Case No: 2302113/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr Anthony Muller

Respondent: London Ambulance Service NHS Trust

Heard at: Croydon **On:** 18 to 22 March 2019

Before: Employment Judge Fowell

Ms E Thompson

Ms H Bharadia

Representation:

Claimant: Mr P Morgan, instructed by Truth Legal Limited

Respondent: Mr N Caidan, instructed by DAC Beachcroft LLP

JUDGMENT

1. The claimant's dismissal was unfair.

2. The complaints of disability discrimination under sections 15 and 20 Equality Act 2010 are upheld.

3. The complaints of direct sex discrimination and direct disability discrimination under section 13 of the Equality Act 2010 are dismissed.

REASONS

Background

1. Mr Muller was employed by London Ambulance Service NHS Trust as a paramedic. On 29 March 2016 he injured himself falling out of the back of an ambulance; he never returned to work and was dismissed about 11 months later, on 28 February 2017. The main problem was his right shoulder, which did not heal. It is now accepted by the Trust that at the time of his dismissal this amounted to a disability and that his managers ought to have been aware of this at the material times, i.e. that they had constructive knowledge of it.

2. The claimant's case is that the problem with his shoulder took a long time to diagnose and so by the time of his dismissal he had not had the surgery he needed, let alone the recovery time. There was a tear in the cartilage around the shoulder joint which was not diagnosed until November or December 2016. A steroid injection was tried in January 2017 which had little effect, and an arthroscopy was arranged for 14 March 2017 – an operation to look at the joint to see if there was a tear. But by then he had been dismissed at a Capability Hearing.

3. The arthroscopy confirmed that there was a tear, and further surgery took place in July 2017 which repaired the damage. After a further period of recovery Mr Muller began applying for jobs as a paramedic again in November 2017, and from about January 2018 went back to frontline duties doing occasional shifts as cover as a member of bank staff with a private ambulance service.

4. His complaint is not just that he was dismissed prematurely, he also says that the Trust had a duty to make reasonable adjustments and should have found him an alternative role while he was recovering. The main option from his point of view was to be placed in the Clinical Hub, which provides telephone support and which is where pregnant paramedic staff are routinely redeployed. The Trust has a policy to that effect, which also says that it applies to those on a capability process.

5. A colleague of Mr Muller's, KBC, is relied on as a comparator. She injured her ankle in December 2016 and was reassigned to the Clinical Hub until she was able to return to the frontline. The Trust says that her case was different; she was not a Clinical Advisor – it was a different role in the Hub - and she had a fixed return date. They were unable to reassign Mr Muller to the Clinical Hub or anywhere else while his length of absence was uncertain.

6. Other options which he suggested included working as a driver in a Fast Response Unit (FRU) - a car which attends the scene of an accident as fast as possible - and being an extra person on an ambulance to mentor trainee ambulance crew members. Mr Muller accepted at this hearing that the FRU option was not suitable given his medical

condition and so we need not consider that any further.

7. The Trust did encourage him to apply for other jobs. They have a redeployment scheme whereby permanent alternative vacancies are notified in advance to those in his position and he applied for a job in the archive department. That came to nothing however: he did not want a permanent reassignment and said as much at his interview, so the interview then came to an end – either by mutual agreement or at his own insistence.

8. The legal complaints presented are of unfair dismissal, direct sex discrimination (in respect of his female colleague KBC being accommodated in the Clinical Hub) and disability discrimination under the Equality Act 2010, specifically:

    a. failure to make reasonable adjustments under section 20;

    b. discrimination arising from disability under section 15, principally in relation to his dismissal;

    c. direct discrimination under section 13 for the same reason.

Legal Framework

9. The applicable provisions of the Equality Act are as follows:

> **13. Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> **15. Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."
>
> **20. Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.

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

10. Hence the essence of direct discrimination is *less* favourable treatment than someone else, such as KBC. The essence of section 15 is *un*favourable treatment because of something arising in consequence of the disability – in this case Mr Muller's absence – and the duty to make reasonable adjustments arises where a provision, criterion or practice puts him at a substantial disadvantage and there is a reasonable step which can avoid that disadvantage.

