EMPLOYMENT TRIBUNALS

Claimant: Steven van der Bank

Respondent: East Midlands Ambulance Service

Heard at: Nottingham

On: 22/1/2018, 23/1/2018, 24/1/2018

Before: Employment Judge Legard

Members: Ms D Newton
Mr Z Sher

Representatives

Claimant: Dr Ahmed (Counsel)

Respondent: Mr Keith (Counsel)

JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.

2. The complaint under s15 of the Equality Act ('discrimination arising') is not well founded and is dismissed.

3. The complaint under ss.20 and 21 of the Equality Act (duty to make reasonable adjustments) is not well founded and is dismissed.

4. The claim for victimisation is not well founded and is dismissed.

REASONS

1. Issues

1.1 The complaints before the Tribunal were unfair dismissal, disability discrimination and victimisation (the breach of contract complaint having been dismissed upon withdrawal during earlier proceedings).

1.2 Both representatives were very helpful by narrowing the issues and confirming that there were four "live" claims before the Tribunal, namely:

(i) Unfair dismissal.
(ii) s.15 'discrimination arising.'
(iii) ss.20/21 failure to make reasonable adjustments
(iv) Victimisation

1.3 The factual issues giving rise to the above claims were summarised in a letter from the Claimant's representatives dated 10th January 2018 and lettered A1(a) to (q), 2(a) to (b), and 3(a) to (c) in the form of further and better particulars. It is clear that the Claimant has benefitted significantly from having obtained legal representation. Both Counsel were content to work off these 'so called' Further and Better Particulars, for the purposes of this claim.

1.4 Disability itself was not an issue, the same having been conceded by the Respondent, and no jurisdictional issues arose.

2. Evidence

2.1 We heard all the evidence from Mr Keith Underwood, Ambulance Operations Manager for the Respondent; from Mr Greg Cox, a General Manager and Dismissing Officer; from Mr Richard Ellis-Etches, an HR Advisor. We also had before us a witness statement from Miss Annette McFarlane, a Service Delivery Manager, whose responsibility it was to consider the Claimant for reinstatement in March 2017. Counsel for the Claimant confirmed that he did not wish to challenge her evidence and accordingly her evidence was accepted in full by the Tribunal without the

need for her to give oral evidence.

2.2 The Claimant gave evidence. He also submitted, in support of his case, a signed statement from Mr Jeremy Banks, a Trade Union Representative, who had accompanied him to most, if not all, relevant meetings in this case. Unfortunately, Mr Banks did not attend to give evidence. No adjournment was sought. Accordingly the Tribunal could only afford to give the contents of that statement very limited weight. As matters turned out, a potentially complicated situation might have arisen, had he been called to give evidence, given that his alleged actions or inaction came in for stinging criticism from the Claimant himself throughout the course of his oral evidence.

2.3 The Tribunal found all witnesses to have given truthful accounts of the events as they perceived them to be. That said the Tribunal found the Claimant's evidence to contain a number of inconsistencies, none of which were intentional. Where any significant difference arose between the recollection of the Claimant and the Respondent's witnesses (specifically of Mr Keith Underwood) we preferred the evidence of the latter. We were particularly struck by the evidence of Mr Underwood, whom we found to have given an honest and straightforward account of his actions as well as showing empathy and understanding towards the Claimant at all times.

2.4 We had also before us two bundles of documents comprising of approximately 350 pages. We took time to read all documents referred to in the witness statements and reminded Counsel that it was <u>their</u> duty to ensure that our attention was brought to any document not contained within a witness statement which they considered to be relevant to the issues.

3. <u>Findings of Fact</u>

3.1 The following findings of fact are made on the balance of probability and are unanimous. As the name suggests the Respondent ("EMAS") provides ambulance/paramedic service to members of the public in the East Midlands area. It is centrally funded, employs in the region of 3,500

people and has a significant budget.

3.2 The Claimant was employed as a paramedic from the 15th September 2014 until his dismissal which took effect on 23rd November 2016. He was based at the Kingsmill Ambulance Station, which is located within the North Notts area. At the time in question the Area or Locality Manager was Lynne Rutland. The Locality Manager for Central Notts Region and the individual who took the lion's share of the attendance management process was Keith Underwood.

3.3 Shortly after commencing employment the Claimant posted a somewhat ill-advised remark on social media, in which he criticised accident and emergency staff. The matter was the subject of a brief, informal investigation undertaken by Mr Underwood. He spoke to the Claimant, accepted his explanation and apology, and took no formal action. The matter was closed. The Claimant believes that this historical incident may have influenced Mr Underwood's attitude towards him during the subsequent ill-health process. We unhesitatingly reject this. It was a discrete, short-lived issue and had no bearing whatsoever on the later management of the Claimant's ill-health absence.

3.4 On 22nd January 2016 the Claimant experience severe stomach pains and was admitted to hospital. He was subsequently diagnosed with a hiatus hernia and prescribed a cocktail of pain-relief medication. The Claimant, a formal soldier, also suffers from PTSD. That said, the Claimant makes no complaint with regard to how the Respondent, and specifically Mr Underwood, approached or managed the PTSD condition. Indeed, the Claimant, and his Trade Union Representative, both emphasised that, in this respect, Mr Underwood could not have done more.

3.5 The Respondent concedes that the Claimant is a disabled person within the meaning of s.6 of the Equality Act, in respect of both conditions. The Respondent manages ill-health absence by reference to an Attendance Policy to which we've been taken in considerable detail. The process governing long-term absence is to be found at paragraph 17 onwards. It encompasses both an 'informal' and 'formal' procedure.

3.6 Paragraph 82 provides that the trigger for a review meeting is 28 calendar days of absence. It is common ground that the Claimant's first welfare or 'review' meeting (the terms appear to be interchangeable) took place on 24th February. However the first invite letter was sent out on 2nd February by which time, of course, the Claimant had been absent for only 10 days as opposed to the 28 days stipulated by the policy. Beyond there being a technical breach of procedure (which itself is open to interpretation) the Claimant struggled to articulate any disadvantage or detriment caused by such a technical breach.

3.7 The first meeting (labelled 'informal') was conducted by a team leader, Ian Bailey. The Claimant confirmed that he was in significant pain; that a colonoscopy had been performed but, at that point, it was uncertain whether surgery might be required. A further review meeting was scheduled for 30th March.

3.8 In the meantime the Claimant was referred to Occupational Health. The report dated 11th March, authored by Grace Bobga, painted a rather bleak picture describing the Claimant's symptoms has having become worse. The Claimant described himself as remaining in considerable abdominal discomfort which was causing him to walk in a hunched position. Ms Bobga provided a guarded prognosis stating as follows:

"Stephen is deemed unsuitable for work…a return to work will be likely, however timescales are unpredictable at the moment and will depend on further outcome of his review with the specialist."

