phase was able to step back and undertake simple tasks. This would 'stop the clock' on the 10-day LMA period – in effect, extending the LMA timescales. As Mr Creighton explained, the purpose of allowing the Claimant to step back when stressed allowed the fog to lift; when he was ready he could return to the LMA assessments and the clock would start running again. He confirmed that had there been a document equivalent to the document we had on **page 263** of the bundle (showing the time periods of the first 4 LMA attempts) it would show a longer period between the start and end dates in each section – i.e. it would show an extended timescale.

60. Returning to the Workplace Adjustment Passport, whether or not the adjustment of 'extended LMA timescales' was agreed at the time, it was not in fact implemented.

61. On 28 September 2018, Ms Johnston noted that it may be that at some point it would be necessary to issue the Claimant with a written warning but that this was not automatic and would have to be considered (**page 308**).

62. By the time the Claimant came to embark on his fourth LMA attempt, Ms Carr had become his line manager. We have no doubt there were good reasons for the changes in line management. However, it is unfortunate that there were so many changes and particularly that there was a change around this time. We found Ms Johnston to be empathetic and genuinely keen to help the Claimant pass his LMA. Her knowledge and understanding of the Claimant's health and the impact of it on his role and how the stressor of the LMA affected his health was growing incrementally.

63. Naomi Carr took over as the Claimant's line manager on 19 October 2018. Ms Carr first met the Claimant on 15 October 2018 prior to a meeting on 16 October 2018 with Ms Johnston and the Claimant (**page 315**). Therefore, Ms Carr came on board just as the Claimant insisted on embarking on the fourth attempt – we find that he had the option of waiting but he wished to do it prior to starting his paternity leave. Ms Carr had little time to digest the history and significance of the issues facing the Claimant. She had only met the Claimant on 15 October for the first time. He started the fourth LMA phase on 19 October 2019, which he failed. He was then absent on sick-leave until June 2019. During her management of the Claimant there were very few days when he was at work. We are satisfied she too would have wanted the Claimant to succeed but she had little opportunity to provide input while he remained absent from work.

64. The change of management is, as we have indicated, unfortunate as it disrupts the flow of understanding and knowledge – particularly in a situation where knowledge and understanding is growing incrementally. Nevertheless, corporately, the Respondent was building a bank of knowledge about the real issues confronting the Claimant: that bank of knowledge consisted of the meetings and discussions with the Claimant and his union representative and the content of the occupational health reports.

65. On 27 September 2018, Ms Thurlbeck (in Ms Johnston's absence) had again referred the Claimant to Occupational Health asking for an opinion on brain fog. Specifically, she asked for an opinion or explanation as to what brain fog is and its impact on the Claimant's ability to carry out his role (**page 308A**). We consider this to be a genuine attempt by the Respondent to understand brain fog in the context of the Claimant's job role and the requirements to pass the LMA process.

66. The Occupational Health Nurse reported on 03 October 2018 (**page 313**). Unfortunately, that report did not go into the detail that Ms Thurlbeck had requested. It did not tell her what brain fog was or how it impacted on the Claimant's ability to undertake his role. Nevertheless, the report acknowledged

his brain fog, saying that it had improved sufficiently to enable him to return to work. The fact that it had improved by the time of this OH assessment possibly contributed to the failure to adequately address the context of Ms Thurlbeck's referral. The OH report recommended a 4 week period of adjustment to his role, starting with extra breaks and reduced cases until such time as he was able to resume his normal duties and work pattern. Of course, this had to be read in conjunction with Mr Wiggins' earlier report.

67. The Claimant did two days of LMA on 18 and 19 October 2018 then went on paternity leave, returning on 12 November 2018 to complete the LMA. After his failed 4th attempt the Claimant spoke to Ms Carr on 16 November 2018. He asked her whether the department would be prepared to take a 'common sense' approach and deem him to have passed, in light of his previous 4 consecutive passes and if not he would like to know what the reasoning was (**page 326**). This was the first time the Claimant had requested this.

68. Ms Carr could not make that decision. She was not senior enough. She spoke to Mr Moore. He spoke to other managers at a national level. In his evidence to the Tribunal during cross examination Mr Moore agreed that as far as he was concerned the requirement for 3 consecutive passes was set in stone. He was taken to **page 752A** of the bundle, which is the Respondent's FOI response dated 30 October 2019 to a request submitted by the Claimant on 09 September 2019. In answer to a question posed by the Claimant (number 2) the Respondent says:

"The national expectation is five Line Manager Assurance checks. In exceptional circumstances, these can be reduced or increased whilst in the Learning and Development [L&D] environment. If reduced, this standard would generally be applied to the training group, but the number of checks can be tailored to individual case managers. Additional checks may then be put in place for individuals following L&D and quality assurance checks are routinely completed on all case managers."

69. Mr Moore conveyed to Ms Johnston and to Ms Carr that they were unable to regard the Claimant as having passed the LMA. He was still required to meet the requirement of securing 3 consecutive passes. When he relayed this to them he was aware of the Claimant's physical disabilities and although he had not referred to any occupational health reports he was aware, through the line managers, that the Claimant struggled with focus and concentration. Mr Moore believed that if he agreed to this it would be potentially giving the Claimant an advantage over others.

70. Mr Brien asked Mr Moore – assuming the Respondent's FOI response to be correct that there was a discretion - if he had been aware of a discretion at the time whether it would have affected his decision. Mr Moore very candidly said that he did not know; that he would have taken it into account. He said that his

understanding at the time was that nationally they were reducing from 5 to 3 and applying a standard across the board; that "*if I had known I may have made a different decision. I don't know to be honest*."

71. We find that the reason for not agreeing to the Claimant's request to deem him to have passed on the basis that he had already secured 4 consecutive passes, was solely because by doing so this would be seen as being unfair to others. At no point did Mr Moore suggest that the rationale was to do with concerns about the Claimant not being up to the job or of concerns about reputational damage to the DWP should it come to light that a particular case manager who had not secured 3 consecutive passes subsequently made a mistake in a PIP application with tragic consequences for the PIP applicant.

72. As at the date of the FOI letter there was one part of the answer which was factually incorrect. The requirement in October 2019 was not for 5 consecutive passes but for 3 consecutive passes. However, that does not affect the remainder of the answer which is essentially that there is some discretion: the position does not, on a reading of that letter from the Respondent, appear to be set in stone. Nobody from the Respondent gave evidence about this letter. Mr Moore was taken to it and aside from noting that the requirement had been 3 and remained 3 by the time he left, said he was unaware that there could be any deviation from the stipulated number of consecutive passes.

73. Mr Moore recalls being made aware that the Claimant had suggested that he should be deemed to have passed the LMA as he had 4 consecutive passes back in February 2018. His recollection was that Ms Johnston had raised it with him. In any event he spoke to an internal quality manager and 'took it to network', meaning that he consulted with colleagues across the regions. It was agreed that because a decision had been taken to reduce the number to 3, it would be unfair on others if exceptions were to be made. Internally he spoke to Claire Mathers, who had by now superseded Kay Farrier.

74. Mr Moore said that there had to be a line in the sand. When he was interviewed by Mr Drummond on 26 February 2019 (**page 475**) he said that he "*could not retrospectively go back, it didn't feel fair to others at the time. The decision was taken nationally that the pass rate would be three from that date onwards.*"

75. This is consistent with what Ms Johnston said when interviewed by Mr Drummond (**page 688**) where she said that '*a decision was made that a line using the date of the change and regardless of what trainees had done before everyone would have to meet the standard on 3 cases... the line was drawn to ensure fairness and that everyone was starting from the same point*'.

76. When asked whether any consideration was given to the Claimant's health, Ms Johnston explained that she had spoken to Mr Moore who said that '*no adjustments could be made as there needed to be consistency of decision*

making across PIP and everyone needs to demonstrate that they are able to make accurate decisions.'

77. Thus it was a sense of unfairness to others that caused the Respondent to reject the Claimant's request to amend or remove its requirements for **him** to secure 3 consecutive passes on the basis that he had previously secured 4.

78. The Respondent's senior managers were understandably keen to ensure that its case managers could demonstrate that they were able to make accurate decisions but they were resolute that the only way of ensuring this was to insist on 3 consecutive passes during LMA.

79. Mr Moore was not aware of the view of Kay Farrier (the Quality Manager during the period when the change from 5 to 3 came about). She was interviewed by Mandy Williams on 30 July 2019. On **page 692** she said: "*I recollect the change to LMA process, people had to get 5 checks and this was later changed to 3. He and someone else got to 4 and I would have put them through, if he had reached the level why wouldn't you?*".

80. We recognise that this view was expressed by Ms Farrier in an interview on 30 July 2019 and that Mr Moore did not speak to her. However, it is significant that she was Quality Manager at the time of the change and this is a view she held at the time. It is more likely than not that there was some discussion amongst managers at the time of the change about what to do if a person had already achieved 3 consecutive passes by 25 July 2018 and that there were varying opinions, including the one expressed by Ms Farrier as recorded above. She held this view even though she was aware that the Claimant had complained about her or her team as unfairly marking him back in February 2018. This, in our view, marks her out as demonstrating particular objectivity on the issue of whether he could be said to have been a competent case manager, having passed 3 consecutive assessments.

81. It was the fourth failure in November 2018 that triggered the Claimant's grievance (18 November 2018) and his long spell of sickness absence. He was by now at his wits end. He was beginning to see the Respondent in a negative light. Once he initiated the grievance process and commenced a period of sickness absence, his view of the Respondent's actions towards him became darker. He now began to see discrimination and harassment in places which we – having considered all the evidence – found it not to be. He was frustrated by his situation. He knew that the LMA process was the problem. He believed that the solution was simple. He started to believe that he was being set up to fail. In his grievance at **page 332**, he says: "*my complaint is against my unfair treatment and that I am being held to a higher standard than my colleagues*". He ends the grievance by saying: "*I am not willing to accept this outcome as I have proven my ability to perform this role and trust that I have demonstrated my case satisfactorily. I now believe that the only solution for my problem is for*

me to be considered to have passed the LMA and that I be transferred out of Wearview House to another area of DWP."

82. The grievance says nothing about harassment by Mr Kane, Ms Little or Ms Obasohan.

83. Ms Carr referred the Claimant to occupational health on 20 November 2018 (**page 347A**).

84. This resulted in an occupational health report dated 29 November 2018 (**page 350**). This report described the Claimant's antidepressant medication, his pain levels and his concerns regarding the requirement for passing the LMA test. The opinion was that he was suffering from chronic moderate to severe pain, severe depression and moderate anxiety; that these conditions were having a significant impact on his mobility and ability to manage his normal day to day activities. The occupational health nurse advised that he was not at that point fit for work in any capacity and that timescales for recovery were unclear. She could not recommend any adjustments that might facilitate or expedite a return to work.

85. The occupational health nurse advised that the Claimant had underlying mental and physical health conditions where relapses in the future can occur, as they are thought to be ongoing with intermittent flare ups, potentially leading to sickness absence. She advised that management meet with the Claimant to discuss his concerns about work and agree a strategy going forwards and recommended a Stress Risk Assessment.

86. Following a call with the Claimant on 13 December 2018 it became clear to Ms Carr, and she so believed, that the LMA process was causing the Claimant a great deal of stress and that thinking about it was preventing him from thinking about returning to work (see Ms Carr's witness statement paragraph 24).

87. On 19 December 2018 Ms Carr conducted a 28-day attendance review meeting with the Claimant. She wrote on 20 December 2018 to say that the department would continue to support his absence and that she would not consider dismissal or demotion at this point but would continue to review his absence regularly and may reconsider her decision at any time if it becomes unlikely that he will return to work in a reasonable period of time (**page 373**). There were several telephone calls/discussions during the period of the Claimant's absence and it is unnecessary to set them all out.

88. The Claimant presented his Claim Form to the Tribunal on 13 February 2019. He was interviewed by Mr Drummond on 15 February 2019 in connection with his grievance of 18 January 2018. At that interview he raised for the first time internally his complaints about being called 'chariots' or 'chariots of fire' and the Warbreck House visit.

89. There was a further 3-month attendance management review on 19 February 2019. At this meeting the Claimant said that he could not face coming back to the same workplace; that he had requested a transfer; that he would work in another office or home; that he should not have to come back to work and put up with comments such as 'chariots of fire'. Ms Carr was genuinely shocked to hear this. The Claimant told her that he had raised it before but felt that he had to shut up and put up with it and that he had reported this at his recent grievance meeting. That was a reference to his meeting with Mr Drummond on 15 February 2019.

90. On 20 February 2019, Ms Carr wrote to the Claimant, saying the same thing as had previously been said with regards to dismissal and demotion (**page 460-461**). All three managers can be commended for reassuring the Claimant that his employment was not at risk at the time of writing. We acknowledge that they were acting responsibly as managers should. However, that does not detract from the fact that from the Claimant's perspective (and indeed from the Respondent's perspective) dismissal or demotion remained more than a fanciful risk. It was a real risk, in the sense that it might well happen – if no resolution could be found to the situation and/or the Claimant remained off work indefinitely.

91. On 28 February 2019 the Claimant asked for the sickness absence procedure to be put on hold until he had received a response regarding whether he had passed the LMA and whether his reasonable adjustments had been granted (**page 480**). That was the date his sick pay reduced to zero. From that point the Claimant was on unpaid sick leave.

92. This request was refused by Ms Carr, following advice from HR (**page 480**) which was that the two processes, i.e. the grievance process and the absence procedure had to continue in parallel. We shall now set out the relevant dates and events relating to the Claimant's grievances, of which there were four.