11. For dismissal on grounds of capability, as here, s98 of the Employment Rights Act 1996 provides that it is for the employer to show that in the circumstances, including their size and administrative resources, they acted reasonably in treating this as a sufficient reason. As an NHS Trust, higher standards are naturally expected. The key question, in such cases, as held by the Scottish Court of Session in **BS v Dundee CC** [2014] IRLR 131, is whether in all the circumstances of the case any reasonable employer would have waited longer before dismissing for lack of capability due to ill-health.

12. There is a further consideration however, which is that the task of the Tribunal is not simply to decide whether the employer should have waited longer, but whether this decision was within the "range of reasonable responses". This reflects the fact that one employer might reasonably take one view of the matter and another might with equal reason disagree. Tribunals are cautioned very strictly against substituting their view of the seriousness of an offence for that of the decision maker.[1] This applies not just to the reasonableness of the decision to dismiss but also to the process followed in coming to that conclusion.[2]

13. In addressing these issues we heard evidence from Mr Muller, and on behalf of the company from Ms Sandra Roberts, known as Taff Roberts, (an experienced paramedic and at the time the Group Station Manager), who prepared the management case for the Capability Hearing, Mr Graham Norton (Asst Dir of Ops, SW London), who took the decision to dismiss him and Mr Andrew Buchanan (then Senior HR Manager for the Trust) who chaired the appeal panel. There was also a bundle of about 400 pages. Having considered this evidence and the submissions on each side we make the following findings.

Findings of Fact

14. Mr Muller's job as a paramedic involved working as part of a two-person ambulance crew. The crew members report to a Team Leader and the Team Leaders report to Group Station Manager, Ms Roberts, who therefore had about 100 staff reporting to her.

[1] For example, by the Court of Appeal in *London Ambulance Service NHS Trust v Small 2009 IRLR 563*
[2] *Sainsbury's Supermarkets Ltd v Hitt [2003] ICR 111*

15. After the injury in March 2016 Mr Muller's left knee improved but his right shoulder did not. There was a sickness absence review meeting on 23 May 2016 with his Team Leader and with Ms Roberts at which they noted that he had been referred for physiotherapy but that this had had little benefit.

16. He remained off sick and three months later there was an Occupational Health review. A report was made on 23 August 2016 following a telephone interview which noted that Mr Muller had received three months of physiotherapy but there was little improvement. His sleep remained disturbed sleep and he had difficulty managing stairs. An ultrasound scan had taken place but it did not reveal what the problem was so he had been referred for an MRI scan. The Occupational Health nurse concluded that it was difficult to predict a likely return date but he should be able to provide reliable attendance following diagnosis and treatment. She also noted that he was signed off sick by his GP until 14 September 2016. (That remained the case until his dismissal).

17. There was then a second sickness absence review meeting with Ms Roberts on 27 September 2016. She was accompanied by Mr Greg Smith, an HR Manager. At that stage he was awaiting a report from a specialist. Ms Roberts told him that she would begin the capability process. That meant that he would have to attend a Capability Hearing with a director, that she would prepare a report for that hearing setting out the management case, and that he might the be dismissed. The main reasons for taking this step, as set out in the subsequent letter, were as follows:

> "1. You have been absent since the 29th March, 2016 and received extensive physiotherapy treatment.
>
> 2. Despite this prolonged treatment your symptoms in your shoulder have not improved.
>
> 3. As such there is no accurate diagnosis and therefore in turn no clear indication of when or if you will be able to return to your role of paramedic at work."

18. That letter makes no mention of redeployment, but he was given a redeployment profile form to complete by Mr Smith. This was with a view to applying for alternative vacancies elsewhere within the Trust, i.e. a permanent or at least a longer-term change of role.

19. The final aspect under discussion at the meeting was a temporary change of duties. Mr Muller says that he asked about light or alternative duties and was told that this was only available if he was going to be off for no more than four weeks and had a definite return to work date. Ms Roberts accepted at this hearing that she gave some thought to the possibility of a temporary return.

20. We accept that there was such a discussion. It would be surprising if there were not. It would be the obvious alternative to suggest and one that Mr Muller discussed with the Occupational Health physician shortly afterwards. It is also in accordance with the Trust's policy, considered below. This aspect is not however mentioned in the outcome

letter, which emphasises instead the lack of a diagnosis and a return date,

21. Mr Caiden's notes of that passage of evidence are quoted in his skeleton argument and agree with out notes, i.e. that there would *generally* need to be a return in four weeks but they (the Trust) take into account all the circumstances of the case.