3.9 Unfortunately, the minutes of the next review meeting, which took place on 30th March, do not appear to have materialised. That said, nothing appears to turn on that particular meeting, which was conducted by another team leader, Ian Moore. At that time the Claimant was under the care of Miss Gemmel, a Consultant General Surgeon. Miss Gemmel's opinion at that time was that the Claimant's condition might benefit from surgery.

3.10 On 28th April the Claimant attended a meeting with Mr Underwood. The

matter had now escalated and this meeting represented his first formal review meeting. Technically this meeting ought to have been conducted by Lynne Rutland. However she was unavailable and therefore the responsibility fell to Mr Underwood. Notes of this meeting are to be found at pages 139(g) to (h). The Claimant informed Mr Underwood that surgery was likely to take one of two forms. If keyhole, his recovery time could be two weeks to one month but if open surgery was required, that could take anything up to six months for him to recover. According to the Claimant the worst-case scenario would be that he would be absent for up to nine months. He also informed Mr Underwood that he had been advised to restrict driving time to a maximum of 30 minutes. The Claimant raised the possibility of undertaking alternative duties at the Respondent's Training Centre at East Wood Halls. However Mr Underwood is recorded as stating that alternative duties would be within the Clinical Assessment Team (CAT) based at Horizon Place.

3.11 A further referral to occupational health was made and, on the same day, the Claimant underwent a skills audit with Mr Ellis-Etches. The Claimant was also placed on the permanent redeployment register (with effect from the 28th April). 'Permanent redeployment' is described within the policy as an "absolute last resort" and "appropriate when it is clear the employee will not be able to return to their substantive post." The policy envisages that an individual will be placed on the register for a period of between four to eight weeks.

3.12 Dr Ahmed, on the Claimant's behalf quite properly cross examined Mr Underwood and Mr Ellis-Etches as to why, in light of the policy, the decision was taken to place the Claimant on the permanent redeployment register at the effective beginning as opposed to the end of the sickness absent management process. Both Mr Underwood's and Mr Ellis-Etches' explanations were straightforward. It was seen as a supportive measure and to ensure that the Claimant did not miss out on any opportunity that might have arisen during the course of his ill-health absence and that might therefore safeguard his employment going forward. His placement on the register was not time limited; there was no obligation upon him to apply for any posts and at no point did the Claimant or his Trade Union Representative ever raise any concern or complaint about being on it. He

would receive priority notification of any vacancy within EMAS and, if appropriate, he could benefit from 'slotting in' without competitive interview. As it was the Claimant remained on the permanent redeployment register for a 26-week period, and for the remainder of his employment, but did not apply for any vacancies that were notified to him during that period.

3.13 On 4th May a further Occupational Health report was received. Mr Scott, the author of that report, described the Claimant as "not fit to return to work". However, his opinion was that the Claimant would be able to return to work to undertake adjusted duties, provided they were sedentary. At that point in time redeployment was not medically recommended.

3.14 On 6th May 2016 a further formal review meeting was convened. Once again the Claimant was represented by Mr Banks. Mr Underwood and Mr Ellis-Etches attended on behalf of the Respondent. According to the Claimant, Mr Banks, on his behalf, attended a so-called "pre-meet." It is not entirely clear what such a pre-meet was designed to achieve. Whilst he remained outside the room, the Claimant alleges that he overheard Mr Underwood say words to the following effect: *"It's obvious that Steve is not getting better any time soon so we should just sack him now."* The Claimant says he was furious when he heard that, remonstrated with Mr Banks when he exited the room but was reassured by Mr Banks' promise to "sort it out".

3.15 An unfortunate aspect of this case has been the Claimant's repeated complaints about the quality of Mr Banks' union representation. The Claimant's clearly articulated position is that he reported concerns to Mr Banks on numerous occasions, none of which (to the best of his knowledge) were ever passed on to any relevant manager within EMAS. Mr Banks failed to effectively advocate his case on his behalf, says the Claimant. Indeed the Claimant visits a significant part of his angst at the door of his Trade Union Representative. Mr Banks did not attend to give evidence. Had he done so, as Dr Ahmed acknowledges, it would have potentially led to a major evidential conflict between the Claimant and his principal witness.

3.16 Be that as it may, the Tribunal was not satisfied that the remarks attributed to Mr Underwood *("…we should just sack him now")* were in fact made. We reached that conclusion for a number of reasons:

- Firstly, the quality of the Claimant's evidence was compromised by the simple fact of him having overheard an alleged conversation from outside a room with a closed door;

- There was no, or certainly very limited, corroboration from Mr Banks, his evidence having not been tested under cross examination;

- Mr Underwood flatly denied having made the remark and we found Mr Underwood to be a credible, unassuming, quiet individual who, at all material times, was strongly sympathetic towards the Claimant and his predicament.

- We find it inherently unlikely that Mr Underwood would say such a thing to a seasoned Trade Union Official. It would be foolhardy to say the least.

- Neither Mr Banks nor the Claimant ever made any complaint about it, formal or otherwise, despite numerous opportunities to do so.

- The grievance process, about which both the Claimant and the Trade Union Representative were familiar, was never invoked. No such remark was alluded to at any stage of the process and the first time Mr Underwood was made aware of the allegation was as part of these Tribunal Proceedings.

- Mr Underwood had no power to sack the Claimant and the alleged remarks were wholly inconsistent with Mr Underwood's subsequent behaviour towards the Claimant which included continuation of the process and extending his sick pay.

3.17 On this occasion (6th May) the Claimant and Mr Underwood discussed concerns regarding the Claimant's ability to (a) drive long distances for periods of time in excess of 30 minutes, and (b) make clinical decisions

both of which were adversely affected by his medication. It was briefly considered whether the Claimant might work for Mr Banks, undertaking an ambulance cleaning role as part of the 'late-ready team.' The Claimant suggested that this role would simply have involved him in cleaning the cab area using a cloth and cleaning spray – ie essentially a sedentary role with minimum physical exertion. However, that is not the way that it was described to Mr Underwood at the time and he, rightly and reasonably in our view, rejected this as an alternative role. Mr Underwood, an experienced paramedic in his own right, took the view that such a role would inevitably involve lifting equipment, squatting and bending and accordingly was wholly contrary to the advice contained within the latest Occupational Health report.

3.18 It was also on this occasion that, for the first time, the Claimant raised the fact that he had previously suffered from PTSD and that his recent difficulties had caused some of those symptoms to re-emerge. The Respondent, through Mr Ellis-Etches, made an immediate and direct referral to the Employee Assistance Programme (EAP) on his behalf and, as stated above (indeed it is a notable feature of his case), the Claimant does not complain at any stage about the Respondent's handling and/or management of his PTSD condition. On the contrary both the Claimant and his Trade Union Representative both declared themselves to be 'happy' with how Mr Underwood approached the matter.