The first grievance (pages 332-336)

93. On 04 December 2018, the Claimant was invited by Mr I Pratt to meet with A Taylor. However, the Claimant objected, suggesting it should be someone outside the PIP business stream. Mr Pratt agreed and on 06 December 2018 Mr S Drummond was then appointed (**page 355**). Mr Drummond interviewed the Claimant on 15 February 2019. There had been some delay between 06 December 2018 and that date caused by Mr Drummond assuming (wrongly as it turned out) that he had to await the Claimant's return from sick leave before interviewing him. A meeting in January 2019 then had to be rearranged due to bad weather which made it unsafe for Mr Drummond to travel to Sunderland. There then followed an exchange of dates to ensure that the Claimant's representative was available.

94. Mr Drummond interviewed Mr Moore on 28 February 2019. On 15 March 2019 he interviewed Ellie Emmett. The delay in interviewing her was caused by Mr Drummond's unavailability. Mr Drummond had not originally intended to be the decision maker on the grievance. He understood his role to be the investigator. After he completed his report with his recommendations (**page 507**) he submitted it to Mr Pratt who contacted HR. Mr Drummond had expected Lucy Moss to review his report but he was told that in fact he was required to make a decision on the grievance.

95. Mr Drummond then made some slight amendments to the wording but not to the substance and sent the outcome to the Claimant on 05 April 2019 (**page 515**). Mr Drummond had grouped the complaints into 6 categories and addressed each one. As regards the first complaint, 'unfair treatment during the LMA process', Mr Drummond recommended an occupational health referral be made specifically to support the consideration of reducing the LMA expectation levels on the Claimant. We consider that to be a significant positive step. He did not uphold complaints 1, 2, 3 and 4 because he regarded the grievance as being directed against Mr Moore. He did not uphold complaints 5 and 6 for the same reason although he commented that the Claimant had made valid points. He recommended upskilling and awareness for colleagues working with the Claimant.

96. On 06 April 2019 the Claimant sent a letter of appeal. He appealed all of Mr Drummond's outcomes and recommendations including the recommendation for a specific OH referral regarding the LMA process. It is unfortunate that the Claimant appealed this. We agree with Mr Drummond that it would have been very useful to have a specific report on what adjustments might be made to the LMA process. It is possible that the occupational health physician might have been unable to make specific recommendations and might have left it to management to decide on this given their knowledge of the processes. Nevertheless, it could not have been to the Claimant's disadvantage. The fact that he appealed even this was indicative of his state of mind at the time, which was that he believed his position to be bleak and he was distrustful of the processes.

The second grievance (pages 528-529) and the appeal against the first grievance

97. Mr B Devaney was assigned to hear the Claimant's appeal which was held on 09 May 2019. In the meantime, on 08 April 2019 the Claimant submitted a second grievance against Mr Drummond. Mandy Williams was assigned to deal with this grievance.

98. Mr Devaney did not complete the appeal on 09 May as he had to carry out further investigations. He interviewed Mr Drummond on 21 May and Mr Pratt

on 28 May 2019. He provided his outcome to the Claimant on 31 May 2019 (**546-550**).

99. In relation to complaint 1 (regarding the LMA) Mr Drummond upheld the appeal. He concluded that:

"PIP management could have taken a less rigid approach. I found it a superficial argument by John Moore that he couldn't change the LMA process to take account of your disability because '*it didn't feel fair to others'*."

100. He went on to say that "None of which means that you should be given an easy ride in your LMA. But it does mean that there should be serious consideration of whether the process should be amended to cater for your disability." In his conclusion he said that "issues 1, 5 and 6 need to be reopened, and your Equality Act move needs to be progressed."

101. It was a very encouraging response. Mr Devaney approached the issues with diligence and considered the grievance with admirable clarity of thought.

The third grievance (pages 551)

102. On 18 June 2019 the Claimant submitted a third grievance against Ms Johnston, Ms Carr, Mr Moore and Ms Thurlbeck. Mandy Williams was assigned to deal with this grievance as well.

The fourth grievance (pages 558-559) and appeals

103. On 10 July 2019 the Claimant submitted his fourth and final grievance, the subject matter being, again, the LMA process. Ms Williams was assigned to investigate this grievance. Between 25 July and 04 September 2019 Ms Williams interviewed the Claimant twice and 11 others: Ms Emmett, Ms Farrier, Ms Carr, Ms Little, Mr Kane, Ms Thurlbeck, Mr Creighton, Mr Drummond, Ms Moss, Ms Hardman and Ms Johnston. On 09 September 2019 she sent the Claimant 3 investigation reports. The Claimant appealed. Appeal meetings were held by Mr Baldwin on 28 November 2019 and 09 January 2020.

104. The above time-line post-dates the presentation of the Claim Form on 13 February 2019 and post-dates the Amended Claim Form. We have gone as far as this to complete the picture. The hearing of the Claimant's complaints was to be heard by the Employment Tribunal in 2020. However, as articulated earlier, it had to be postponed and was re-scheduled for January 2021.

Mr Creighton's line management

105. Mr Creighton became the Claimant's line manager in June 2019. One of the first things he had to do was build up trust with the Claimant. It is to Mr

Creighton's credit that he was successful in this. By the time he became his line manager, the Claimant's faith and confidence in the department was at a real low. From the Claimant's perspective he believed there to be a lack of understanding of the full impact of his disabilities.

106. The one thing that could, on the face of things, be done for the Clamant was to deem him to have passed the LMA. Doing that would have been the solution for the Claimant. However, the decision was not for any of the line managers to make. Mr Creighton spoke to Mr McBride who was an HR Caseworker on 03 July 2019, a note of which is on **page 552**). He was advised that "*we have not passed anyone else under the same circumstances…if we allowed Russell to do this, this would be giving him an advantage because of his disability, rather than putting in place reasonable adjustments to make things a level playing field*.'

107. Mr Creighton asked Mr McBride about this because the Claimant had raised it with Mr Creighton at the first opportunity once Mr Creighton became his line manager. From Mr Creighton's perspective, the decision not to deem the Claimant to have passed had been made and he could do nothing about that. Therefore, he needed to work to the future.

108. Mr Creighton had some work to do to restore the Claimant's confidence in the department. In general terms his approach was to tackle each of the Claimant's concerns and issues in a solution-focussed manner. Specifically, he did so by looking forward and by discussing with the Claimant how he could take the stress out of the LMA process. He did not make many changes but the ones that he did make were key.

109. Mr Creighton allowed the Claimant to take extended breaks. He was allowed to take as many breaks as he needed during the day so long as he let him know if he was going to be away from his desk for any length of time or where he was, just so that he would know where to find him if anything happened. That was no different to the position under Ms Johnston or Ms Carr.

110. However, unlike the position when Ms Johnston and Ms Carr line managed the Claimant, he 'stopped the clock' on the LMA process. This meant that when the Claimant was suffering from brain fog or other anxieties during the LMA phase, he was allowed to step back, and undertake simple tasks, until such time as he was able to resume. The 10 day period stopped running during this period and only resumed after the fog had lifted. Mr Creighton understood 'brain fog'. Mr Creighton, alone of the line managers, was personally familiar with the concept as he had a friend who suffered from it and he understood well that everyone's needs are different.

111. He also allowed the Claimant to discuss things with his mentor and colleagues even during the assessments albeit not about the actual decision

itself. He left it to the judgement and common sense of the mentor and the Claimant and his colleagues not to discuss or suggest what the decision would be, but they were free to discuss subject issues or general areas applicable to assessments generally. There was the element of trust. The Claimant, the mentor and the colleagues were trusted not to stray into areas that were off limits.

112. Mr Devaney, when giving evidence to the Tribunal said that when he listened to Mr Creighton give his evidence he considered his approach to be enlightened; that Mr Creighton made allowance for the Claimant's mental issues, not limiting things to his physical condition. He considered Mr Creighton's approach to be one which could be taken without undermining the rigorous national standard which LMA was trying to bring in.

113. Mr Creighton's approach was in the end successful. To an extent it may be said to be 'enlightened' by comparison with the previous line managers. Mr Creighton was obviously very successful in restoring trust in the Claimant and the steps that he took to relieve the stress during the LMA process have borne fruit. However, we are conscious that it may seem that we are critical of Ms Johnston and Ms Carr. We make it clear that we are not. The steps which Mr Creighton took worked. As far as Ms Johnston was concerned at the time, she too believed that the steps she was taking would also work. Ms Johnston helped the Claimant. She hand-picked a dedicated mentor for him, Lyndsey Plews. The Claimant also had other mentors at different times other than Ms Plews, but the point is he had a dedicated mentor. Ms Johnston allowed the Claimant micro breaks whenever he needed them. She arranged for him to have a different parking bay as soon as the Claimant raised it. When the Claimant said that he was not receiving feedback on assessments quickly enough, she arranged for him to be given priority feedback. She arranged for face to face feedback when the Claimant said that he was finding email feedback stressful. She arranged for the same quality assurance manager to check his assessments to ensure consistency. She extended the consolidation phase to 25 days after the third failed attempt. Her knowledge and understanding of the Claimant's health and the impact of it on his ability to undertake LMA grew incrementally. She was trying different things to help and support the Claimant with a view to securing his passage through LMA. Ms Johnston referred to an extension of the LMA phase in paragraph 11 of her supplemental witness statement. However, this was not something the Claimant was aware of and in any event only allowed for a short extension in the circumstances described to allow the third assessment to be assessed after the end of the two week period.

114. Ultimately, though, it is not a question of whether Ms Johnston personally could have taken the steps that were in fact taken by Mr Creighton. The issue is whether it was reasonable for the Respondent to have taken those steps. It can be seen from the above that Ms Johnston personally did a lot to support the Claimant.

115. Ms Carr had little time with the Claimant to see what support she might be able to provide him, given that for most of her line-management the Claimant was off sick. However, she too wished to support the Claimant and to see him pass the LMA.

116. The Claimant may have come to see management as making things difficult for him but, standing back and looking at matters objectively, that is not how we have found it to be.

Visit to Warbreck House, Blackpool and allegations of harassment

117. On 01 February 2017. The Claimant visited Warbreck House in Blackpool. This was at the invitation of Mr Moore. Two other employees, K Carter and B Mawson also attended. Mr Moore drove them there in a hire-car. The car was a large vehicle, either an SUV or a saloon.

118. Mr Moore was used to the journey and used to taking other employees with him. It was his habit to ask if the passengers were okay and to ask if any stops were needed. It was also his habit to call through to Warbreck house when he was about 15 minutes away to enable those with whom they were to meet to prepare for their arrival.

119. All four arrived at Wearview House early in the morning. The Claimant parked his car in the basement car park and by the time Mr Moore arrived in the hire-car, he was waiting outside the building. Mr Moore was aware by this date that the Claimant was a wheelchair user. However, he did not know to what extent the Claimant relied on his wheelchair, having also seen him walk with the use of a walking stick.

120. The Claimant left his wheelchair in the boot of his car. Although there was a dispute about this, we find that the Claimant did not mention to Mr Moore either at the outset or at any point during the journey that he would require a wheelchair on arrival. We find, on the balance of probabilities, that Mr Moore asked his passengers, as was his habit, how they were, whether anyone required a stop and that – had the Claimant mentioned he needed a wheelchair – Mr Moore would have asked for one to be made available when he called the office as he approached Blackpool. We do note, however, that Mr Moore recollected that the Claimant approached the car using a walking stick as an aid.

121. When they arrived at Blackpool, Mr Moore went to his meetings and the Claimant and the others went to separate meetings. It was only when they were leaving to return to Wearview House in the afternoon that they met up again. At this point, Mr Moore saw that the Claimant was in a wheelchair, being pushed by a member of staff from Blackpool, called Ellie.

122. The wheelchair was not in the best of conditions in that one of the tyres was deflated. Although disputed by the Claimant, we find on the balance of probabilities that as they went from Warbreck House to the car, the Claimant felt embarrassed by the situation of being pushed by another member of staff in a defective wheelchair. We conclude that this sense of embarrassment was felt acutely by him but not discerned by the others. We reject the suggestion that Mr Moore or anyone else laughed at the Claimant. It is more likely than not that the passage of time has played tricks on the Claimant's memory and he recalls in his own mind that this scene was much worse than we found it to have been. For example, he described how he was pushed against his will, over his objections that Ellie should stop pushing him, that he was nearly thrown out of his wheelchair and that he was laughed at by the others.

123. It is important to note that this event was never raised by the Claimant until February 2019. It was not mentioned in the written grievance of 18 November 2018 but was raised by the Claimant for the first time in the investigatory meeting with Mr Drummond on 15 February 2019. That was two days after the Claimant presented his Claim Form to the Tribunal: more than two years after the event. In the grievance of 18 November 2018, while the Claimant raises a complaint about Mr Moore's decision making with regards to the LMA, he says 'Mr Moore has been nothing but friendly and approachable when dealing with me in person'. That is difficult to reconcile with what the Claimant says in paragraphs 17-18 of his witness statement, which is that Mr Moore laughed off his objections to being pushed by him. In his evidence to the Tribunal, the Claimant said that he was pushed against his will by Ellie. In his oral evidence he did not refer to Mr Moore pushing him.

124. The Claimant in cross examination said that he was angry and could not express the hurt and humiliation this had caused him; that the journey back to Newcastle was difficult and he was silent throughout.