22. There is no suggestion that any such four-week rule, however flexible, is part of the Trust's official policy. Nevertheless it is clearly capable of amounting to a provision, criterion or practice for the purposes of section 20 of the Equality Act 2010, and we accept that it was applied here, i.e. that "in general" (as in the oral evidence) or "usually" (as in Mr Robert's witness statement) within this part of the Trust at least, temporary reassignment is only offered where there is a return expected within four weeks.

23. The official policy is set out in the Managing Attendance Policy and it is worth setting out the relevant sections. Section 12.4 deals with what to do on receipt of an Occupational Health report. It states:

> 12.4.1 The manager should arrange a meeting with the member of staff.
>
> 12.4.2 …
>
> 12.4.3 The purpose of the meeting is to discuss the member of staff's condition and his or her prognosis, and find out whether there are any ways that the Trust can help. It is also an opportunity to discuss the OHD report, including any recommendations and how these might be implemented.
>
> 12.4.4 The subsequent management response to the sickness absence will take account of the circumstances of the case and may include the need to seek further specialist advice, redeployment to alternative duties on a temporary or permanent basis or an application for ill-health retirement.
>
> 12.4.5 However, when there is little likelihood of the member of staff being able to return to work in any capacity within the Trust and other options have been exhausted, he or she should be referred for possible dismissal on the grounds of capability."

24. Mr Morgan placed particular reliance on this last paragraph while Mr Caiden urged us to read this in context, but it seems to us that the context does not greatly help his case. The clear indication here is that a manager should look first for further specialist advice, then consider redeployment on a temporary or permanent basis. Paragraph 12.4.5 provides for dismissed when these options are exhausted. In ruling out a temporary reassignment at that stage and referring him for dismissal, it is clear that the Trust failed to follow its policy in an important respect. Indeed, their whole approach appears to have been misplaced

25. We note too that the Managing Attendance Policy does not have any guideline timescales. We heard evidence from Mr Buchanan that it would in general be around a year from the start of an absence to a Capability Hearing, and referral would be about

a month, so the referral would be normally be at about 11 months stage. Here it was done at the six-month stage, which is surprisingly early.

26. The Managing Attendance Policy goes on at Appendix 3 to set out the normal approach to redeployment.

> **"Redeployment**
>
> **1. Introduction**
>
> The Trust will endeavour to support employees to return to work following long-term sickness absence by offering temporary or permanent employment wherever possible.
>
> **2. Temporary redeployment**
>
> Temporary redeployment would be suitable for employees who are fit to return to work in some capacity but need a period of transition before resuming the full duties of their substantive post. Temporary redeployment of this kind will generally be agreed. For periods of up to 3 months but may be extended at the manager's discretion.
>
> Employees should be written to outlining the terms of the secondment, including the end date.
>
> **3. Permanent redeployment**
>
> Permanent redeployment is appropriate when it is clear that the employee will not be able to return to their substantive post. in such circumstances consideration of the employee for any appropriate posts will be made prior to advertisement. Redeployment may be arranged on a trial basis of up to 3 months if necessary;
>
> The following will apply:
>
> - individuals will be considered for any vacancy for which they have the necessary skills;
> - the individual will be kept informed of all vacancies as they are advertised;
> - reasonable training will be given to enable staff to meet post requirements;
> - Consideration will be given to any reasonable adaptations that may be necessary to enable staff to undertake posts;
> - If alternative employment is accepted, it will be under the terms and conditions (including salary and grade) for that post;
> - OHD will be asked to confirm that the post is suitable for the individual on health grounds;
> - If there are no suitable vacancies after this period, or when a member of staff does not accept alternative employment then termination of the contract with the Trust

will be considered."

27. Nothing in all this can be faulted. The policy provides that for a recovering employee, whether or not disabled, temporary redeployment would be considered for three months, including with further training if need be, and if they are then not able to return, permanent redeployment can then then be considered. That is all in marked contrast to the approach taken with Mr Muller. Taking those provisions together with section 12.4 quoted above, he should have been referred for specialist advice, then, if and when able, redeployed to alternative duties on a temporary basis, since permanent redeployment was never appropriate unless it became clear that he would be unable to return to *any* duties, not simply those on the frontline.