3.19 By this time the Claimant was facing the prospect of going from half to nil pay. Mr Underwood intervened on his behalf, made a direct plea to the General Manager on his behalf and secured an extension to half pay until 23rd June 2016. Indeed Mr Underwood went a stage further in that he authorised the Claimant to take annual leave to Mexico through the month of June during the course of which the Claimant was restored to full contractual pay.

3.20 Meanwhile a further Occupational Health report was commissioned dated 25th May 2016. This report is brief and of limited overall assistance. Amongst other things, it records the fact that the Claimant had become

increasingly demoralised in the knowledge that, despite earlier assurances, he was no longer going to undergo surgery. During the course of all of the evidence, the Claimant also vented his anger at the way in which he felt let down by a number of medical professionals, specifically Dr Gemmel. Whilst the Tribunal has some sympathy and understands his frustration, it is noteworthy, from an employment perspective, that the Claimant's frustrations and complaints are principally directed towards his own side, be that his Trade Union Representative or his own medical team as opposed to the Respondent.

3.21 A further meeting took place on 1st June with the same personnel present. This was now the third formal review meeting, by which time four Occupational Health reports had been commissioned and received. The Claimant had now been off work for a period of approximately five months. The prognosis was pessimistic and, if anything, the Claimant's health had taken a step backwards. The removal of the possibility of surgery had crushed his hopes for recovery, certainly for the foreseeable future. That said, the Claimant was determined to try and safeguard his job and livelihood and there was no question that the Claimant was, at all times, extremely proud of, and committed to, his permanent role. He had, in his words, 'persuaded' his GP to provide the Respondent with a fit note, which indicated that he was capable of undertaking amended duties on a 9 to 5 basis, provided there was minimal driving and no heavy lifting.

3.22 It is important to note that, prior to his ill health absence, the Claimant's paramedic shifts were generally twelve hours in length. A decision was taken to review the Claimant after his holiday and following yet further Occupational Health input. At that point the possibility of the Claimant being temporarily redeployed to the CAT desk at Horizon Place was being mooted. Horizon Place is located in a business park adjacent to the M1 and approximately 40 minutes' drive from the Claimant's home in Mansfield (the time being measured outside rush hour).

3.23 Within the CAT department, there was the EOC (the Emergency Desk where 999 calls were received); the CAT desk itself and also an 'urgent'

desk. We were informed and accept that there are roles at the urgent desk that do not require clinical decision making but instead consist of follow up welfare calls to those who have requested emergency or non-emergency assistance.

3.24 At page 112A of the bundle there is an alternative duties framework which provides important guidance to managers when considering how and where to redeploy disabled or incapacitated employees into alternative roles. Amongst other things it says as follows:

"it is essential that any alternative duty is meaningful and is aligned to an existing role, or project, within approved departmental directorate budgets" and

"priorities are given to operational support roles eg CAT team"

and

"to allow paramedics to continue to utilise their knowledge and skills, and to maximise operational support going forward, initial consideration should be made for these staff working on the CAT team."

It was common ground that the CAT Department would always have vacancies for temporary redeployment given its relative size and staff turnover due to holidays and sickness.

3.25 On the Claimant's return from holiday a further Occupational Health report was commissioned and received. This report, authored by Jane Wharmby, remained pessimistic in tone. It described the Claimant as continuing to be in pain and adversely affected by his medication. Ms Wharmby was not able to advise when he would be fit to resume his paramedic role. That said, the report went on to state:

"If surgery is approved a good outcome is anticipated, but that if surgery is not approved, I am unable to advise regarding a timescale."

The Claimant was considered not currently fit for such a role, and within the same report the disability question was posed and answered in the affirmative.

3.26 We recognise that knowledge of disability does not necessarily crystallise on receipt of expert medical advice. Constructive or imputed knowledge can, of course, crystallise earlier depending upon the circumstances including, for example, whether it was reasonable for a Respondent to have initiated an enquiry or ask the question earlier. That said, in this case, we find that there were no circumstances known to the Respondent any earlier than the receipt of this occupational health report from which it might reasonably have been expected to appreciate that the Claimant might be a disabled person. Accordingly we find that knowledge of disability for the purposes of the Equality Act, whether by reference to s.15 or Schedule 8, crystallised upon receipt of this Occupational Health report on or about 29th June 2016.

3.27 More importantly, in our view, is that this Occupational Health report, which is significantly more comprehensive than its predecessors, paints a somewhat bleak picture and, on any objective view, restricts the Respondent's room for manoeuvre going forward.

3.28 Mr Underwood met with the Claimant, together with Mr Banks, once again on 7th July 2016. This was the fourth formal sickness absence review meeting. The Claimant had now been absent for a period of approximately 6 months. On account of the Claimant's continuing inability to perform his substantive role as a paramedic, and in accordance with the GP fit note and occupational health advice, the decision was taken (with the full agreement of both the Claimant and Mr Banks) for the Claimant to be temporarily redeployed to the CAT department with effect from 11th July. The agreement was that the Claimant would work in a non-clinical decision making role on the 'urgent' desk during work hours that would avoid the necessity for him to negotiate rush hour traffic. It would be a temporary 4-week redeployment, the first week of which would be a trial period. According to the notes of the meeting, the Claimant would work a 6-hour day, Monday, Wednesday and Friday, and reporting to Sue Jevans.

3.29 On 11th July the Claimant duly returned to work and had a 'return to work' interview with Ian Bailey. Mr Bailey confirmed in a discussion note, also signed by the Claimant, that he would undergo a 4-week temporary redeployment on the urgent desk on alternate days, working a shorter shift. The Claimant alleges that, on arrival at his place of work, Miss Jevans appeared unprepared and that his initial introduction to the desk was unstructured. Mr Underwood's evidence was that, following the meeting on 7th July, he had driven over to Horizon Close and spoken directly with Miss Jevans about the Claimant's impending redeployment onto her team. However, Mr Underwood did admit that he failed to provide Ms Jevans with much by way of detail.

3.30 Although we recognise that the CAT environment can be, and often is, frenetic and busy we nevertheless accept the Claimant's evidence on this point. It is clear to us that there were material shortcomings in the way that he was received and inducted into the CAT team. His introduction to the desk was poorly organised and fell significantly short of his reasonable expectations. This undoubtedly added to his level of stress. That said, once again, any concerns that the Claimant may have had, legitimate though they may have been, were not voiced at that point either to the Respondent directly or by his trade union representative on his behalf. Indeed there was only passing reference to this episode within his claim form.