125. The Claimant's account is, we find, inconsistent and unreliable but not, we find, dishonest. He has come to believe that the events happened as he described them. His view is coloured by the passage of time and by his perception of his treatment in February 2018 and 2019 regarding the LMA . We find that had the trip to Warbreck happened as recounted by the Claimant has recounted it in evidence, he would have reported it at the time or shortly thereafter. He had no compunction in raising a grievance about Mr Moore's decision making on 18 November 2018 (which followed the discussion between Ms Johnston, Ms Carr and Mr Moore regarding the LMA on 16 November 2018). Further, in the document prepared by the Claimant on **page 158** (an expression of interest application form) on 29 August 2017 he refers to himself having actively challenged members of his team on unacceptable behaviours regarding sexist comments and supported managers in disciplinary matters. The conduct as described by the Claimant (being laughed at when almost

tipped out of his wheelchair) is unacceptable behaviour. However, he did not challenge it at the time or within a reasonable period thereafter. We do find, however, that Mr Moore could have dropped the Claimant (and his other passengers) closer to the entrance to the building and picked them up at the end of the day. This could have lessened the embarrassment the Claimant felt.

126. There had been no other trip to Warbreck House and the Claimant was looking back on it at a time when he felt particularly aggrieved by his treatment regarding the LMA and his belief that the Respondent was failing to accommodate his disability and in particular the effects of his brain fog. We are satisfied that his memory of February 2017 has been affected and shaped by his perception of his treatment as of February 2019. Blackpool was a one-off event over 1 day. It was unconnected with other matters about which the Claimant complained. As such, for the purposes of presenting a complaint, time expired on 30 April 2017 (save for any extension afforded by early conciliation provisions). In his witness statement, the Claimant gave no explanation for not presenting a complaint or starting conciliation by then. In cross-examination he said that it was because he did not wish to seem weak and that it was embarrassing for him to have to raise it. He does not explain why it was not referred to in his grievance of 18 November 2018, other than that his wife prompted him to mention it.

The Claimant's time as a Team Leader and allegations of harassment

127. The Claimant claims that in the first week of his appointment as a team leader (August 2016) people started calling him 'chariots' or 'chariots of fire'. The Claimant says that he objected at the time as he found it offensive. The Claimant said that the name was suggested by Pamela Little (**page 450**). He said that from then she and Edward Kane regularly referred to him in this way until November 2018 when he was moved from the team leader role to the case manager role. He said that the last time Pamela Little referred to him in this way was in approximately 2017. There are only two specific occasions referred to by the Claimant in his witness statement at paragraph 30:

127.1.1. On 12 November 2018, he said that Mr Kane approached him at his desk and referred to him as 'chariots';

127.1.2. On 16 November 2018, he said that Ms Obasohan referred to him as 'chariots' when she saw him in the corridor leading to the lift.

128. As regards Ms Obasohan, in paragraph 87 of the Claimant's witness statement the date is given as 17 November 2018. Ms Little, Mr Kane and Ms Obasohan deny that they ever used this phrase to refer to the Claimant. We shall consider them in turn.

129. In paragraph 89 of his witness statement, the Claimant says that he did not mention being called chariots of fire due to embarrassment but that, after speaking with his wife about the Way he was feeling, she encouraged him to raise the matter with management, which is why he raised it in the first grievance meeting with Mr Drummond (**page 449-450**).

Ms Obasohan

130. We find that Ms Obasohan never used the word 'chariots' or anything similar either on 16 or 17 November 2018 or on any other occasion. She was not aware, when he was a team leader, that the Claimant's team had a team name. We accept her evidence that the first time she had heard the word was when an HR officer told her of the allegation. In his witness statement the Claimant says she called him chariots on 16 November 2018. In his Claim Form (**page 21)** he says it was 17 November 2018. In the Claim Form the Claimant says he corrected her, telling her that his name was Russell; that she then asked if he had had any more kids yet in a condescending tone, that he mentioned the recent birth of his daughter, that 'Naomi' said he needed to get fixed and that she laughed and walked away.

131. Aside from the ET1 the first reference we can find to Ms Obasohan's name by the Claimant is in his letter of appeal against Mr Drummond's grievance outcome (**page 516 and 523**). He says that he was passing Ms Obasohan on the 4th floor on his last day of work as he left the office early after Naomi Carr had refused to allow him to go into training again and refused and quality transfer. The Claimant gives more detail of the allegation on **page 674** at a meeting with Mandy Williams on 25 July 2019. He refers to the incident taking place on 16 November 2018 following a conversation with Ms Johnston and Mr Moore. In his letter to Mr I Pratt of 02 December 2019, the Claimant refers to the incident being on 19 November 2018 (**page 763**).

132. We find that Ms Obasohan did bump into the Claimant most likely on Friday 16 November 2018 and that she exchanged pleasantries with hm. The references to 17 and 19 November 2018 are confused. However, it must have been 16 November as the Claimant was not at work on Monday 19 November 2018 having called in sick and there was no suggestion he worked Saturday 17 November. Ms Obasohan recalls an occasion, but not the date, when she passed him in the corridor. She asked him how his wife and his boys were. The Claimant said that his wife had just had a baby girl and she said something like that was nice.

133. We found Ms Obasohan to be a very credible witness. She did not really know the Claimant very well. She had not heard of the phrase 'chariots of fire' and did not know the film 'chariots of fire'. We accept her evidence which was that, not being from the UK, had she heard the Claimant being referred to this, she would have asked what the reference was. Mr Brien put with a light touch

that she used the phrase in order to fit in with the others. That makes no sense at all to us. The Claimant's own case was that he had been referred to as 'chariots' or 'chariots of fire' when he was a team leader and that this stopped when he was transferred to a case manager towards the end of 2017. He identified only two occasions when he said the phrase was used after that (12 November and 16 November 2018). The Claimant had not engaged with Ms Obasohan for over a year and he said she had never referred to him in this way before. There was no suggestion that she was present on 12 November 2018 when Mr Kane allegedly used the phrase. What, we ask rhetorically, was there to fit in with, as of November 2018? We conclude that there was nothing: there was no 'culture' of name calling into which Ms Obasohan might feel compelled to fit.

134. Furthermore, the Claimant suggested that he corrected her immediately about her use of the phrase as he was offended by it. However, having heard her evidence under cross examination, it seems to us unlikely having been chastised, that Ms Obasohan would have gone on to ask about the Claimant's family. It is more likely that there would have been some recognition by her of the Claimant's upset or nothing said at all.

135. We accept her evidence that she was genuinely shocked to hear of the allegation and that she could not understand why the Claimant had identified her as being someone who had referred to him in this way.

Ms Little

136. We also accept Ms Little's evidence that she did not refer to the Claimant as chariots or chariots of fire. We reject the suggestion that she came up with the name for the Claimant's team. The Claimant, the other witnesses, Ms Little, Mr Kane and Ms Hardman gave evidence about the subject of team names, during the claimant's tenure as a team leader.

137. Ms Hardman suggested that the teams within PIP create a team brand for the teams and that one way of encouraging team building and to introduce some light-heartedness to the working environment was for the teams to come up with a team name. It was the team members who came up with the name for their team. Ms Little's team came up with the name of 'Little Gem' – being a play on her surname. One name was after a local kebab shop favoured by members of a particular team. The Claimant's team name was 'hot shots'. In his evidence to the Tribunal, the Claimant said that Ms Little and Mr Kane both suggested it should be chariots of fire.

138. The witnesses were at loggerheads on this issue. The Claimant says that Ms Little and Mr Kane came up with the name and that he finds it offensive to suggest that he in fact came up with the name. Ms Little and Mr Kane say that the Claimant used the term to refer to himself and that they find it offensive

that they are accused of referring to the Claimant in this by way of mocking his disabilities. As we shall come on to, we find that it was the Claimant who initiated the phrase 'chariots of fire' and that he used it occasionally in a light-hearted manner. However, we find that no real attempt was made by any of his colleagues to tackle this self-description, even though the Claimant was working in a telephony environment and it was acknowledged that customers might inadvertently hear the term being used and that some employee might be uncomfortable with its usage.

139. It was for each team to come up with their own team name and that is what happened. The Claimant's team came up with the name 'hot shots'. Other teams came up with names for their teams. Ms Little did not interfere in that process and nor did Mr Kane. We reject the suggestion that she came up with the name and reject the suggestion that she called the Claimant chariots or chariots of fire. Had she regularly referred to the Claimant as chariots after his protestations and objections that it was an offensive term, we find it unlikely that he would have described her as he did in his email of 29 August 2017 to Mr Moore on **page 160**, where he said that 'Pam is extremely professional'. It is possible that the Claimant might have felt under some compulsion or pressure to describe her as he did in that email. However, looking at the exchange, we conclude that he was not. He had already emailed Mr Moore (**page 161**) to say he had no concerns regarding Ms Little. He could have left it at that and said nothing more but he volunteered the further view of her which was that he considered her to be extremely professional.

140. In his evidence to the tribunal, the Claimant did not say he felt under some pressure to say this about Ms Little. Rather, he acknowledged that he described her as being professional but said that his view of her changed later. In his witness statement at paragraph 25 the Claimant says that he was called chariots or chariots of fire in his very first week of being a team leader, which was back in September 2016 and in paragraph 30 says that from that point onwards he was regularly called this by Ms Little and Mr Kane. In those circumstances of regular name calling we find it highly unlikely that, in August 2017, he would have referred to Ms Little as extremely professional if that is not how he saw her at the time. There was nothing in particular that happened 'later' which would have caused a change in view. We reject his evidence on this and find that he referred to her as professional because that is genuinely how he regarded her, which we find is inconsistent with the suggestion that she had been mocking his disability up to that point.

141. The Claimant's explanation in cross examination that he came to change his view of her **after** that is, however, instructive in performing our task of fact finding. The Claimant did indeed come to change his view of Ms Little – and of others (because of his perception of being discriminated against in relation to the LMA) but at the time Ms Little is alleged to have harassed him, he regarded her as professional. Had she done the things she is accused of by then (mocked

him with name-calling, ignored a complaint about Mr Kane pushing his wheelchair and laughing that incident off) he is unlikely at that time to have seen her and to have described her as such.

142. We accept Ms Little's evidence that the Claimant had referred to his wheelchair as 'chariots of fire' and on occasion 'wheels of steel'. We reject the suggestion that the Claimant complained to Ms Little about Mr Kane grabbing his wheelchair and pushing him out of a lift at a time when he was a team leader and that she ignored his complaint. We were never given a date for this alleged incident, not even a year. We do not know whether it is said to have happened in 2016 or in 2017. No approximate date was put to Mr Kane in cross examination.

Mr Kane

143. The Tribunal's impression of Mr Kane's performance as a witness was that he was defensive and emotionally angry. However, that is not to say that this demeanour conveyed to us that he was lying. He was aghast at the suggestion that he had mocked the Claimant's disability by referring to him as chariots or chariots of fire against his objections. Mr Kane could not see himself in the allegation. He referred to personal acquaintances with severe disabilities and to the area of work that he worked in, namely disability benefits. He said that the Claimant, in fact, referred to himself in those terms, which he, Mr Kane, found offensive. Of course, for his part, the Claimant was aghast at the suggestion that he had referred to himself as 'chariots' or 'chariots of fire' and he was offended by the suggestion that he might do so. His demeanour was very different. He was confident in what he said but did not convey any overt emotion. All of this just goes to show the difficulty tribunals face with allegations like this. Demeanour is not a particularly safe means by which to assess the reliability or veracity of accounts. A confident witness may give an inaccurate account and a defensive, emotional witness may give an accurate account – or indeed, vice versa.

144. What struck us was the total absence, until very late in the day, to any reference to the Claimant being referred to as 'chariots of fire' or 'chariots'. During his cross examination the Claimant said he first raised this issue, in an email to his trade union representative, Mr Fowles, in July 2018, which (although he had provided it to his solicitors) did not appear to be in the bundle. The email was subsequently disclosed and was inserted into the bundle as **page 802**. In fact the email from the Claimant to Phillip Fowles was dated 22 June 2018. The email does not refer to chariots or to name-calling in any form. It says: '*just checking to see if you have had any advice regarding my situation and if you wanted to take a look at any of the supporting evidence that I have found to support my case?*' He then refers to a meeting with Joanne (Johnston) to '*discuss what they plan to do regarding my transfer sometime this morning so whenever you are free*'.

145. The Claimant, when further asked about the email after it had been disclosed, said whilst the email did not mention those things, nevertheless, at the subsequent meeting with Mr Fowles he discussed the name-calling and chariots of fire. We find this inherently unlikely. Firstly, the email is about the forthcoming meeting with Ms Johnston. Secondly, it is highly unlikely that a trade union representative, upon being told that a disabled employee, a wheelchair user, had been subjected to mocking name-calling over his objections, would have done nothing about it. There is not a single email from Mr Fowles or anyone else referring to this. Thirdly, it is inconsistent with the further email, disclosed at the same time as **page 802** and which was inserted into the bundle as **page 803**. That is an email dated **22 December 2018** which says: "*I don't know if it's relevant but I have been referred to as chariots of fire due to my using a wheelchair over the past 2 years by the other team leaders and a member of the management team grabbed the handles of my wheelchair without asking first and pushed me out of a lift*." The email goes on to refer to Ms Little witnessing this, making a joke of it and not following up a complaint he made to her. Although that email is to a different person, it suggests that it is the first time that the Claimant had raised the matter; otherwise we might have expected to see it say something like 'as I mentioned to my trade union representative, Mr Fowles'.

146. Having given the matter careful consideration, we find that the phrase '*I don't know if it's relevant but…*' is inconsistent with the Claimant having raised the matter specifically with his trade union some 6 months earlier. We are confident that this was the first time there was any reference to anyone of the phrase 'chariots of fire'. The subject line 'tribunal official sensitive' makes clear why the email was sent. It was raised for the purposes of preparing for the presentation of the Claim Form (form ET1) which was sent to the Tribunal on 13 February 2019. It may well be that the Claimant raised this following discussion with his wife. However, it was not as described in paragraph 89 of his witness statement with a view to raising it at the grievance meeting on 15 February 2019. It had been raised for the purposes of the tribunal claim that was under contemplation at that point in time, and was sent 2 days after ACAS were first contacted for the purposes of early conciliation.