28. There was a further Occupational Health report in October 2016, following a face to face consultation with a Dr Kurzer. This report recorded that Mr Muller was awaiting a referral to a specialist at the West Middlesex Hospital. Since much turned on the wording we will set it out, so far as relevant, with some added emphasis:

Information and advice given to management

- In regard to the question asked by management, *I am certain that he will be fit to resume his role* as a front line paramedic. However. full diagnosis has been delayed *through no fault of his own*. In my own experience, I have found that scans may be entirely normal and yet when the inside of a joint is visualised there can be a partial tear of a muscle. This is simply missed for technical reasons, such as overlying normal tissue covering the damaged area on a scan.

- *It is not a question of it he returns to his substantive post, but more 'when'.* He is dependent on his assessment by a new specialist and is currently awaiting an appointment.

- Mr Muller mentioned to me that he has completed forms about *a temporary alternative placement. I agree that this is an excellent idea,* still utilising his skills, but avoiding front line clinical duties, which would otherwise be physical. Obviously, it should be to a more sedentary post, *such as the Clinical Hub*. *I expect that even if a diagnosis is made and he does improve, he is looking at a minimum three months until full recovery, if not a little longer.*

Future Plans

As above, Mr Muller's knee appears to be improving with private physiotherapy, but if it does not, I suggest that he discuss with his physiotherapist as to whether he requires referral onto a specialist. Hopefully this will not be necessary. As regards his right shoulder, it does genuinely appear that he was told there was nothing wrong with his shoulder, solely based on the results of scans. In my experience, this is not always so, and it is certainly possible that his new specialist may arrange for an arthroscopy, looking inside his right shoulder under anaesthetic. *In the meanwhile, Mr Muller would be fit to return to alternative placement, not clinical front line duties,* but would still be able to utilise his skills as a paramedic."

29. Our first observation is that this approach is entirely in keeping with the Managing Attendance Policy, particularly in its focus on further investigation and specialist advice. The prognosis however is less clear. It starts with a definitive statement about certainty, which is then qualified by the words "if it does not" improve. We are satisfied that the overall sense of this report however is that he will recover, but that there had not been a diagnosis yet, so the ways and means for that recovery had not been identified.

30. The key question is how long this would all take, which remained uncertain. The report states that it would be a minimum of 3 months. Mr Caiden makes the point that this is a floor not a ceiling. In practice, the recovery took a little over a year but that is no help in working out what Dr Kurzer meant. We think it unlikely that a manager reading that passage would expect it to take longer than a year, given the confidence expressed in eventual recovery, but beyond that it is difficult to say. It is too vague even to be regarded as a ball-park indication.

31. The second point emphasised by the Mr Muller is that this was not his fault, and that is not disputed. The third point is that he was fit to return to an alternative placement, not the frontline, and so this was known to management from then on. That is at odds with his own GPs medical certificates, which continue to certify that he was unfit for work, not even for amended duties. However it does not seem to us that the respondent can excuse its failure to consider a temporary reassignment on that basis, since Mr Muller was asking for that and their own Occupational Health report recommended it as an excellent idea.

32. For the reasons already given, in these circumstances the Trust's policy would indicate that reassignment or redeployment on a temporary basis would then be the appropriate step, rather than pressing on to a Capability Hearing, despite what may be a substantial further absence. We bear in mind that it is important not to substitute our view on such points, but we are simply observing what the Trust's own policy expected of its managers.

33. It is conceded that the Trust and its managers knew or ought to have known about the disability at all relevant times, essentially from September 2016 onwards. Neither Ms Roberts or Mr Norton were in fact aware of this, but there was nevertheless an obligation to take that into account, and so make further allowances over and above this policy if reasonable.