3.31 It was Miss Jevans' idea that the Claimant should work 6 hours from 2pm to 8pm so that he avoided the stress and the time of rush hour travel. The Claimant maintains that those hours were contrary to what was agreed although the minutes of the relevant meeting on the 7th July appear silent on the actual hours. In any event, he says, on advice from his trade union representative, he elected not to complain.

3.32 Unfortunately the Claimant managed just over two weeks in this role before being hospitalised, albeit briefly. He remained off work thereafter until 12th September 2016. The Claimant's entitlement to sick pay expired on 31st July. In the circumstances Mr Underwood took the decision to escalate the matter to what is termed a 'final case review meeting' and at

which possible termination can be considered. The Claimant had already been forewarned of this possibility in previous meetings. According to the policy, the employee should have at least 14 days advance notice of such a meeting and should be provided with relevant documentation within the same time frame.

3.33 Before the final case review meeting the Claimant had been referred to Occupational Health for the sixth time. The Claimant, Mr Banks, and indeed Mr Underwood were all well aware of this fact, although none of them (for reasons unknown sought to bring this to the attention of Mr Cox, whose responsibility it was to chair the meeting. The meeting duly went ahead on 9th September, following an earlier request for a postponement.

3.34 Dr Ahmed, on the Claimant's behalf, sought to cross-examine and later argue that the Respondent failed to provide the Claimant with an appropriate period of advance warning and/or the relevant documentation as stipulated within the policy. We do not agree with this position. We find that the so-called "pack" was sent out within the relevant time scale. It was sent to the Claimant's Trade Union representative which was entirely appropriate in the circumstances and in accordance with the Claimant's wishes.

3.35 We further find that the pack contained all the documentation that was material to the matters under discussion. In any event, we note that no complaint was raised by either the Claimant or his Trade Union representative, and had there been any such complaint, Mr Cox would have unhesitatingly granted an adjournment or, if necessary, a postponement of the hearing. As Dr Ahmed fairly conceded, these matters (together with other procedural issues) were what he termed "barristers points." Dr Ahmed maintained that he was entitled to advance the same notwithstanding the fact that they had not been identified at the time, or within the pleadings, or indeed as one of the issues that was agreed at the outset of this hearing.

3.36 The Tribunal was however concerned by the fact that, at the date of the

meeting, and despite that the fact that occupational referral was 'in the pipeline', the Respondent proceeded to adjudicate the matter and ultimately dismiss the Claimant. We took considerable time in our deliberations over this issue. However, on balance, we found that, when their actions are viewed in the round and against the entirety of the relevant circumstances, the Respondent did act reasonably in determining the matter, without awaiting a further occupational health report. We took into account the following matters:

- First, there were five occupational health reports already before Mr Cox, one of which was dated 29th June 2016, therefore relatively recent;

- Second, neither the Claimant nor his highly experienced Trade Union representative considered this matter to be of any significance or the basis for unfairness or complaint at the time.

- Third, and importantly, the Claimant himself produced an up-to-date medical report dated 8th September from Mr Catton, an Oesophagogastric and General Surgeon. This report, considered by Mr Cox, was pessimistic in content, describing the Claimant as "significantly plagued by the severity of his symptoms" and, despite a recommendation that the Claimant undergo a repeat of his CT scan and the possibility of a subsequent referral to a "pain team", overall Mr Catton could not provide the Respondent with any conclusive diagnosis or prognosis. In short, neither the Claimant nor his medical advisers were any clearer in September as to what the future might hold for him than they were several months before.

- Fourthly, the Claimant's own remarks during the hearing itself painted an equally bleak picture. For example, he described himself as 'not responding to current treatment' and that the medication was still affecting him adversely.

3.37 Mr Cox took time to consider his decision, and having done so,

determined that the Claimant's contract should be terminated on notice, by reason of ill-health capability. At paragraph 22 of his witness statement, Mr Cox stated as follows:

"The ultimate issue for me, and we had discussed this at length, was that the Claimant could give me nothing in terms of a positive date to return. That was the basis of my decision. Had he been able to give us a clear idea of when he might be able to return, I may have decided to afford further opportunity for improvement."

We accept that evidence in its entirety. Furthermore, at his discretion, Mr Cox decided to double the Claimant's notice period to 8 weeks. He did so because he wanted to give the Claimant the maximum opportunity to either find a suitable role through the permanent redeployment register or to ensure that, in the event of fresh medical evidence coming to light, his decision could be reversed and notice rescinded. His rationale for terminating the Claimant's contract, was set out comprehensively in the dismissal letter (see pp208 – 212).

3.38 The Claimant was given a right to appeal but elected not to exercise it. Mr Underwood continued to maintain responsibility for the Claimant's welfare during the notice period and, on 12th September 2016, the Claimant returned to the urgent desk within the CAT team to work out his notice period.

3.39 Meanwhile, and during the notice period, the Occupational Health report dated 20th September was received. This report was particularly troubling in that it described the Claimant as having made *"no significant improvement from his early reported symptoms."* It went on to say as follows:

"The fact that Steven is still taking opiate base medication combined with antidepressants and medication that aids sleep raises concerns whether he should be driving or be at work at all."

Importantly the contents of this report were significantly worse than the way in which the Claimant had presented his own symptoms at the final

case review meeting. The report triggered alarm bells for Mr Underwood who became immediately concerned not only about the Claimant's own welfare but about the potential risk to others – colleagues and road users. Mr Underwood took the decision to effectively remove the Claimant from his duties there and then, albeit on full pay.

3.40 The Claimant underwent a final Occupational Health referral in October 2016, his seventh such referral. This particular referral was triggered by a severe emotional reaction following his dismissal and in the wake of a troubling text message received from his wife. The Occupational Health report confirmed that he suffered a severe emotional reaction to the events in question and was experiencing significant symptoms of depression and anxiety. Counselling and therapy was initiated.

3.41 The Claimant's contract was terminated on 3rd November 2016. On 31st December 2016, he attended hospital by way of a pre-arranged appointment, for 'pain block' treatment involving an injection. This treatment appears to have had a very positive and immediate impact upon his condition, alleviating most of his pain and discomfort there and then.

3.42 At the final case review meeting Mr Cox had indicated that, in the event of the Claimant affecting a full recovery post termination, EMAS might consider reinstatement. On 1st March, some four months post termination, the Claimant met with Annette Mcfarlane, a Service Delivery Manager, who had no prior knowledge of or involvement in the Claimant's case. This was not an appeal but, on advice from HR, a meeting to explore the possibility of reinstating the Claimant as a paramedic. Having considered the matter Ms Mcfarlane took the view that it would not be appropriate to reinstate the Claimant into a paramedic role and wrote to him accordingly. The Claimant, represented by experienced Counsel, elected not to cross-examine Ms Mcfarlane upon the contents of her witness statement (including her rationale for declining to reinstate the Claimant in his former paramedic role). Accordingly her evidence had been taken by the Tribunal as an agreed statement of fact.