147. When Mr Kane was interviewed by Ms Williams, he referred to the Claimant as referring to himself as 'wheels of steel' and 'chariots of fire' (**page 685**). We note that he contemplated the possibility that he too may have used the phrase: 'I know I didn't; it's human nature to self-doubt but I'm sure I didn't'.

148. As to the allegation that Mr Kane called the Claimant 'chariots' in November 2018, very little context of the conversation was provided by the Claimant. In paragraph 30 of his witness statement the incident is put as being 'on or around 12 November 2018'. In paragraph 85, the date is given as 'on or around 16 November 2018'.

149. We do not accept that Mr Kane referred to the Claimant in this way on or around either of those dates. The Claimant had a series of discussions with Ms Carr on 16 November 2018 (**pages 326-327**) the notes of which have not been challenged as inaccurate. That was an opportunity for the Claimant to mention that Mr Kane had insulted him only a few days earlier, adding to the stress he was already under. We have already noted that there was no reference to either Mr Kane or Ms Obasohan's insulting behaviour in the grievance document of 18 November 2018. Nor did the Claimant mention it when speaking to Ms Carr during the numerous calls between them while he was on sick-leave (**pages 338-346**).

150. Although we have found that neither Mr Kane nor Ms Obasohan referred to the Claimant as 'chariots' in November 2018, in so far as concerns the time when the Claimant and Mr Kane were team leaders, we conclude that the truth lies somewhere in between the two polarised positions. We find that on balance of probabilities, Mr Kane had on the odd occasion – and against his better judgement – used the phrase chariots of fire when he and the Claimant were both team leaders. However, we find that he did so only because it was the Claimant who described his own wheelchair as being 'chariots of fire'. Mr Kane did not intend it as a form of abuse and we find, at the time, when he probably used the phrase, that it did not have the effect on the Claimant of creating an offensive, hostile, humiliating or intimidating environment or of violating his dignity. The Claimant had initiated it and on the balance of probabilities, Mr Kane responded, as a response to the passive invitation by the Claimant.

151. We emphasise, however, that we reject the suggestion that he used the phrase on 12 November 2018. We find that the Claimant has in his own mind, invented this and the allegation regarding Ms Obasohan out of a concern that this complaint to the tribunal might be seen to be out of time. The Claim Form was presented on 13 February 2019.

Car park and lifts at Wearview House

152. In the first few weeks of his employment, the Claimant's wife drove him to work, as the Claimant had not by then passed his driving test. He passed his test sometime in 2016. We were not given a more precise date. In any event, having passed his test, he started to drive to work in his car, a Vauxhall Corsa. He asked for and was given a parking bay, number 78, in the basement car park. The parties agreed that this space was allocated to the Claimant in January 2016.

153. This bay was specifically allocated to him. It was a standard size bay, and the Claimant found it too narrow. He subsequently asked if he could be provided with a wider bay. He accepted in evidence that he did not ask to change bays until September 2018 and that when he asked for a wider bay, the

Respondent provided him with one fairly quickly. The move was confirmed in an email of 19 September 2018 that he would change to bay 38 (wheelchair bay) with effect from 24 September 2018, was nearer the lift (**page 301**).

154. The Claimant had no difficulty removing his wheelchair from his car whether it was parked in bay 78 or bay 38. This is because he stored it in the boot of his car. The issue with bay 78 was that sometimes a car parked in the next bay would be too close as to make it difficult for the Claimant to get out of the car. Bay 38, which was wider, resolved that difficulty. However, the Claimant never drew this to the attention of the Respondent until 14 September 2018 (**page 296**) and when he did it was resolved.

155. On occasion it would happen that the basement lift was out of order. For example, it was out of order on 06 July 2017 (**page 156**). Also on 04 June 2018 it was out of order for the day (**page 243**). This meant that in order to get out of the basement the Claimant would have to use the stairs to the first floor, from where he could then take the other lift to access the higher floors. Alternatively, he would have to walk out of the main entrance to the car park and walk up the outside incline. The incline was too steep for him to push himself in his chair. Either of those options resulted in difficulty and discomfort for the Claimant. Another alternative would be to call someone to alert them to his difficulties and for him to receive assistance.

156. On 19 December 2018, the Claimant went to Wearview House specificallly for a sickness absence meeting and noticed that the lift was out of order. It had apparently been out of order for number of weeks. That was at a time when the Claimant had been absent from work on sick-leave. There was no evidence of the lift being out of order at all in 2019. We accept Mr Creighton's evidence that he checked and confirmed that the lift had not been out of order in 2019. It is possible that there were other occasions in 2017 or 2018 when either lift was out of order but in the absence of any evidence of this are unable to make any finding as to whether it was. Aside from the long period in December 2019, when the Claimant was not at work, the times when the lift was out of order were few.

157. Most lifts will, from time to time, be out of order which requires an engineer to come and restore them to use. The Respondent had an estates manager whose responsibility was to liaise with the lift contractors and engineers. It had in place measures to ensure that the lifts were operational. When the lift was out of order the Respondent managers would generally let people know by email.

158. The Claimant first mentioned that the doors from the basement, being heavy, caused him particular difficulties in accessing the lift in his interview with Mr Drummond on 15 February 2019 (**page 451**). He had not raised this in his written grievance of 18 November 2018 or before whether in writing or verbally.

The Claimant's period of sickness absences

159. On 26 June 2018 the Claimant commenced a period of sick leave. He returned to work on 14 September 2018 on 'Part Time Medical Grounds' or 'PTMG'. In between those dates he was contacted regularly by Ms Johnston (his then line manager) in keeping with the Respondent's 'Keeping In Touch' ('KIT') policy. The key stressor for the Claimant was the situation surrounding the LMA, which we have addressed above.

160. During one such KIT discussion on 28 June 2018 (**page 252**) Ms Johnston asked the Claimant what he felt could be done to facilitate his return to work and she suggested that she could arrange a taxi. The Claimant said that there was nothing other than permitting him to work from home 'completing tasks'. We find that, had the Claimant ever asked for a taxi to and from work on occasions when that we needed the Respondent would have provided it. Had he required a taxi on a permanent basis or for some sustained period of time, there was a process to be followed which required him to apply and set out his explanation for requiring it. The facility of being driven to and collected from work by taxi was always available to the Claimant.

161. The phrase 'completing tasks' was a reference to work outside the core work of a Case Manager. The essential or fundamental task of a case manager was to assess PIP applications. This was and is an important task. The financial and mental or physical well-being of many disabled people depend on diligent and proper scrutiny of their applications. As with all jobs there will be tasks, more administrative in nature perhaps, that the jobholder has to perform which might be considered to be ancillary to or outside the core elements of the role. Reference was made during the hearing to 'simple tasks' and to 'complex tasks'. There had been a task team at one time but this had been disbanded by the summer of 2018.

162. Ms Johnston was of the view that the role of PIP case manager, being an 'end to end' role, meant that there was no workflow or simple tasks that could be given to the Claimant as a permanent adjustment and she discussed this with HR in September 2018 (**page 292**). Ms Johnston was of the view that the Claimant could undertake work on 'tasks' for a short period of time, up to two weeks, while he reintegrated back into the Case Manager role.

163. The Claimant requested to work from home on tasks at that point in time because, we find, he could face the prospect of returning to the PIP department to undertake the LMA, having by now failed three times. He later repeated this request as an alternative to what was to become his main request which was for him to be 'deemed' to have passed the LMA, which he made in November 2018. Had the Respondent agreed to that, he would have had no need to work on 'tasks' and would not have gone on to complete an application to work from

home. He would have no need to work from home, or on permanent tasks, as those things would not have been something required to overcome the disadvantage which the requirement to pass the LMA was creating for him.

164. On 31 July 2019, at a meeting with Mr Creighton, the Claimant discussed his application to be able to work from home (**page 568**). The reason for the request was that the lifts were said constantly to be breaking down; that the front door was often not working properly; that he found working among other people stressful and that the drive to work was stressful. Mr Creighton declined the request and gave his reasons on 02 August 2019 (**pages 570-573**).

165. The Claimant was provided with an outside bay by about September 2019. Mr Creighton gave as his reasons for rejecting the application to work at home the fact that the Claimant was at that time working on the ground floor with a parking space outside the main entrance so that he did not have to use the stairs or the lift at all. He checked and advised that there were no recent issues with the front door but if ever there was, the Claimant should use the call button to inform security that help was required; that he would text the Claimant in advance if he was aware of an issue and ensure that there would be suitable support for him to access and exit the building. He added that when required the Claimant could travel to and from work by taxi.

166. The Claimant used the outside parking bay for about 3 months but then requested to move back to bay 38 as he found the incline too steep – that was the least steep parking which was available. There was no other outside bay that could have been given to him as another disabled user occupied the one to the left of the main entrance.

167. In August 2019 a job became available at Benton Park View in Newcastle. Ms Pescod emailed the Claimant about this on 12 August 2019 asking if he was still interested in it and if he would attend there for a face to face chat (**page 580**). The Claimant said that he was okay with that but would need a dedicated disabled parking space. At **page 583**, she asked the Claimant to contact Paula Tatters to make arrangements regarding parking. On 13 August 2019 the Claimant emailed Mr Pratt with a copy to Ms Pescod to say that he would like to take up the offer of having a taxi to take him to work at Newcastle in a role which he mistakenly believed to be with HMRC (**page 592**).

168. Ms Pescod corrected the Claimant's misunderstanding on 13 August (**page 591**). She pointed out that the Claimant had said that Benton Park View was somewhere he could travel to and that once a trial was agreed, his request for a taxi could be considered. She was concerned about the Claimant's stated need for a taxi from a well-being perspective. The Claimant's current place of work was five minutes from home. Benton Park View was a 35-mile round trip and could be tiring. She wanted to be sure that the Claimant had identified an appropriate place of work. It was put to Ms Pescod that she had suspended the

Claimant's application for a move to another role/office (this was the 'equality move'). However, we find that she did not. She took no steps to contact the 'network' – the body which held applications for an equality move. She simply suspended consideration of that particular move to an office in Newcastle until the suitability of that location could be fully discussed.

169. As it turned out, the Claimant subsequently withdrew Newcastle as a suitable location in discussion with Mr Creighton. We find that it was never a suitable location (in terms of distance) for the Claimant and that he did not see it as suitable either. He was simply looking at all options – even unsuitable ones - to get him out of the PIP department as by this stage he still had not passed his LMA.

Relevant law

Harassment related to disability: section 26 Equality Act 2010

170. Section 26 provides that:

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(1) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

171. The intention of those engaged in the unwanted conduct is not a determinative factor although it may be part of the overall objective assessment which a tribunal must undertake. It is not enough that the alleged perpetrator has acted or failed to act in the way complained of. There must be something in the conduct of the perpetrator that is related to disability. The unwanted conduct must be related to the protected characteristic. This is wider than the phrase 'because of' used elsewhere in the legislation and requires a broader inquiry, but the necessary relationship between the conduct complained of and

the protected characteristic is not established simply by the fact that the Claimant is disabled and that the conduct has the proscribed effect.

172. Unwanted conduct is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant (see ECHR Code of Practice on Employment, paragraph 7.8). This does not mean that express objection must be made to the conduct before it can be said to be unwanted. It does not follow that because A's conduct has been going on for some time without any apparent objection from B that B condones it or accepts it. The Tribunal must be alive to the very real possibility that a person's circumstances may be such that they feel constrained by certain pressures whether in their personal life or in work which explains a failure to object (expressly or impliedly) to what they now say, in the course of litigation, was objectionable and unwanted conduct. Equally however, B is not required to expressly approve of A's conduct before a Tribunal may find that A's conduct was not unwanted. Clearly, conduct by A which is by any standards, or self-evidently, offensive will almost automatically be regarded as unwanted and in the vast majority of cases there is nothing to be gained by considering whether B objected to the conduct.

Sections 20-21 Equality Act 2010: failure to make reasonable adjustments

173. The duty is set out thus:

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

(2) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(3) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.

(4) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.

174. Paragraph 20 of Schedule 8 of the Act provides:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
(a) ….
(b) [in any case referred to in Part 2 of this Schedule] that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

175. The focus of section 20 EqA is on affirmative action: **General Dynamics Information Technology Ltd v Carranza** [2015] I.C.R. 169, EAT, para 32. It is imperative to correctly identify the 'PCP''. Without doing this, it is not possible to determine whether it has put the disabled person at a substantial disadvantage or what adjustments are required. The question that has to be asked is whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. In the case of **Ishola v Transport for London** [2020] IRLR 368, the Court of Appeal observed that the words 'provision, criterion or practice' are not terms of art, but are ordinary English words. They are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. In context, and having regard to the function and purpose of the PCP in the 2010 Act, all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again (see Simler LJ @ para 38).

176. The employer must take such steps as it is reasonable to take to avoid the disadvantage (section 20(3)). It is well established that 'steps' are not merely the mental processes, such as the making of an assessment but involve the practical actions which are to be taken to avoid the disadvantage: **General Dynamics Information Technology Ltd v Carranza**, @ para 35.

177. Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is capable of amounting to a relevant step under section 20(3). There is no requirement that the adjustment must have a good prospect of removing the disadvantage. It is enough if a tribunal finds there would have been a prospect of the disadvantage

being alleviated: **Leeds Teaching Hospital NHS Trust v Foster** EAT 0552/10. The only question is whether it was reasonable for it to be taken.

178. The duty to comply with the reasonable adjustments requirement under section 20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage: **Abertawe Bro Morgannwg University Local Health Board v Morgan** *2018 ICR 1194, CA*.