34. Ms Roberts prepared the management case in November 2016, a surprisingly long time before the Capability Hearing the following February. The delay appears to have been simply administrative. Her case summary was criticised on the basis that she noted three times the doctor's comment that he had had little benefit from physiotherapy, three times that there would be minimum recovery period, but not once did she mention any of the three positive comments, i.e. that he would make a return, that the delay was not his fault, and that he was fit for alternative duties. Those criticisms are valid, and we agree that the tenor of the report is very negative. The one page summary gives no

indication whatever that Mr Muller might return to work. The paragraphs summarising Dr Kerzers report simply state:

> 1.6 Paramedic Muller underwent a face to face assessment with Occupational Health on 11th October 2016 where the OH Physician Dr Anthony Kurzer stated that Paramedic Muller had seen little, if any positive benefit from extensive physiotherapy and that even if a diagnosis was made he would need a minimum of three months until full recovery.
>
> 1.7 As Paramedic Muller remains long term sick since 29th March 2016 and is still unfit for duty with no clear diagnosis or likely return to work date he has been referred to a Director on the grounds of capability

35. There seems to us a real risk that even though Mr Norton read the Occupational Health reports in question, his approach to the hearing and the preferred outcome may well have been affected by this one-sided statement of the position.

36. That report was not updated prior to the Capability Hearing. In the meantime Mr Muller had an MRI scan on 30 November 2016 and an orthopaedic appointment on 13 December 2016. Those dates are recorded in the contact sheets between Ms Roberts and Mr Muller, but she does not appear to have followed up either appointment to see if his medical position had changed.

37. During this time Mr Muller was supplied with lists of vacancies, and it was a matter for him which roles he applied for. One was for a job as Archives Officer on 7 December 2016, for which he was interviewed on 15 December. On his account he felt he was misleading the panel by saying that he wanted a permanent role, and so they agreed to terminate the interview. Internal emails to the HR department suggest that their view was different, that he pulled out because he would have a £600 per month drop in wages. That is true. The normal sick pay arrangements provide for six months full pay, and then six months half pay, but because this was an accident at work, Mr Muller was in receipt of injury payments, topping his salary up to about 80% of his previous level. He agreed that salary played a part in his decision and there had been some discussion with HR about whether he could keep his injury payments.

38. It is clear, from a fair reading of the Managing Attendance Policy set out above that it was never intended that an employee would find themselves in this position. Permanent redeployment is the final stage when it is clear that temporary reassignment was not viable and he would never be able to return to his original role. It is not clear what happened at the interview but we take the view that he was within his rights to say that he should not go back to a permanent job. Throughout this process his priority was to return to work as a paramedic. He may have felt pressured to apply for this permanent role, and may well have gone along hoping to discuss how it could be made temporary. Equally, it seems that the panel did indeed want a permanent person. By one means or another the interview was wound up and we prefer the view that it was by mutual agreement, but the significance of this episode is very limited. It is not suggested by the Trust that this was a reasonable adjustment on their part, and in any event we find

that it was reasonable for him to refuse as it was not a suitable alternative arrangement.

39. As already noted, the Trust has a policy on reassigning pregnant paramedics to the Clinical Hub – Policy and Procedure on the Redeployment of Pregnant Operational Paramedics. We shall refer to it as the Pregnancy Policy and this too is a very relevant document. It provides:

> **"1. Introduction**
>
> 1.1 The Trust wishes to ensure that Paramedics have the greatest opportunity to practice and maintain their clinical skills.
>
> 1.2 In cases when pregnant women are unable to continue on operational duties than the Trust has a responsibility to ensure, as far as reasonably possible, that they continue to carry out duties commensurate with their level of pay (including shift allowance) and to ensure best benefit patient care.
>
> 1.3 In line with this requirement the Clinical Hub has been identified as the most appropriate workplace for pregnant paramedics. It is recognised that other options may be identified in future. …
>
> **2. Scope**
>
> 2.1 This Policy primarily covers arrangements for paramedics and redeployment to the clinical Hub but the principles may be applied to other staff groups and workplaces.
>
> 2.2 *The Policy may, in particular, apply to paramedics who are long-term sick and away from undertaking full clinical duties, and subject to the necessary checks, able to undertake alternative duties in the Clinical Hub (subject to the same requirements set out in this document).*
>
> **3. Objectives**
>
> 3.1 The objective of this policy is to set out the procedure and considerations to expedite alternative employment for pregnant paramedics.
>
> 3.2 To assist paramedics to maintain their clinical skills.
>
> …
>
> **5. Procedure**
>
> 5.1 The manager, on being informed of the employee's pregnancy should contact the Clinical Hub manager and provide her/him with the employee's name, contact details and the planned final date of working before maternity leave.
>
> 5.2 Clinical Hub placement
>
> 5.3 The employee will be contacted and undertake an assessment for the Clinical Hub. A Paramedic who is successful at assessment will continue in Clinical Hub up to the point

that she commences her maternity leave.