3.43 The Claimant, through his Counsel, also sought to criticise the Respondent on account of their failure to consider the Claimant for ill-health retirement. Again, this was not a matter that was ever raised by the Claimant or his Trade Union representative at the time. The Claimant was not eligible for ill-health retirement within the first two years of his employment. It follows that the Claimant would not have become eligible until at least the 15th September 2016 after which of course he had already received notice of termination. Furthermore there was never any prospect of the Claimant successfully applying for ill-health retirement given that, even on his own case, he was 'fully fit' to work following his pain block injection treatment that he received on 31st December. It is important, in our view, to recognise the fact that management of ill-health is a two-way street. There is an obligation upon the employee, especially when he or she is represented at every stage by an experienced Trade Union representative, to raise matters which they consider may be relevant to their circumstances. The Respondent, even one with significant resources at its disposal, cannot be expected to second guess every whim or request from the affected employee. The simple fact is that ill-health retirement was never on the cards.

3.44 In or around June 2017 the Claimant maintains that he secured employment within the Prison Service, subject to the Service receiving a satisfactory reference. Unfortunately we have not been provided with any documentation in support of such an application or offer and importantly we have not seen any documentary evidence from the Prison Service explaining when and/or why such an offer of employment was rescinded. The Claimant alleges that he was asked to provide a reference in support of the post. He referred the Prison Service to EMAS and EMAS produced a reference in the form set out at page 250A. The relevant part of the reference reads as follows:

"Steven was employed on a Permanent contract in the role of Paramedic. Steven left the Trust due to Dismissal."

The author of that reference was an HR Administrator Apprentice, named Jessica Redgate. It was dated 9th June 2017. It did not explain or give reasons as to what led to the Claimant's dismissal.

3.45 On 16th June 2017 Mr Ellis-Etches provided a reference addressed to (we are led to understand) the Prison Service effectively curing the deficiency in the previous reference. It said as follows:

"I am writing following your request for confirmation of Steven Van Der Banks dismissal from his employment from East Midlands Ambulance Service as a Paramedic. I can confirm that this was on the grounds of ill health capability, due to there being no time frame for his recovery. I can confirm that there are no other concerns with Steven and should his health situation change, Steven is welcome to apply for any future vacancies within the Trust."

This was a positive reference, relatively speaking and one designed to alleviate any cause for concern that the Prison Service might otherwise have had.

3.46 The Claimant says that he failed to state on his application form to the Prison Service that he had in fact been dismissed. In evidence he claimed that he 'equated' dismissal with misconduct and not ill-health. The Prison Service, says the Claimant, following receipt of the first reference had withdrawn the offer of employment because of what they considered to be a material inconsistency between his application and the reference provided in support. The Claimant contends that the reference, presumably that from Jessica Redgate, was an act of victimisation on the part of the Respondent.

3.47 Finally, it is noteworthy that there is a further reference dated 19th January 2018 on precisely the same terms as that authored by Ms Redgate. Mr Ellis- Etches' explanation for this is the fact that such references are automatically produced from a computer database.

4. Relevant Law

Discrimination arising from disability

4.1 Disability-related discrimination (s.15) arises where an employer, because of something arising in consequence of a disabled person's disability, treats that disabled person unfavourably, and the employer cannot show this treatment was justified. The EAT in *IPC Media Ltd v Millar [2013] IRLR 707* confirmed that s.15 EA 'does much the same job as was done prior to the decision of the House of Lords in *Lewisham v Malcolm* by s 3A DDA'.

4.2 Section 15(2) of the EqA provides that there will not be discrimination arising from disability if A shows that A did not, and could not reasonably have been expected to know, that B had the disability.

Proportionality

4.3 The test to be applied then is an objective one, and not, as in unfair dismissals, a band of reasonable responses approach - *Hardy & Hansons plc v Lax [2005] IRLR 726* (a case concerning alleged indirect discrimination). The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. In the ECJ case of *Bilka-Kaufhaus GmbH v Weber von Hartz*, *[1986] IRLR 317* (cited with approval by the Supreme Court in *Homer v Chief Constable of West Yorkshire Police*, *[2012] IRLR 601*) the test for justification was said to be: was the treatment 'necessary and in proportion to the objectives pursued by the employer?'

4.4 The availability of alternatives to the discriminatory action being considered will be relevant to the question of whether the means adopted are proportionate - *Harrod v Chief Constable of West Midlands Police [2014] EqLR 345*. 6.6

4.5 There is nothing to prevent an employer relying on 'after the event' justification which was not actually considered at the time - *Cadman v Health and Safety Executive [2004] IRLR 971*. There is no rule of law that the justification must have consciously and contemporaneously featured in the decision-making processes of the employer.

4.6 The availability of alternatives to the discriminatory means being considered will be relevant to the question of whether the means adopted are proportionate - *Harrod v Chief Constable of West Midlands Police [2014] EqLR 345*.

4.7 In considering what evidence is required to establish justification, the EAT in *Chief Constable of West Yorkshire Police v Homer [2009] IRLR 262*, (considered on other grounds by the Supreme Court) stated (at para 48):

"… it is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions'.'

4.8 Similarly at EAT level in *Seldon v Clarkson Wright and Jakes [2009] IRLR 267*, *EAT*, Elias P stated (at para 73):

"We do not accept the submissions … that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature… Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment."

(this decision was later affirmed by Court of Appeal and the Supreme Court).

Ill health and unfair dismissal

4.9 The starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in *Spencer v Paragon Wallpapers Ltd [1976] IRLR 373*. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.

"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?"

4.10 As the EAT has pointed out in *Edwards v Mid-Suffolk District Council [2001] ICR 616* the tests to be applied when assessing whether a dismissal is unfair under the ERA 1996 and unlawful under the Equality Act are different (but see Underhill LJ's comments in *O'Brien v Bolton St Catherine's Academy [2017] IRLR 547*).

4.11 Another case of interest is *B.S v Dundee City Council [2013] CSIH 91.* It concerned an employee with 35 years of unblemished service, dismissed for ill health incapability. He had been off work for approximately 1 year and the OH report had described him as 'making progress' with a possibility of a return to work within a 1-3 month timeframe. The Court of Session, in remitting the matter, held that the Tribunal had attached too much importance to the need to obtain further medical opinion.

4.12 *Schenker Rail (UK) Ltd v Doolan UKEATS/0053/09* (Lady Smith) concerned a production manager dismissed for capability. The Claimant in this case was keen to return to work and had been certified as fit to return to work by his GP at the date of his dismissal. There were competing medical opinions before the dismissing panel but both appeared to suggest that there was a risk of further setback in the event of him being re-introduced into a stressful working environment. Phased return had been considered but rejected. In overturning a finding of unfair dismissal, the EAT criticised the Tribunal for having substituted their view for that of the employer. It was for the employer (not the Tribunal) to

reach its own conclusions on the medical evidence and it was entirely reasonable for that employer to have concluded, in the circumstances, that there was a significant risk of the claimant succumbing to further periods of stress-related illness if he returned to his pressured role.