179. The PCP, or the relevant physical feature, must put the employee to a comparative substantial disadvantage. As to comparators, in **Fareham College Corporation v Walters** [2009] IRLR 991, the EAT (Cox J) said:

"*in many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play*".

Knowledge of disability and disadvantage

180. In considering whether the employer can be said to be subject to a duty to make reasonable adjustments, the Tribunal must consider the knowledge of the Respondent. The law is clearly articulated in **Department of Work and Pensions v Alam** [2010] IRLR 283. The employer is not under a duty to make reasonable adjustments if it did not know or could not reasonably have known:

a. That the employee was a disabled person, and

b. That he was likely to be placed at a substantial disadvantage by the relevant PCP

Burden of proof

181. Section 136 Equality Act 2010 provides that:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;

(3) But subsection (2) does not apply if A shows that A did not contravene the provision

182. Section 136 EqA, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by

otherwise reverting to the provision: **Hewage v Grampian Health Board** [2012] I.C.R. 1054.

183. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had failed to make reasonable adjustments or harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

184. In the case of **Project Management Institute v Latif** [2007] IRLR 579, the EAT considered the application of section 136 in the context of reasonable adjustments. The burden does not shift at all in respect of the 'PCP' or 'substantial disadvantage'. Those are aspects of the complaint and issues of fact which a Claimant must establish in every case. The reversal of the burden comes into play on the issue of adjustments. By the time a case comes before a tribunal there must be some indication of what adjustments it is alleged should have been made. The burden is reversed once a potentially reasonable adjustment is identified. It is for the Claimant to identify not only that the duty to make reasonable adjustments has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Therefore, there must be evidence of some apparently reasonable adjustment that would have avoided the comparative substantial disadvantage occasioned by the PCP. At the very least it is important for the Respondent to understand the broad nature of the adjustment proposed and be given sufficient detail to enable it to engage with the question of whether it could reasonably be achieved or not.

Submissions

185. Both representatives prepared written submissions which they supplemented with oral submissions. We hope to do no disservice to their submissions by not setting them out in full here. We took into account those written and oral submissions. We refer in more detail to some aspects of them in our conclusions section. On the issue of the 'LMA', Mr Tinnion referred us to the case of **Hart v Chief Constable of Derbyshire Constabulary** [2007] UKEAT/0403/07, which concerned a disabled trainee police officer who had failed her probationary period. **Hart** was a case where the suggested adjustment was such that it would relieve the police officer from the obligation to achieve competence with respect to a core aspect of the duties of an officer.

Mr Tinnion referred to the EAT's conclusion that it could never be reasonable to expect a chief constable to make an adjustment which would dilute the standard of competence in such a major way. Mr Tinnion submitted that he wished to draw an analogy with the current case where the Claimant sought to avoid the obligation of demonstrating his competence with respect to the central aspect of the role of a PIP Case Manager.

186. Mr Tinnion also referred us to the case of **Dunn v Secretary of State for Justice** [2018] EWCA Civ. 1998 at paras 44-45. This was under the heading of 'what is not discrimination' in Mr Tinnion's written submissions on the law.

187. In the course of oral submission, the legal member of the Tribunal asked both counsel to address it on the subject of the burden of proof in the case of reasonable adjustments. At the end of the day, he emailed counsel giving them an opportunity to make any further written submissions on this point and in particular, on the case of **Latif**. Both counsel took that opportunity. We are grateful for those submissions and we considered them carefully. Mr Tinnion also very helpfully sent an agreed chronology of the grievances.

Discussion and conclusion

188. We propose setting out our conclusions based on the themes as identified by the parties. We start with what was said to be the central complaint, that of LMA.

LMA: failure to make reasonable adjustments

The PCP

189. The Claimant was required to pass the LMA (requiring 3 consecutive 'standard met' assessments) in order to undertake the role of PIP manager. The Respondent admitted that this was a PCP which it applied to the Claimant and others.

Substantial disadvantage

190. The stress and anxiety induced in the Claimant by the requirement to pass 3 consecutive LMAs caused a deterioration in his psoriasis, which led to a flare in his psoriatic arthritis, pain, sleeplessness and day-time fatigue all of which taken together substantially adversely affected his ability to concentrate and retain information inducing what was described as 'brain fog'. The 'PCP' placed the Claimant at a substantial disadvantage compared to other employees without his disabilities in that he was at an increased risk of failing the LMA, thereby not being able to undertake the role of a PIP case manager. It is not enough, of course, that there be a substantial disadvantage: the PCP must put him at a comparative substantive disadvantage. That is, in our

judgement, amply evidenced by the Claimant's multiple failures (which extended beyond November 2018) and that he was the only employee we were told about who had failed the LMA multiple times. Mr Kane passed, Ms Little passed. We note how a new trainee, straight out of nursery had passed first time and that this upset the Claimant (**page 236**) – although that might have been exceptional, so too we conclude from the evidence was the Claimant's position of multiple failure over a long period. Further, it was never suggested that the Claimant lacked the intelligence or knowledge or abilities to pass the LMA. On the contrary, it was put to the Claimant by Mr Tinnion that his line managers had more confidence in him passing it than he had.

191. The requirement for three consecutive passes put the Claimant to the increased likelihood of failing LMA because of difficulties arising from his disabilities (concentration, retention of information, "*brain fog*"). There was sufficient evidence that he suffered from brain fog and the effects of this on his concentration and memory were accepted by occupational health and eventually by his line managers. That he was failing the LMA repeatedly exposed him to the risk of dismissal. This is evidenced by the fact that he was placed on an informal PAL. It may be that no-one had been dismissed before under a PAL but that is not to say that it would not happen to the Claimant. It is the risk of dismissal to which the Claimant was put that constitutes the substantial disadvantage, not the fact of dismissal. There was also the additional consequence that failure of the LMA led to increased stress and sickness absence, thereby exposing the Claimant to the further risk of dismissal for reasons of ill health capability. This is demonstrated by the fact that he did take substantial sick leave for stress, occasioned by the stress of the LMA process and that the letters issued by his line managers (while supportive) indicated the possibility that he could be dismissed if he was unable to return to work in a reasonable time frame. There is therefore a real and heightened, as opposed to a trivial or fanciful, risk of dismissal. This risk follows naturally from a failure to perform and with long term absence. The ordinary employee would see this sword of Damocles as being a disadvantage or detriment, as would the ordinary manager. We accept the submission of Mr Brien that it follows one way or another that if the employee does not pass the LMA, he is increasingly likely to be dismissed than someone who does pass the process as the situation could not continue indefinitely.

Knowledge that the Claimant was likely to be placed at the substantial disadvantage by the PCP

192. The Claimant identified the LMA as being the disadvantage to him on the stress reduction plan (**page 224**) on 19 April 2018. By this stage, he had had two goes at passing the LMA. However, up until then, he had nearly passed; he had failed 1 in the first attempt and challenged that failure on the basis that, in his view, it had been marked harshly and was too complex to be given to a trainee. We conclude that there was nothing unusual in failing twice

and Ms Johnston was reasonably entitled to believe that the Claimant would succeed on his third attempt. In relation to the first two and leading into the third LMA attempts It was not unreasonable for the Respondent not to have known or understood that the requirement to pass 3 consecutive assessments was putting the Claimant at a comparative substantial disadvantage. The reality was that it was an emerging picture, On the first attempt the Claimant came close to passing; managers believed he would be fine the next time. However, after he failed the third time the Respondent, and armed with a fuller understanding of his physical and mental impairments and the effects of those, the Respondent was in a much better position to really understand the issue. He was by now under an informal PAL. The stress and anxiety resulted in sickness absence. He had been told that a warning was possible (**page 308**) and had received the letters at **pages 277A** and **281**.

193. By the time the Claimant came to undergo his fourth attempt (in October 2018) we conclude that the Respondent knew or ought reasonably to have known that he was likely to be comparatively disadvantaged (in the way set out above) by the requirement to secure 3 consecutive passes. By now it had the experience of seeing the Claimant, an able, intelligent man, fail three times; it had the completed adjustments passport (**page 305**); it had discussed his needs with him many times and he had explained his difficulties. At page **308A** there was a referral to occupational health indicating the knowledge or at least an appreciation of a connection between the brain fog and the failures. The Respondent had the Claimant's own account of his disabilities, an understanding of the stresses of the LMA and it had two occupational health reports from August and October 2018. We conclude that the penny had dropped certainly by 18 October 2018.

194. Although a little later in the time-line, in November 2018, at **page 327** Ms Carr – who was new to the Claimant's line management – realised that LMA was the major issue. That was the last day of his LMA in November 2018. It ought reasonably have been clear to the Respondent (if not to her personally) by that date at the latest that he was likely to be put to the substantial disadvantages set out above by then.

Adjustments

195. The essential question then is whether there was a step which it was reasonable for the Respondent to take to avoid the substantial disadvantage occasioned by the PCP. An employer may consider that it has done a lot to help and encourage a disabled employee, as in this case and that it should not, in such circumstances, be criticised for acting unreasonably. We have found and recognise that the Respondent did a lot for the Claimant and in many respects acted reasonably. Our task, however, is to consider whether the Respondent acted reasonably overall but to consider there was a step which it was

reasonable to take that might have had a prospect of avoiding the disadvantage to the disabled employee occasioned by the application of the PCP.

196. The one step that would **unarguably** have removed the substantial disadvantage to the Claimant was to have deemed the Claimant to have passed the LMA. Both counsel agreed on this, albeit they disagreed as to whether it was a reasonable step.

197. As indicated above, during closing submissions, the Tribunal asked counsel how the burden of proof applied here. Having considered those submissions and applying section 136 Equality Act 2010 as we understand it as set out in the case of **Latif**, we conclude that the Claimant has done enough to raise a prima facie case so as to shift the burden to the Respondent. In particular, we have regard to the following findings of fact:

197.1.1. The Claimant had secured 4 consecutive passes in February 2018;

197.1.2. As was never in dispute, he is able and intelligent and able to do the role of PIP Case Manager competently;

197.1.3. At times of stress and because of the other symptoms of his physical disabilities he suffers from 'brain fog', namely a deterioration in his cognitive functions: concentration and memory and he did so during the LMA process;

197.1.4. He had failed 4 attempts and was substantially comparatively disadvantaged by the requirement to pass 3 consecutive assessments;

197.1.5. The Quality Assurance Manager considered it acceptable for the Claimant to have been deemed to pass after the requirement changed from 5 to 3;

197.1.6. The Respondent's own letter in response to the FOI request indicated a discretion to reduce the rigid LMA requirements for consecutive passes and that the number of checks could be tailored to individual case managers; that additional quality assurance checks could be put in place following learning and development;

197.1.7. The agreed position that by deeming him to have passed the substantial disadvantage occasioned by the requirement this would have removed the substantial disadvantage.

198. The Claimant has, in our judgement, identified an apparently reasonable adjustment (as he is required by **Latif**) and in those circumstances, the

Respondent must satisfy the Tribunal that it was not reasonable to make that adjustment.

199. The Respondent's submissions on this are set out at paragraphs 40 – 51 of Mr Tinnion's written submissions. In paragraph 42 he submits that the Respondent had a threshold: before 25 July 2018 an employee was likely to get a 'disallowance' case; then it changed to a situation where the employee undergoing LMA was guaranteed to be given a 'disallowance'; if he were deemed to have passed, this would have undermined its threshold requirement.

200. However, the difficulty for the Respondent is that Kay Farrier or Claire Mather could have looked at those 4 consecutive cases which the Claimant had passed back in February 2018 and analysed what type of cases they were. Given that the evidence was that it was 'likely' that before 25 July 2018 an employee would have been given a full disallowance, it is difficult for the Respondent – absent any evidence – simply to submit that this meant it was not reasonable for the Respondent to deem the Claimant to have passed. The Respondent did not lead any evidence from anyone in quality assurance, which was surprising given their argument that the rigid system deployed was there to ensure the quality of assessments. There is also the FOI answer which talks of the facility to increase or reduce the requirements and to tailor matters to individual cases and that additional checks could be put in place to ensure quality and competence.

201. In any event, we have found that the Respondent's reason for not allowing the 4 to count as an LMA pass was that it was 'not fair to others'. There was, in fact, no analysis as to the quality or abilities of the Claimant before reaching the decision not to deem him to have passed. Had there been some we might have had more of a concern. However, it is clear that the reason for not deeming him to pass was 'fairness'. This was also clear to Mr Devaney who regarded that a superficial argument. This notion of fairness was repeated to Mr Creighton by Mr McBride who regarded the 'deeming' suggestion as more favourable treatment 'because' of the Claimant's disabilities. That note demonstrates a misunderstanding of the law on and concept of reasonable adjustments – albeit a common misunderstanding. In contrast to other areas of discrimination law, the duty to make reasonable adjustments can require an employer to treat a disabled person **more** favourably than it would treat others. We accept that a respondent is not limited to relying on the reason given at the time for not making an adjustment (in this case, 'fairness'). It is entitled to come along later and say '*the reason why it was not reasonable to deem the Claimant to pass was X even though we did not consider X at the time*' (in the context of this case 'X' would be the 'threshold/competence' argument). However, bearing in mind the burden is on the Respondent, we would expect to receive evidence to make good the point.

202. Therefore, having given it careful consideration, we reject the Respondent's argument that by deeming the Claimant to have passed in his particular circumstances, that this would have undermined the need to uphold standards which the threshold of 3 consecutive passes was aimed at achieving. The Respondent has not adduced any evidence in support of this submission. Although we considered the submissions, we must here address one particular submission as significant emphasis was placed on it. We were invited to consider the following scenario: 'suppose the DWP, having reduced the LMA pass from 5 – 3 consecutive 'standards met' on 25 July 2018 simply deemed the Claimant to have passed (in circumstances where he had not secured the 3 consecutive passes after that date); and suppose the Claimant refused an application for PIP on 26 July 2018 and that an applicant reacted badly to this, even committed suicide'. It was argued that the 'man in the street' would look dimly upon the DWP in that scenario as it may come out on review that the case manager had not, in fact, passed the threshold, thus causing reputational damage.

203. We considered this submission carefully but rejected it. Tribunals must take care not to determine a case by reference to a what we considered to be an 'in extremis' argument such as this. There is a risk that it is made to strike terror into the heart of the tribunal – by emphasising the potential catastrophic consequences should the Claimant have been deemed to have passed and then gone on to make an error on an application. In discussion we rejected the submission as an explanation for not taking the step of deeming the Claimant to have passed. In rejecting it, however, we do not wish or seek to diminish the importance of the point to the Respondent – we recognise it. However, there is undoubtedly a myriad of factual scenarios that might arise on any given assessment. We were not impressed by the 'man on the street' argument. The same 'man on the street' may regard the decision to go from 5 -3 passes as reflecting badly on the department and blame the department in a case where after 25 July 2018 a PIP case manager assesses a case which ends with catastrophic consequences. Why, the man on the street may ask, did the department reduce the standard from 5-3? Why, he may ask did the department allow this particular case manager to assess this particular case when he had – let us suppose – failed 5 cases in a row at the beginning of July and then passed 3 in a row on 25 July? The man in the street may ask these questions but this case is not to be judged by what he may or may not have in his mind in a hypothetical scenario.

204. We did not accept paragraph 44 of Mr Tinnion's submissions. The evidence was that managers were confident of the Claimant's abilities. The Claimant was not failing to understand things in the consolidation phase. It was recognised that the stress of having to hit 3 consecutives was the issue; that is compounded by the brain fog and anxiety all of which is related to his overall combination of disabilities. Mr Devaney said that management should have been looking at all together and we agree. The evidence before the Tribunal

was not that that the Claimant was not competent but that he was failing to hit 3 consecutive passes because of the effects on his concentration and memory caused by his disabilities; it was the requirement for 3 consecutive passes that was the very thing that he required to be adjusted.

205. We were not assisted by the references to the case of **Hart**. That case turned on its own facts and a rather stark formulation of the issue in those proceedings. There is no principle of law that emerges in that case which alters our assessment of and application of the law to the facts of this case and we do not agree that it is analogous to the Claimant's situation in these proceedings. As regards paragraph 49 of Mr Tinnion's submissions, we make clear that we do not criticise the Respondent's approach in requiring 3 consecutive passes as being irrational. We do not criticise the general requirement for 3 consecutive passes at all. We conclude only that in the Claimant's case it was reasonable to make an adjustment to that policy. We reject the point made by the Respondent in paragraph 51 of its submissions. This ignores the impact of the Claimant's disabilities and, in particular, the increasing stress and brain fog.

206. We find Mr Brien's submission compelling that if, by deeming the Claimant to have passed, there might have been some residual concern the Respondent could have dealt with this by checking his work over a period of time and satisfying itself as to his competency. The Respondent did not say why this could not have been done – bearing in mind that it already carried out random checks on a percentage basis, and bearing in mind the letter at **pages 752A-B**. It is reasonable to test competence by having a system of 3 consecutives but it cannot be the **only** way of assessing competence and no-one ever suggested that it was. If there were concerns, quality assurance would pick up on this. His work could have been checked more regularly to ensure quality. We disagree with Mr Brien that checking 100% of the Claimant's work would have been reasonable but there was no need for that. Ms Farrier – the Quality Assurance Manager – was of the view that it was acceptable to regard the Claimant as having passed. In those circumstances, we can infer that she must have been reasonably confident that there was sufficient facility to check the robustness of the assessments.

207. In any event, the way the system is designed, a trainee case manager could fail 5 in a row, even badly, then pass 3 in a row and would then be certified to act as a PIP case manager. In our judgement, that counts against the Respondent's argument that it is a minimum competency threshold.

208. Had the Respondent agreed to remove the requirement for 3 consecutive passes in the Claimant's case he would have been able to return to work without the stress of having to do the LMA and would have been able to carry out the work of a case manager. The Respondent would have been

able to put in place additional safeguards for a period of time, such as randomly checking his work or increased supervision and monitoring sessions.

209. Therefore, we conclude that when the Claimant first raised the matter on 16 November 2018, the Respondent could have deemed the Claimant to have passed the LMA. Had they done that both the Respondent and the Claimant agree it would have removed the comparative disadvantage to him. The Respondent has not satisfied us that this was not a reasonable step to take in the circumstances of the Claimant's case.

210. We also conclude that prior to the fourth LMA, the Respondent could have taken the step of extending the LMA process beyond the two weeks in the way in which Mr Creighton subsequently did. We call this 'stopping the clock' (as described in our findings) but it amounts to the same thing. As with the 'deeming to have passed' adjustment, we were satisfied that the Claimant had established a prima facie case. We had regard to the fact that Mr Creighton did the very thing which was suggested as an adjustment and that the Claimant has since passed his LMA.

211. Had it stopped the clock and extended the timescale of LMA back in October 2018, the Respondent could have provided the Claimant with simple tasks until such time as he was ready to start the clock again – this was also something which Mr Creighton did. This would have allowed time for the fog to clear, at which point the Claimant could then resume the LMA process. The length of time would be extended but we fail to see how that can be said to be unreasonable. When we look at the time and effort put in by the Respondent to assisting the Claimant to pass – over a period of many months – the extension of the LMA phase to allow him to step in and out of it, seems in our judgement to be eminently reasonable and achievable. We do not agree with the submission, for reasons given, that this would undermine the desire to ensure that case managers were competent. How could it, we asked ourselves, when in effect it is the very thing that Mr Creighton did?

212. Had those steps been taken before the Claimant's fourth attempt it would have improved the chances of the Claimant succeeding and would have had a prospect of alleviating the disadvantage occasioned by the rigid requirement of having to pass 3 consecutive passes. Given our findings on the Respondent's knowledge as to the likelihood of substantial disadvantage back in October 2018, the Respondent, we conclude, could reasonably have made the adjustments which Mr Creighton came to make, by the start of the fourth LMA attempt on 18 October 2018.

213. In summary then, it would have been reasonable to make the adjustments which Mr Creighton made by October 2018 and it would have been reasonable to have deemed the Claimant to have passed by 16 November

2018, when he first asked for that adjustment. The Respondent failed to make these adjustments and the complaint under sections 20-21 succeeds.

214. In light of our conclusions, there is strictly no need for us to consider the other issues raised by the Claimant such as an equality move permitting the Claimant to work on reduced/less stressful tasks but we have considered them for the sake of completeness. The equality move was only sought because of the difficulties the Claimant had in passing the LMA – the adjustment which we found ought to have been made would have eradicated the need for an equality move.

215. In any event, there was no evidence of a particular role that was available prior to October/November 2018 (when the duty to make adjustments was triggered) which the Respondent could have but failed to move the Claimant to. Whatever the issues or confusion around the Benton Park View role, the Claimant himself did not regard this as a suitable location; he did not put it on his list of locations once he spoke to Mr Creighton. Further, The Claimant could carry out the role of case manager; the issue for him was the requirement to pass 3 consecutive assessments. It was reasonable to adjust that requirement and had it been done would have obviated the need for an equality move.

216. It is right to say that moving the Claimant to another role would have removed the disadvantage occasioned by the requirement to pass the LMA. However, there was insufficient evidence as to what roles were available, when, where and the suitability of any such roles. We were into the realms of total speculation. There must be an apparent adjustment that could have been made on the evidence. The Claimant has not got beyond the conceptual stage that an equality move is something that the employer might have done. He did not establish a prima facie case.

217. Even on face of the equality move policy, the Claimant did not meet the criteria. With adjustments to the LMA process he could do the job. Under the equality move policy he only qualifies if with an adjustment he cannot do his role. That was, on our findings, not the case. The equality move issue hinges on the LMA adjustment issues. If, as we have concluded, the Respondent ought to have made adjustments by the 4th LMA attempt (or even immediately after it), the equality move issue falls away and becomes no more than an academic debate. Whether the Claimant was unhappy with how it was handled is neither here nor there.

218. As to the issue of giving the Claimant reduced or simple tasks, we conclude that it would not have been reasonable for the Respondent to find permanent simple tasks for the Claimant to do – although it would have been reasonable to provide him with simple tasks when the clock was stopped during the LMA phase. Ms Johnston had previously provided the Claimant with simple

tasks on a short-term basis. To give him permanent simple tasks, however, would have been such an erosion of the role of PIP Case Manager as to amount to an entirely different job. That was not reasonable.

Parking and lifts

219. Mr Brien submits in paragraph 37 of his written submissions that Ms Johnston was aware of the difficulties the physical features of the basement created for the Claimant by 14 September 2018 and whilst she moved his parking bay nearer the lift he says this did not address the issue with the lift being out of order or the heavy door.

220. We have found that the Claimant did not mention to her that the door was too heavy for him to open. He had asked only to be moved nearer to the lift (**page 296**) and this was accommodated. We accept that, even though the Claimant had good upper body strength, he would find it more difficult than a person without his disability to negotiate a door while seated in his wheelchair. The weight of the door is not really the issue. The Claimant had good upper body strength. A non-disabled person with weak upper body strength may well find a heavy fire door difficult to open. However, doors generally operate as an obstacle to wheelchair users and present as an obstacle. A heavier door more so. That is why many doors have push-button access for wheelchair users.

221. Oddly, the Claimant's case was not that the Respondent should have fitted push-button access on the basement door as a reasonable adjustment. His case was in the end was that he should have been provided with a taxi; or afforded the opportunity to work at home (as submitted in paragraph 40 of Mr Brien's written submissions). Had he advanced a case that the Respondent had failed to make an adjustment of fitting push-buttons we would, undoubtedly have had heard evidence from the Respondent as to why they had not been fitted to these particular fire doors.

222. We conclude that it was not a reasonable step for the Respondent to have to take in order to avoid the disadvantage of a heavy door in the basement car park to permit the Claimant to have worked from home, in the circumstances of this case when other options were open to it. The Claimant's pleaded case did not identify taxis or working from home as steps the Respondent ought to have taken to avoid the disadvantage caused by the heavy doors and the occasionally broken lift. The suggested adjustments on page 42 were to move him to the outside car park or ensure that the lifts were operational. Home-working was identified as a putative adjustment only in the list of issues. There is no difficulty with doing that of course. Whilst acceptable for it to be identified in the issues although not the pleadings (and no objection was taken in any event) nonetheless, it illustrates that even at the stage of amendment of the Claim Form, neither the Claimant nor his solicitors were advancing as an adjustment to overcome the obstacle of the heavy door or the lift that the

Claimant should be permitted to work from home. Nevertheless, that was the case advanced by the time we got to closing submissions. We accept the evidence of the Respondent's witnesses that it was not reasonable for them to arrange for the Claimant to work from home at a time when they were mentoring him and supporting him through the stressful LMA process. Providing him with permanent home working to meet the odd occasion when the lift might be out of order or because the door in the basement car park was heavy would have been a sledgehammer to crack a nut. We note for example, that Mr Creighton arranged for the Claimant to work on the ground floor and provided him with an outside parking bay. Ms Johnston had also offered the option of a taxi, which would have avoided the need to use the basement.

223. As we have found, the Respondent did move the Claimant to an outside car park. The Claimant asked to return to the basement car park after a few months. Recognising the physical limitations of the building design (the incline) and the heavy doors, he chose to return to the basement and did not take up the offer of a taxi. Neither scenario was, we accept perfect for him but our task is to consider what the Respondent could reasonably have done. We conclude that it could not reasonably have done more on the issue of car parking.

Taxis

224. We have found that this facility was always available to the Claimant. Mr Brien submitted that ultimately the Respondent did not actually provide him with a taxi (paragraph 42 of his submissions) and merely informed him it was a possibility. That, he submitted was insufficient. We disagree. It was not just a possibility. It was a reality. However, aligned to that reality was the reasonable requirement of the Respondent that it should be the Claimant who identifies the need for a taxi on a permanent basis and the reason for it, so that it can be considered and provided with justification. That is not an unreasonable position for any employer to adopt.

225. Both Ms Johnston and Mr Creighton (**page 571-572**) had said they could provide taxis. Of course, the taxi would have to be booked in advance. If the need for a taxi was ad hoc the Claimant was required simply to let Mr Creighton know that it was needed. If it was to be a permanent arrangement then there was a process for the Claimant to follow to secure it permanently. The Claimant must take some responsibility for these things. It is not entirely a one-way process.

Home working

226. Mr Brien submitted that the Respondent's stance on refusing the Claimant to work from home has been shown (by the global pandemic) to be unreasonable. We disagree. The Respondent is not to be judged by hindsight. The reasonableness of its actions are to be determined according to the

circumstances of the time and its understanding of those circumstances. It is right that events that post-date an incident can have relevance. Much in the way we have looked at what Mr Creighton did in 2019 in considering whether it was reasonable for the Respondent to have done those things earlier. However, the home-working issue was different. In our judgement, no-one could reasonably have been expected to forsee a global pandemic which would force people to work from home.

227. In any event, at the time the Claimant first raised the prospect of home working (in June 2018 with Ms Johnston (**page 252**) he was absent on sick leave. He raised the issue because he was stressed at the thought of returning to work to undergo the LMA. It is plain to the Tribunal – and indeed we conclude plain to all concerned at the time: the Claimant, Ms Johnson, Ms Carr and subsequently Mr Creighton – that **the** stressor and the thing that was keeping the Claimant away from work was the requirement to pass 5 consecutive assessments in the LMA.