Duty to make reasonable adjustments

4.13 A failure to make reasonable adjustments can amount to, of course, a separate cause of action. Whether or not an employer failed to discharge its duty to make such adjustments tends to be a fact sensitive issue for the Tribunal. Put shortly, an employer's duty to make reasonable adjustments arises where a provision, criterion or practice ('pcp') is applied by the employer which does or might place the disabled employee at a substantial disadvantage by comparison to those not disabled. If so, it is the duty of the employer to take such steps as it is reasonable to take (in all the circumstances of the case) for it to have to take in order to prevent the 'pcp' having that effect – s.21(1) EqA.

4.14 The guidance given in *Environment Agency v Rowan [2008] IRLR 20* remains relevant and is to be applied, namely that in order to make a finding of failure to make reasonable adjustments there must be identification of:

(a) the provision, criteria or practice applied by or on behalf of an employer; or
(b) the physical feature of premises occupied by the employer;
(c) the identity of non-disabled comparators (where appropriate); and
(d) the nature and extent of the substantial disadvantage suffered by the claimant.

4.15 Knowledge (or rather lack of) is a defence (although the knowledge 'test' is different under Schedule 8 to the EA) and the question of what the employer knew or could reasonably be expected to know is a question of fact for the Tribunal – *Hanlon v University of Huddersfield (1998) EAT/166/98*.

4.16 The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly - *see Smith v Churchills Stairlifts plc [2006] IRLR 41* and *Collins v Royal National Theatre Board Ltd [2004] IRLR 395* (both Court of Appeal).

4.17 As was noted by the House of Lords in its decision in *Archibald v Fife Council [2004] IRLR 651*, (per Baroness Hale at para 47), the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is thus not just a matter of introducing a 'level playing field' for disabled and non-disabled alike, because that approach ignores the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled.

4.18 The Court of Appeal in *Aylott v Stockton-on-Tees Borough Council [2010] EWCA Civ 910*, *[2010] IRLR 994* held that (then DDA s 4A) must be construed so as to comply with the EC Directive which does apply to dismissals. It therefore follows that it may be a reasonable adjustment NOT to dismiss a disabled employee. Given that this comment is made in relation to the duty as interpreted to comply with the Directive, it must also be of application to the duty as set out under the EqA 2010.

4.19 The provisions of DDA 1995 ss 18A and 18B are not re-enacted in the EqA 2010. The matters listed therein remain, however, a useful checklist. Under the relevant Code of Practice there is also a substantial amount of guidance on the circumstances in which a duty to make reasonable adjustments arises, and on how that duty may and may not be met in particular cases given by way of example.

4.20 In *Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)* HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made *will* remove the substantial disadvantage'. The EAT in that case then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant '*a chance*' of getting better through a return to work. In *Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10*, *[2011] EqLR 1075*

the EAT again emphasised that when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring.

Victimisation

4.21 The main 'victimisation' principles were set out by Underwood P in the case of *Pothecary Witham Weld v Bullimore [2010] IRLR 571*. In *Nagarajan v London Regional Transport [1999] IRLR 572* the appellant (who had brought tribunal proceedings against the Respondent) subsequently applied for a promotion and was rejected. The tribunal held that the decision not to promote him constituted victimisation. The House of Lords agreed. Lord Nicholls and Lord Steyn both held that the phrase 'by reason that' required the same approach as the terminology of 'grounds' used in the definition of direct discrimination. In examining the reason for that treatment, the issue of the respondent's state of mind therefore is likely to be critical. Where an employer's ostensible reason for the act complained of is innocent it is necessary for the tribunal to consider the employer's 'mental processes' (conscious or unconscious) and if on such consideration it appears that the protected act had 'a significant influence on the outcome' victimisation is established.

4.22 In *Chief Constable of West Yorkshire v Khan [2001] IRLR 830* the House of Lords held that the Chief Constable's refusal of a reference could not properly be described as having been 'by reason that' the applicant had brought his discrimination claim. Per Lord Nicholls:

> *'29. Contrary to views sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in Nagarajan, a causation exercise of this type is not*

required either by s.1(1)(a) or s.2. The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'

4.23 In *Prison Service v Ibimidun [2008] IRLR 943*, Judge Clark effectively held that the Tribunal had fallen into error by simply 'joining the dots' without enquiring as to the underlying 'reason why' (in that case C had been dismissed because, in the opinion of the dismissing officer, he had brought proceedings in order to harass his employer).

5. Submissions

5.1 Both Counsel provided us with written skeleton arguments, supplemented by oral submissions. We are indebted to both for the careful and balanced manner in which they have represented their respective clients. Neither representative has sought to refer directly to any case law other than a few standard cases set out within the Respondent's skeleton argument.

5.2 Dr Ahmed, on the Claimant's behalf, concentrated his fire on a number of alleged breaches of procedure by the Respondent; argued that the decision to dismiss was taken prematurely and that, where there were differences in recollection, the Tribunal should prefer that of the Claimant over Mr Underwood. By his own admission, Dr Ahmed struggled to articulate the basis of the victimisation complaint, advanced on the basis of "vicarious liability." Dr Ahmed particularly struggled to explain how the Respondent could be vicariously liable for alleged victimisation in circumstances where the author of the reference had no knowledge of the fact that the Claimant had done a protected act.

5.3 On the Respondent's behalf, Mr Keith tailored his submissions to each of the pleaded allegations as set out within the Further and Better Particulars

and argued that the Respondent was entitled to dismiss the Claimant in circumstances where there was a significant period of ill-health absence and no foreseeable improvement. He maintained that the Respondent had gone the "extra mile"; had considered and attempted such adjustments as were reasonable and was fully justified in terminating the Claimant's contract of employment when it did.

5.4 Both Counsel made submissions on 'Polkey.'

6. Conclusions

6.1 Before we adjudicated on the substantive heads of claim, we considered it appropriate to deal first with each separate allegation of unfavourable treatment as set out in the Representative's letter dated 10th January 2018 and as referred to above.

(a) Premature Invitation to Ill-Health Review Meeting

6.2 We have already considered this within our findings of fact above. Arguably this amounted to a technical breach in that on a fair reading of the policy the trigger point for commencing the procedure, including the sending of the invitation, is the 28-day point. That said, for reasons expressed above, we do not consider that this early trigger to have disadvantaged the Claimant in anyway whatsoever. It was not 'unfavourable' treatment and, in any event, was not linked in any way to the Claimant's disability. It could not be said to be "because of something arising in consequence" of his disability. Had the trigger point been brought forward, for example in the context of a short-term persistent ill-health absence case and, as a consequence, the Claimant had suffered a penalty then our conclusions may have been different. In this case, if anything, the early trigger was to the Claimant's benefit in that it led to early intervention and Occupational Health referral.