228. Given that the Claimant had not passed the LMA and there were only limited case worker 'tasks' that could be given to him and given the reasonable need for ongoing mentoring it was not a reasonable step for the Respondent to have to take to allow the Claimant to work on non-core tasks at home on that basis.

229. Although we have considered Mr Brien's 'pandemic' submission, we do not agree with him. We conclude that it was not reasonable for the Respondent to arrange for the Claimant to work from home particularly in the absence of a formal request by the Claimant. Although he mentioned home-working in July 2018, he did not make a formal request to move until after his ET1 had been completed: see July 2019 meeting **page 568.**

230. The Respondent has a home working policy and the Claimant did not make use of it. We conclude that it is generally reasonable to expect employees to complete a formal application. Although in certain circumstances such a requirement might have to be adjusted, there was no reason why the Claimant could not make a formal application. He raised it with Mr Creighton more out of frustration with his position within the LMA process. He did not know Mr Creighton well by that time and he only applied for it out of frustration believing that he would not pass LMA.

Grievance as a PCP and suggested reasonable adjustments

231. In paragraph 59 of his submissions Mr Brien submitted that there was a PCP of requiring the Claimant to resolve his 1st Grievances dated 18 November 2018 prior to suspending the attendance management procedure, permitting the Claimant to work from home and prior to permitting the Claimant to work from another office.

232. We conclude that this does not, on the fact, work as a 'PCP'. What the Claimant is really complaining about is the way in which **his** grievance was handled. Mr Brien, recognising what was said by the Court of Appeal in the case of **Ishola**, suggested that this went beyond an unfair approach in the Claimant's case and was a 'policy' which the Respondent would have applied to others. He referred to Ms Johnston's evidence where he asked her what advice she took in relation to the Claimant's request (at **page 480**) to suspend the absence management process until his grievance had been completed. She said that she spoke to HR and was told that they should run in parallel. Mr Brien suggested that this was a 'policy' of HR. Ms Johnston replied that she did not know but that she guessed it would be a policy.

233. We conclude that this was an unsure answer obtained through skilful cross-examination. We are not, in any event, satisfied that there was any such policy as contended for by Mr Brien. The advice and the outcome was that they should run in parallel. If there was a 'policy' at all it was not that one process (the grievance) should be completed before the other (attendance management) be considered. It was the opposite: they were to run together. The Tribunal regards that as perfectly understandable. There is no reason on the facts of this case why they should not have run together.

234. We do not uphold this aspect of the complaint of failure to make reasonable adjustments.

Harassment complaints

Warbreck House

235. We first considered whether this complaint was brought in time and if not whether time should be extended. The matters complained of took place on a single day on 01 February 2017. It was conceded by the Claimant that his complaint was presented out of time – he was not suggesting it was part of an over-arching state of discriminatory affairs or regime. Mr Brien submitted that it is just and equitable to extend time for reasons given in his written submissions in paragraph 57.

236. We are not satisfied that it is just and equitable to extend time and we do not do so. The Tribunal does not, therefore, have jurisdiction to adjudicate on the complaint. We can understand how a person might not want to raise a complaint due to being embarrassed and not wanting it to become public knowledge or because they do not want to be perceived as being weak or vulnerable or to be seen as making trouble for their supervisors. However, the Claimant had, in fact, raised a complaint in the course of his employment about a colleague, which he took to Ms Little. In 2017, he also regarded himself as someone who would and had challenged inappropriate behaviours among his

team. Further, he did eventually raise a complaint against Mr Moore in November 2018, and then subsequently against all of his line managers.

237. We conclude that the Claimant only raised this complaint about Warbreck House after his grievance regarding the LMA as a means of ensuring that he would not have to return to the PIP department. By the time he raised the first grievance he wanted out of PIP – he had failed the LMA four times and was disillusioned by the PIP department. We infer from the email at **page 803** that he raised the Warbreck House issue when he did (as well as the Chariots issue which we address below) because he felt it might be relevant to assist in his complaint to the Tribunal. Having regard to his state of mind towards the end of December 2018, we conclude that the Claimant was desperate to get out of PIP, that his desperation affected his perception of historic events, which led him to introduce the 'Warbreck House' and the 'chariots of fire' issue, neither of which was mentioned in his written grievance of 18 November 2018. It was to strengthen his hand in his real fight, which was about LMA, the answer to which he had come to believe was to be moved to another department.

238. There is inevitable damage to memory caused by the passage of time – particularly one which concerns a single day - and given the tendency of human memory to play tricks particularly when events are recalled at a time when there is a current significant issue (LMA) which has lead him to look negatively upon those around him and to recreate events as being different to how they were. We considered the submissions made by Mr Brien. However, we conclude it would not be just and equitable to extend time on this complaint because of the timing and manner in which it was raised and because of the prejudice to the Respondent in having to respond to matters of such age. Although we have not extended time, we have made certain findings of fact above. While the events as described by the Claimant may not be entirely accurate, we refer back to our finding that the Claimant clearly has significant mobility issues. Mr Moore saw that he was walking with the aid of a walking stick when he pulled up outside Wearview House on 01 February 2017. Mr Moore could have dropped the Claimant and his colleagues nearer the entrance to the building thus avoiding any potential embarrassment for the Claimant. We observe that Mr Moore ought reasonably to have been more in tune with the Claimant's needs than he in fact was.

Chariots/chariots of fire

239. The Tribunal found this a particularly difficult issue. We have considered the most recent allegations (against Ms Obasohan and Mr Kane in November 2018) first of all and then looked back at the overall picture painted by the Claimant going back to his time as team leader.

240. It is striking that the Claimant says that he was referred to chariots or chariots of fire regularly up until the point when he transferred from PIP team

leader to PIP case manager. There is then a gap of about a year when, it appears out of the blue and within a matter of days of each other Mr Kane and Ms Obasohan are alleged to refer to him as 'chariots'.

241. We reject the Claimant's evidence that Ms Obasohan and Mr Kane referred to him as 'chariots' in November 2018. We infer from our all our findings above and in particular the email at **page 803** that there had been a reference to 'chariots' but that this was back in the time when the Claimant had been a team leader. If Ms Obasohan and Mr Kane had offended him as he says on or about 12 and 16 November 2018, we find it highly unlikely that he would not have mentioned this in his grievance of 18 November 2018 – especially given his sense of frustration with the Respondent at that very point in time. They would have been fresh in his mind. Those events do not get a mention even in the email at **page 803**.

242. The first reference to 'chariots' and to Ms Obasohan and Mr Kane's alleged remarks in November 2018 comes in the Claim Form submitted on 13 February 2019 (**pages 15 – 25**). We infer that these allegations were made in order to ensure that the complaint about 'chariots' was seen to be brought in time. We conclude, however, that they simply did not happen. We found Ms Obasohan to be an impressive and credible witness and we accept her evidence that she did not refer to the Claimant as chariots and that he did not pull her up on the use of that term. We reject the suggestion that she was condescending to the Claimant.

243. We also reject the suggestion that Mr Kane approached the Claimant's desk and referred to him as chariots telling him that it was impossible to be dismissed if you have a disability. We accept that Mr Kane probably spoke to the Claimant at some point in November 2018 – he did not deny this and it would not be exceptional. On the balance of probabilities, we conclude that he said something like it would be difficult to be dismissed for performance. That after all was the concern of the Claimant. He had been put on a PAL. It is also consistent with Ms Johnston's view that, while dismissal was a possibility, there would be a lot of support given to obviate that and she had not known of anyone who had been dismissed for poor performance following a PAL. That has nothing to do with disability.

244. We conclude that the Claimant, looking back over his whole period of employment, and having taken the step of initiating litigation, began to reconstruct the past to fit with his current narrative, which was that he was the victim of disability discrimination. He began to see things different to how he saw them at the time. We conclude that he looked back at events in 2017, recalled that the term 'chariots' and 'chariots of fire' had been used; forgot that he himself had used it and, the mind being as it is, it reconstructed events to fit with how he saw the world in late 2018. Then when he came to present his complaint, recognising that these matters occurred some time ago, reflected on

which team leaders he had spoken to before taking sick leave on 18 November: Mr Kane and Ms Obasohan and introduced an allegation about their conduct which fitted the narrative.

245. As regards the time when the Claimant was working as a PIP team leader, from our findings we conclude that the phrase 'chariots of fire' or 'chariots' as well as 'wheels of steel' were used but were used by the Claimant and picked up on and repeated occasionally by some around him. It was low level jocularity of the sort the Claimant would now be ashamed of. But he was happy when he was a team leader. He was anything but happy as a Case Manager – a role he felt forced into and which he was failing to progress in and in circumstances where he felt he was not being listened to in terms of his needs. Looking back and recalling the terms 'chariots of fire' were in usage in 2017, the Claimant cannot accept that he ever used those terms himself about himself; that is not the person he believes himself to be. He would not dream of saying anything like that now as it does not accord with his self-esteem. However, people do and say things they regret and this is one of those situations where we conclude the Claimant did just that. The man he was in 2017 is not the man he sees himself as now. To reduce the dissonance of his own past usage with his current perception, his memory has, we conclude, replayed events, casting others, Ms Little, Mr Kane and others in the role of mocking colleagues, calling him names against his expressed objection whereas, in our judgement, he initiated those phrases himself, most likely to make light of the fact that he was a wheelchair user. It was a desire to fit in, given his 'visibility' to others. It was, we conclude, his way of saying "don't treat me differently just because I am in a wheelchair". One way of doing that was to make light of the fact that he was a wheelchair user.

246. When Mr Kane gave evidence to the Tribunal he was, in our judgement, defensive and angry. That might suggest that he was the sort of person that might do what he was accused of. However, having considered all the evidence, we put that his demeanour down to his sense of anger and shock that he has been accused of an act of disability related harassment. When interviewed about the Claimant's allegations he was asked whether he might have used the phrase 'chariots of fire.' We note that he had the insight to question himself albeit he dismissed it. It might be said that he too is reducing the dissonance associated with seeing himself as a person who would not mock anyone's disabilities and making jokes about the Claimant's wheelchair - by saying that it was the claimant who used it about himself. We were conscious of that possibility and considered it along with the Claimant's suggestion that he and Ms Little were invested in a denial (meaning they had to deny the allegation or face the consequences). We have considered all these things but based on the evidence before us, we conclude that Mr Kane probably did use the phrase on occasion back in 2017 but only because he was disarmed by the Claimant himself using it and he was given passive or implicit permission to do so. The conduct was not unwanted conduct and it was not for the purpose nor

did it have the proscribed effects set out in section 26 Equality Act 2010. We make clear, however, that we accept Mr Kane's evidence that he did not refer to the Claimant as 'chariots' in November 2018 as he was alleged to have done.

247. Having found that neither Mr Kane nor Ms Obasohan engaged in unwanted conduct in November 2018, the complaint that others (Mr Kane and Ms Little) engaged in unwanted conduct related to disability back in 2017 is also out of time. For the avoidance of doubt, we do not extend time for the same reasons as we have set out above. Even if we were to extend time, we conclude that any use of that phrase or similar phrases by Mr Kane, back in 2017 did not have the purpose or the effect of creating the proscribed environment (within section 26 Equality Act) nor was its purpose or effect to violate the Claimant's dignity.

248. This complaint of harassment related to disability is dismissed.

Grievance as allegation of harassment

249. The issue here is whether the delay in dealing with the grievances or dealing with them in breach of procedures constitutes unwanted conduct related to disability.

250. There was a delay between 06 December 2018 and 14 January 2019 which was unsatisfactory. Mr Drummond gave an explanation for it, which was that he made an incorrect assumption. While we accept his explanation was genuine and honest, the delay was – and we imagine Mr Drummond would accept this – unacceptable and, in the language of the statute 'unwanted conduct'.

251. After that, we do not find that there were any delays of the sort that could be said to be unreasonable or unacceptable given the issues being raised by the Claimant. We do not see that the re-opening of the things considered by Mr Devaney constitutes a breach of procedure. His conclusion was that they should be re-opened. We were not taken to any procedure which it could be said had been breached.

252. Unacceptable delays in dealing with grievances may well have the effect or the purpose of creating an intimidating or hostile etc… environment for an employee. It is also perfectly possible that unacceptable delays or breaches in procedure, being unwanted conduct, amounts to conduct 'related to disability' – but that will depend on the facts of each case. Mr Tinnion referred us to the case of **Dunn** in his written submissions. However, the paragraphs referred to in Underhill LJ's judgment (paras 44-45) are on the subject of 'direct' discrimination and by extension of argument, discrimination contrary to section 15 – both sections where there is a 'because of' causative requirement. There is no direct discrimination claim or section 15 claim before us. The complaint of

harassment is formulated on the wider basis that the unwanted conduct must be 'related to' the protected characteristic. **Dunn** was of no assistance. We have applied the wider formulation as set out in our section on the relevant law above. However, we could not see how, in this case, the delays (such as they were) related to disability. The very highest Mr Brien was able to put it was that it was the Claimant's disability that led him to making the first grievance and his disability that led to Mr Drummond and Mr Devaney's recommendations. However, Mr Drummond's unacceptable delay pre-dated his recommendations and pre-dated Mr Devaney's involvement.

253. Mr Brien did not advance this argument with any vigour. His submission amounts to saying that the context of all of this is disability, therefore it relates to disability. We accept that the test of 'related to' is broader than that of 'because of' but even taking a very generous and wide approach to that phrase we are unable to conclude on the evidence that this 'conduct' was related to disability. The conduct was not deliberate. It is not enough that the context was disability and reasonable adjustments. The context or subject matter could have been anything. We accept Mr Tinnion's submission that if Mr Brien is right then any response to a grievance of this sort would be conduct which 'related to' disability. For the avoidance of doubt, there was nothing else, in our judgement, in relation to the timing of or the conduct by any of the managers who were involved in investigating the Claimant's grievances that could be said, on the facts, to be unwanted conduct related to disability.