(b) Referral to Occupational Health prior to the first review meeting taking place.

6.3 We do not consider this to be a breach of policy. Indeed, the procedure

allows for a manager to make such a referral "at any stage within the process." Even if we are wrong on this, it could not be said that such a referral was unfavourable to the Claimant nor could it be said to have been because of something arising in consequence of his disability.

(c) Placement on the Permanent Redeployment Register

6.4 We have dealt with this point comprehensively within our findings of fact above. This was a decision made in order to provide the Claimant with the greatest possible support. It was not time limited as the policy intends it to be and that was to his advantage. In any event, the Claimant never made any application for an alternative role and therefore, beyond simply being on the register, it is difficult to understand how it could amount to unfavourable treatment, whether by reference to s.15 or otherwise. Neither the Claimant nor his Trade Union representative (a common thread to the majority of these issues) ever raised a complaint about it.

(d) Insistence that the Claimant work on the CAT desk

6.5 On the facts, this complaint was not made out. Mr Underwood, rightly and reasonably in our view, rejected the Claimant's request to work on the 'make ready team' and also within the training centre. He rejected the latter request because the Claimant lacked the relevant teaching qualifications. Mr Underwood was also fully entitled to turn down a request that the Claimant perform an administrative role, namely auditing patient report forms on behalf of the Clinical Team Manager. This individual manager had no authority to offer such a role to the Claimant. She was already receiving assistance from a pregnant employee who was not due to begin her maternity leave until September and there was no duty on the part of the Respondent to actively create a role for the Claimant in order to accommodate his disability. Mr Underwood, quite properly and reasonably in our Judgment, offered the Claimant an opportunity to work in a non-clinical decision-making role, within a department that could easily accommodate him and which necessitated a relatively short drive of between 20 to 30 minutes outside rush hour. The decision to offer the urgent desk role was, in our judgment, entirely reasonable and wholly in accordance with the Respondent's policy on

alternative duties, which looked to align such roles to the employee's substantive role. Finally, the Claimant was repeatedly reminded that he could apply for roles that he considered appropriate from the permanent redeployment register.

(e) Ignoring Medical Advice

6.6 There is no evidence of Mr Underwood or Mr Cox ignoring medical evidence. On the contrary, both took full account of the contents of a number of occupational health and other medical reports (for example Mr Catton's report) at each and every stage of the ill-health management process.

(f) Refusing to allow the Claimant to undertake administrative work on behalf of the Clinical Team Mentor

6.7 See (d) above.

(g) Mr Underwood said the Claimant that he would be "sacked there and then"

6.8 We reject this allegation for reasons set out within our findings of fact above (see, in particular, paragraph 3.16).

(h) During the Meeting of 6th May Mr Underwood was "infuriated" by the Occupational Health Report and his behaviour towards the Claimant was "abusive"

6.9 We unhesitatingly reject this allegation. There is no reason for Mr Underwood to have become either infuriated with the report or abusive towards the Claimant. We accept Mr Underwood's evidence on this point and he did not strike us as someone prone to either becoming infuriated by the contents of an Occupational Health report, let alone abusive towards the Claimant. The Claimant never explained what the abusive behaviour was or how it manifested itself. Mr Ellis-Etches, who was present at all these meetings, refuted such allegations and there was no complaint, contemporaneous or otherwise. Even in Mr Bank's untested

witness statement there is no supporting evidence for this allegation.

(i) Revoking of Sick Pay

6.10 This allegation is no longer pursued. However we also note that, on the facts, the opposite was true. The Claimant was contractually entitled to 2 months at full pay and 2 months at half pay. He was not only paid in accordance with his contract but received a discretionary extension to that, following the intervention of Mr Underwood.

(j) Requiring the Claimant to work a shift from 2pm to 8pm

6.11 This was not the subject of any complaint or concern for either the Claimant or his Trade Union representative. Indeed, at the final case review, the Claimant expressed himself "happy with the hours". On all the correspondence sent to the Claimant he was explicitly informed that if he had any difficulties, problems or concerns whatsoever, he need only speak to either Mr Underwood, Mr Ellis-Etches or indeed the Employee Advice Service. Mobile phone numbers and contact details were provided but at no stage did the Claimant, or his Trade Union representative, ever seek to contact any of the above let alone complain. 2pm to 8pm represented a shortened 6-hour shift, and meant that the Claimant could travel to work without having to face rush hour. The GP note, which states 9-6, does not have to be slavishly followed by the Respondent. It is the Respondent's duty to adjust the Claimant's hours in such a way as to accommodate both his wishes and needs as well as the advice of Occupational Health. This they did and at no point did they receive any complaint for having done so.

(k) Dismissing the Claimant without awaiting the outcome of nerve block injection treatment

6.12 Hindsight is of course a fine thing. Mr Cox, on 9th September, was faced with making a decision and, in doing so, he had before him six Occupational Health reports and an up-to-date report from Mr Catton. There was no medical evidence which contained a definitive, let alone positive, prognosis. The Claimant had been absent for approximately eight months. Temporary redeployment had been attempted.

Adjustments had been made to hours and travel times. He was no loner required to undertake clinical decision-making. The Claimant himself was unable to provide Mr Cox with any cause for optimism. Mr Cox could have delayed his decision until such time as the Claimant underwent such treatment, thereby perhaps extending his employment until 31st December but, in our Judgment, he was entitled to make his decision based upon the information to hand at that point in time. The fact that he doubled the Claimant's notice period to eight weeks demonstrated a willingness on his part to revisit that decision if the Claimant, notwithstanding the bleak prognosis, staged a recovery in the interim period. The Claimant's failure and/or refusal to appeal Mr Cox's decision does not assist the Claimant on this point or indeed more widely.

(l) Alternative Duties

6.13 This allegation is also repeated under 3(a) to (c). This has been considered in detail above.

(m) The Failure to provide the Claimant in advance of the final case review meeting with a copy of Mr Underwood's statement.

6.14 This, we find, is a non-point. It is standard practice for management to present their case at the final case review meeting by reference to an aide-memoire. There is no requirement under the policy or otherwise for such a document to be provided in advance. In any event the document in question was no more than a chronological precis of the Occupational Health reports and review meetings. All the information contained within it was familiar to the Claimant and he suffered no disadvantage whatsoever by having it provided on the day. The evidential pack, containing the reports and minutes of meetings and so forth, had been provided within appropriate timescales and furthermore, and once again, no complaint was ever raised.