254. The complaint of harassment related to disability fails and is dismissed.

Summary of conclusions

255. The Claimant had proved facts from which we could conclude, as of 18 October 2018, that the Respondent had failed in its duty to make reasonable adjustments namely those set out in C para 4 e and h of the final list of issues. The Respondent has failed to satisfy the Tribunal that those steps were not reasonable in the circumstances.

256. The Claimant has also proved facts from which we could conclude, as of 16 November 2018, that the Respondent had failed in its duty to made reasonable adjustments namely that adjustment set out in C para 4a of the final list of issues. The Respondent has failed to satisfy us that this step was not a reasonable step to take in the circumstances.

257. The first steps (4 e and h) would have had a prospect in alleviating the substantial disadvantages identified in C para 2 a and b of the final list of issues. The latter step (4a) would have removed the substantial disadvantages altogether.

258. The Respondent was aware by October 2018 that the PCP identified in C para 1 of the list of issues was likely to put the Claimant to the relevant substantial disadvantages.

259. We conclude therefore that the Respondent had failed to take such steps as were reasonable to avoid putting him to the substantial disadvantage. The complaint of discrimination by failure to make reasonable adjustments succeeds.

Closing remarks

260. The Tribunal would hope that the Respondent will see the importance of 'thinking outside the box' when it comes to issues of reasonable adjustments. This was a case where line managers were, on our analysis, supportive and well-meaning but where they may have been held back in what they could do for the Claimant by a 'policy' mindset in relation to the issue of LMA. We noted the advice given on **page 552**. As we have observed above, the duty to make reasonable adjustments can require an employer to treat a disabled person **more** favourably than it would treat others. Where there are policies in place (such as that relating to the number of passes required to pass the LMA) those policies may have to be adjusted even if it means others may see it as being unfair. We recognise that this will then require delicate management of those other employees and that sense of unfairness but such difficult exercises often have to be undertaken to ensure compliance with duties under the Equality Act.

261. We would also add that, although the case was not advanced in this way, the Tribunal was somewhat disconcerted to learn that there were apparently few doors in Wearview House (the basement car park being an example) with push button access. Whether that has been corrected or is even possible we do not know. However, we would hope that the Respondent would assess the building with a view to minimising the difficulties for wheelchair users.

262. We also found in our findings of fact that no real attempt was made to tackle the self-description of 'chariots' by the Claimant back in 2017 even though the Claimant was working in a telephony environment and it was acknowledged that customers might inadvertently hear the term being used and that some employees might be uncomfortable with its usage. We would hope that this issue of 'inappropriate use of language' would be reflected in any training on awareness that might be given in the future.

Remedy

263. In light of our conclusions a remedy hearing will be necessary, at which the Tribunal will consider the Claimant's claim for financial losses and injury to feelings.

264. Directions for the Remedy Hearing will be issued separately from this reserved judgment.

Employment Judge Sweeney

1 March 2021

APPENDIX

LIST OF ISSUES

DISABILITY

1. R admits C had the following disabilities at all material times:
    a. psoriatic arthritis;
    b. depression.

A – LIFTS AND PARKING [DOC, paras. 7-16]

Parking at Wear View House, Sunderland (reasonable adjustments) [DOC, paras. 17-22]

1. The parties agree that R applied a PCP requiring C to work from R's office at Wear View House.
2. Did following physical features of R's basement car park at Wear View House put C at the following substantial disadvantages in comparison with R's workers who used the basement car park who lacked C's disabilities?
    a. size of standard parking bays (disadvantage to C: C difficulties removing wheelchair);
    b. lift sometimes not working (disadvantage to C: having to use stairs);
    c. heavy door to access basement room with lift entrance (disadvantage to C: having to push open heavy doors);
3. Did R know the above physical features put C to these disadvantages?
4. Would R taking the following steps have avoided the disadvantages:
    a. permitting C to park in R's outside (non-basement) car parking spaces;
    b. allowing C to work from home;
    c. arranging transport for C to/from Wear View House.
5. If the adjustments identified above would have avoided the disadvantages, were those adjustments ones which it was reasonable for R to have to take to avoid the disadvantages?

6. If (a) was a reasonable adjustment, did R permit C to park in those outside parking spaces, and if so, from what date? If not, on what date was R first in breach of any duty to permit C to park in those outside spaces?
7. If (b) was a reasonable adjustment, did R "*ensure*" the lifts servicing the basement car park were operational? If not, on what date was R first in breach of any duty to "*ensure*" the basement car park lift was operational?
8. If (c) was a reasonable adjustment, did R permit C to work from home? If not, on what date was R first in breach of any duty to permit C to work from home?
9. Was C's claim presented within 3 months of those dates, given effect of ACAS EC provisions (ACAS Receipt 20 Dec 2018, ET1 presented 13 Feb 2019)?
10. If not, it is just and equitable for the ET to extend time in respect of this claim?

B – CHARIOTS OF FIRE [DOC, paras. 24-30]

"Chariots of Fire" (harassment) [DOC, paras. 31-32]

1. Did the following people call C "*chariots of fire*"/"*chariots*" to C's face, or refer to C (when speaking to other people) as "*chariots of fire*"/"*chariots*"?
    a. Pamela Little:
        i. to C's face during C's first week as a Team Leader in September 2016;
        ii. "*regularly*" thereafter in 2016 and 2017 (no dates provided);
    b. Edward Kane:
        i. in November 2018 (reference to C: "*chariots*")
        ii. in November 2018: EK said "*it is pretty much impossible to get dismissed if you are disabled*."
    c. Josephine Obasohan:
        i. on 17 Nov 2018.
2. To the extent the answer is yes, is that conduct related to one/both of C's disabilities?
3. Did that conduct have the purpose or effect of:
    a. violating C's dignity;
    b. creating an intimidating, hostile, degrading, humiliating or offensive environment for C?
4. If yes, what was the date on which that conduct had that purpose/effect?

5. Was C's claim presented within 3 months of that date, given effect of ACAS EC provisions (ACAS Receipt 20 Dec 2018, ET1 presented 13 Feb 2019)?
6. If not, it is just and equitable for the ET to extend time in respect of this claim?

C – LMA [DOC, paras. 33-41]

LMA (reasonable adjustments) [DOC, paras. 48-51]

1. R admits it applied a PCP that required C to pass the LMA as part of his work as a PIP Case Manager.
2. Did the application of the PCP put C to the following substantial disadvantages in comparison with R's Case Managers who lacked C's disability:
    a. C at increased likelihood of failing LMA because of difficulties arising from C's disabilities (concentration, retention of information, "*brain fog*");
    b. C at increased risk of dismissal because of (a).
3. Did R know the PCP put C to these disadvantages?
4. Would the following adjustments have avoided the disadvantages to C:
    a. deem C to have passed LMA based on previous results (when LMA passmark was 5 consecutive passes, C once successfully obtained 3 consecutive passes);
    b. ~~reduce LMA competency pass downward from 3 consecutive passes~~;
    c. allow C to work on reduced/less stressful tasks;
    d. "*allow the Claimant to be given an equality move to another post.*" [sic].
    e. allow C further time to undertake the LMA;
    f. provide C with extended breaks during the LMA;
    g. provide C with a one-to-one mentor to support him with the LMA;
    h. permit C to speak to colleagues about the LMA process during it
5. If yes, did R make those adjustments? (R admits it did not make the first two adjustments).
6. Were those adjustments ones which it was reasonable for R to have to take to avoid the disadvantages to C, or did R make reasonable adjustments for the disadvantages in other ways?
7. [NB: No jurisdiction/time bar issue in respect of this claim].

D – ALTERNATIVE WORK ISSUES [DOC, paras. 52-58] / E – EQUALITY MOVE [DOC, paras. 65-68]

D - ALTERNATIVE WORK ISSUES (REASONABLE ADJUSTMENTS) [DOC, paras. 59-62]

1. Did R apply a PCP that required C to carry out all elements of his post?
2. Did the application of the PCP put C to the following substantial disadvantages in comparison with colleagues without C's disability:
    a. ~~issues with concentration;~~
    b. ~~issues with retention of information;~~
    c. increased risk of dismissal;
    d. "*prevents him from being transferred internally*" [sic].
3. Did R know C was put to these disadvantages?
4. Did R apply the PCP to non-disabled Case Managers?
5. If yes, did the application of PCP to non-disabled Case Managers put them to the same disadvantages?
6. Would the following adjustment have avoided the disadvantages to C?
    a. allow C to return to work on reduced/less stressful tasks.
7. If the adjustment would have avoided the disadvantages, was it an adjustment which it was reasonable for R to have to take to avoid the disadvantages?
8. If yes, did R make the adjustment, and if so when?
9. If no, on what date was R first in breach of any duty to make the adjustment?
10. Was C's claim presented within 3 months of that date, given effect of ACAS EC provisions (ACAS Receipt 20 Dec 2018, ET1 presented 13 Feb 2019)?
11. If not, it is just and equitable for the ET to extend time in respect of this claim?

E- EQUALITY MOVE (REASONABLE ADJUSTMENTS) [DOC, paras. 69, 72-76]

1. Did R apply the following PCPs to C:
    a. C had to pass the LMA;
    b. C had to carry out all elements of his post.
2. If yes, did the application of the PCPs put C to the following substantial disadvantages in comparison with colleagues without C's disability:
    a. ~~issues with concentration;~~
    b. ~~issues with retention of information;~~
    c. increased risk of failing LMA;
    d. because of (c), increased risk of dismissal.

3. Did R know applying the PCPs to C put C to these disadvantages
4. Would taking the following step have avoided the disadvantages to C:
    a. allow C to be given an "Equality Move" to another post.
5. Was that step taken?
6. If not, was that adjustment one it was reasonable for R to have to take to avoid the disadvantages to C, or did R make reasonable adjustments for the disadvantages in other ways?

F – WARBRECK HOUSE, BLACKPOOL [DOC, paras. 77-81]

Warbreck House, Blackpool – 1 February 2017 (harassment) [DOC, paras. 80-81]

1. Did the following conduct occur on/during the February 2017 visit to Warbreck House, Blackpool?
    a. John Moore brought a car too small to accommodate C's wheelchair;
    b. John Moore parked "*some distance*" from the main entrance at Warbreck House;
    c. at Warbeck House, C was provided with a wheelchair with a flat tyre;
    d. C was pushed in an unsteady wheelchair, almost tipped out at one point;
    e. C raised objections to his treatment, John Moore "*laughed it off*."
2. Was that conduct related to one/both of C's disabilities?
3. Did that conduct have the purpose or effect of:
    a. violating C's dignity;
    b. creating an intimidating, hostile, degrading, humiliating or offensive environment for C?
4. If yes, what was the date on which that conduct had that purpose/effect?
5. Was C's claim presented within 3 months of that date, given effect of ACAS EC provisions (ACAS Receipt 20 Dec 2018, ET1 presented 13 Feb 2019)?
6. If not, it is just and equitable for the ET to extend time in respect of this claim?

G – GRIEVANCE [DOC, paras. 82-84]

Grievance (reasonable adjustments) [DOC, paras. 85-88]

1. Did R require C to resolve his 1st Grievances dated 18 November 2018 prior to the following alleged adjustments being implemented;
    a. adjustment – work on simple tasks;

b. adjustment - suspend attendance management procedure;
c. adjustment - work from another office;
d. adjustment - work from home;
e. adjustment - put in place a workplace adjustment passport (R denies a WAP - as opposed to adjustments contained/recommended in a WAP – constitutes an adjustment);
f. adjustment – [**reduce requirements of LMA process – not adequately particularised**].

2. To the extent this conduct occurred, was the conduct a PCP or "one off" conduct?
3. Did the application of the PCP put C to the following substantial disadvantages in comparison with R's employees who were not disabled?
    a. C was subject to R's attendance management procedure;
    b. C was on reduced pay;
    c. C was at increased risk of dismissal;
    d. C was prevented from returning to work;
    e. C was prevented from working in another role.
4. Did R know applying any PCP put C to the disadvantages?
5. Would the following alleged adjustments have avoided the disadvantages to C?
    a. progress C's 1st Grievance in accordance with R's grievance policy;
    b. suspend attendance management process pending outcome of 1st Grievance;
    c. allow C to work from home/another office pending outcome of 1st Grievance;
    d. allow C to work on simple tasks only, pending outcome of 1st Grievance.
6. To the extent the above adjustment(s) would have avoided the disadvantages, did R timely implement those adjustments or not?
7. If not, were those adjustments one it was reasonable for R to have to take to avoid the disadvantages, or did R make reasonable adjustments for any disadvantages to C in other ways?
8. If R is in breach, was C's claim presented within 3 months of the date of breach, given effect of ACAS EC provisions (ACAS Receipt 20 Dec 2018, ET1 presented 13 Feb 2019)?
9. If not, it is just and equitable for the ET to extend time in respect of this claim?

Grievance (harassment) [DOC, para. 89]

1. Did R:
    a. fail to deal with C's 4 grievances in a timely fashion?
    b. deal with C's 4 grievances in breach of R's own procedures?
2. Was that conduct related to one/both of C's disabilities?
3. Did that conduct have the purpose or effect of:
    a. violating C's dignity;
    b. creating an intimidating, hostile, degrading, humiliating or offensive environment for C?
4. If yes, what was the date on which that conduct had that purpose/effect?
5. Was C's claim presented within 3 months of that date, given effect of ACAS EC provisions (ACAS Receipt 20 Dec 2018, ET1 presented 13 Feb 2019)?
6. If not, it is just and equitable for the ET to extend time in respect of this claim?