(n) Failing to permit the Claimant to work out his notice period.

6.15 It is difficult, in our judgment, to see what alternative there was to removing the Claimant from his duties following the receipt of the 20th

September Occupational Health report, a report which, amongst other things, questioned the sense of allowing the Claimant to drive to work, let alone be at work. Mr Underwood acted responsibly and with commendable alacrity in order to protect both the welfare of the Claimant and indeed the other road users and/or colleagues. If this did amount to unfavourable treatment within the meaning of s.15 which itself is debatable, it was inherently justified in the circumstances of the case.

(o) and (p) Failing to reinstate the Claimant

6.16 This allegation was not pursued in the final analysis. In any event, we do not find the Respondent, through Mr Cox, made any promise to do so - merely that they might consider it in the event that the Claimant made a full recovery. As it turned out the Respondent did consider reinstatement, but, for reasons set out by Ms Mcfarlane, rejected it. The Claimant elected not to challenge Ms Mcfarlane on the contents of her witness statement and therefore her reasoning behind her decision to reject an application for reinstatement. Accordingly, this claim cannot succeed.

(q) Stating in a post-termination reference that the Claimant was "dismissed"

6.17 This is repeated under paragraph 2 (a) to (b). This complaint concerns the provision of a reference in response to the request from the Prison Service which we have dealt with above and do so again below.

6.18 Turning then to the substantive complaints before us:

s.15 "Discrimination Arising."

6.19 We find that, for the most part, the Claimant failed to prove that he had suffered unfavourable treatment, let alone unfavourable treatment because of something arising in consequence of his disability. That said, his dismissal was clearly unfavourable treatment. He was dismissed because of his ill-health absence. Such absence arose in consequence of his disabling conditions. Knowledge (or lack of) does not arise and accordingly, the Claimant makes out a prima facie case under s.15 in

respect of his dismissal.

6.20 We accept that the Respondent's stated legitimate aim which is as follows: "to ensure regular and reliable employee attendance so that adequate resources are available, at a reasonable cost to enable the provision of a high quality, efficient and effective service to the public place".

6.21 We turn to the question of whether or not the dismissal was, in all the circumstances, a proportionate means of achieving that aim. We recognise that EMAS is a large undertaking, with significant resources at its disposal, and can "carry" sick or disabled employees for significant periods of time. However, as made clear to us in evidence, no Respondent, whatever its size, can be expected to employ a disabled employee who, notwithstanding adjustments, is incapable of undertaking his substantive role and is likely to continue to be incapable for the foreseeable future. It is entirely proportionate, in our view, for the Respondent, in such circumstances, to dismiss a disabled employee and, in this particular case, the Claimant provided that before they do so it has explored alternatives and taken such medical advice as it is reasonable for it to have taken. We are entirely satisfied that the Respondent in this case did so. The Claimant's dismissal and the respondent's actions leading up to it were necessary and in proportion to the objectives pursued by the Respondent. In short, the Claimant's dismissal was a proportionate means of achieving their legitimate aim and accordingly the s.15 complaint fails.

<u>ss20/21 Duty to make reasonable adjustments</u>

6.22 We are satisfied that the Respondent applied a PCP to the Claimant, namely the requirement for regular attendance and performance of his duties in accordance with his job description. We are equally satisfied that such a requirement placed the Claimant, a disabled person, at a substantial disadvantage when compared with a non-disabled comparator (we apply the comparative test by reference to s.23 EA).

6.23 We find that the Respondent's knowledge for the purpose of such a claim (see the wider definition as set out in Schedule 8 to the Act) crystallized on

receipt of the Occupational Health report on or about the 29th June 2016. We further find that the Respondent, armed with such knowledge, took such steps as it was reasonable for it to have taken in order to avoid the disadvantage. The Respondent referred the Claimant to Occupational Health; extended his sick pay entitlement; placed him on the permanent redeployment register without any limitation of time; found him an alternative, albeit temporary, role within the CAT team; removed any clinical decision making requirements for the role; adjusted his working hours; ensured that he was not driving during rush hour; extended his notice period; referred him for appropriate counselling and treatment in respect of his PTSD and supported him throughout his period of ill health. We dismiss the complaint for reasonable adjustments.

Unfair Dismissal

6.24 The reason for dismissal is clearly ill-health capability and this point was not seriously argued before us. The real question is whether, in treating ill-health capability as the reason, the Respondent (more particularly Mr Cox) acted reasonably within the meaning of s.98(4) ERA. We conclude that Mr Cox did act reasonably. He took into account relevant and up-to-date medical evidence (the failure to await the 20th September Occupational Health report was unfortunate but does not, in our view, render the dismissal unfair). We have looked at the matter in the round, taking into account the totality of the relevant circumstances. The Respondent could not reasonably be expected to have waited any longer, in circumstances where the Claimant had been effectively absent for a period of approximately 8-9 months; was incapable of performing his paramedic role and would remain so for the foreseeable future. In the absence of any suitable alternative roles, we find Mr Cox acted reasonably in concluding that there were no viable alternatives to dismissal. Dismissal was a fair and reasonable option. We dismiss the claim for unfair dismissal.

Victimisation

6.25 The Claimant had, of course, done a protective act in that he had brought

proceedings under the Equality Act. It is debatable whether the reference provided to the Prison Service on his behalf was in fact detrimental to the Claimant, given that it was factually accurate. On balance, however, we are prepared to accept the Claimant's case that the "Redgate" reference was detrimental in that, by omitting to give the reason for dismissal, the recipient of the reference might well take a view adverse to the employee in question. That said, it would appear that the omission was cured by Mr Ellis-Etches' subsequent reference and also arguable that the Claimant was the author of his own misfortune by failing to inform his putative employer that he had in fact been dismissed. All the above however is academic in our view because we are unanimously of the view that there was no connection whatsoever between the "Redgate" reference and the protected act. There was no evidence at all that Ms Redgate, or indeed anyone acting on the Respondent's behalf, whether subconsciously or otherwise, was motivated to provide such a reference because of the Claimant having done a protected act. Accordingly, we dismiss the claim for victimisation.

Postscript

6.26 We simply wish to record our considerable sympathy for the Claimant and his predicament. He has quite clearly suffered as a consequence of the events narrated within this Judgement. Ultimately, however, our task is to determine whether the Respondent has breached its duty under the Equality Act and subjected the Claimant to unlawful treatment. Unfortunately, from the Claimant's perspective, we have concluded that the Respondent did all it reasonably could to support him through what was, on any view, a most unfortunate period of ill-health.

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Employment Judge Legard

Date: 21st March 2018

JUDGMENT SENT TO THE PARTIES ON

24 March 2018

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FOR THE TRIBUNAL OFFICE