…

5.5 A paramedic is unsuccessful at assessment will, in most cases, undertake a short period of training and other assessment. If the Paramedic is unsuccessful at this second assessment and other redeployment options will be considered."

40. The policy is therefore of wider application than for pregnant employees and shows that as a matter of course those in Mr Muller's position ought to have been contacted, invited to undertake an assessment, and if unsuccessful given a short period of training and another assessment. The aim is at least in part to maintain their clinical skills. There was no such approach in Mr Muller's case but a vacancy was advertised in the Clinical Hub on 20 December 2016 and he applied for it that day. He was not shortlisted. The reason given was that he did not meet one of the essential criteria and in practice this seems to mean that he could not carry out two days' work each month on the frontline. Mr Buchanan's evidence was that he expected that a paramedic would meet all of the other requirements.

41. The evidence of Ms Roberts was that, as far as she knew, pregnant paramedics had a dispensation so did not have to go on the frontline for these two days, although she had never referred someone to it. It follows that applying this requirement to him was a further departure from the Pregnancy Policy which, as someone undergoing the capability process, applied equally to him.

42. During the course of the hearing the Trust proposed that there might have been another reason - his lack of recent paramedic experience - but we heard no evidence about the assessment carried out and that also appears to be at odds with the policy in that it aims to help staff maintain their clinical skills and if need be for them to be retrained and reassessed.

43. This treatment of Mr Muller has to be contrasted with that of the female colleague, KBC. She provided a statement, in the form of answers to questions, seemingly put forward by Mr Muller himself, but did not attend the hearing. According to that statement she suffered an injury in December 2016 and was off sick for a week. She was then given office duties pending operation to her ankle in February 2017. After that, she was off sick again for four weeks, and then had four weeks of light duties. There were no sickness reviews but she too was told by Ms Roberts that she could only be reassigned to temporary duties within the Clinical Hub for four weeks, so after that she was off work sick. She then, according to her statement, "kicked up a fuss" and was put into the Clinical Hub. There was no interview and no assessment.

44. Ms Roberts disputed that last aspect, saying that she arranged an interview for KBC. An interview may have been arranged but there is no other evidence from the Trust to show, for example, that there was an interview, or an assessment, or even a vacancy, and so we are inclined to accept KBC's written account on these points.

45. That evidence also mentioned that she was put into a different role as HCPL – initials which were never fully explained but seem to involve Health Care Professional, and this involved liaising with other health professionals rather than giving clinical advice directly to those in need. She left that role in December 2017, comfortably over six months after this placement.

46. Mr Muller, by contrast, met with a series of obstacles that did not apply to KBC and would not have applied to a pregnant employee. The advert for this role in the Clinical Hub to which Mr Muller responded also stated that the successful person did not need to be fully fit immediately but within six months, so for that reason too the need to be able to undertake frontline duties ought not to have been a bar.

47. A further Occupational Health report was prepared on 24 February 2017, shortly before the Capability Hearing, this time with a Dr Gaal. It records that Mr Muller finally saw a shoulder specialist in November 2016 – although it seems to us more likely that this was the orthopaedic appointment on 13 December 2016 – and that this diagnosed the "partial thickness supraspinatus tear" in the right shoulder. That led to the steroid injection in January "but essentially he remains troubled by discomfort and a consequent lack of mobility and strength." The report continued:

> "His next clinical review appointment is scheduled for 14th March 2017, where possible further treatment options are likely to be discussed (i.e. arthroscopy, with or without repair of the tendon and with or without decompression of the shoulder joint).
>
> **Summary and Fitness for Work Recommendations:**
>
> Anthony remains unable/unfit to return to his normal frontline role.
>
> However, he is fit for alternative, non-frontline duties (not involving heavy lifting).
>
> Has the option of working on an FRU been considered?
>
> …
>
> Recovery is anticipated for Anthony, but this will depend largely on further exploration of treatment options and their effectiveness. This will be informed by his next specialist clinical review in March 2017.
>
> I do not anticipate that a full recovery is likely within the next 2-3 months, unless Anthony can get access to faster treatment services."

48. The main changes therefore were that he had by this time received a diagnosis, an injection had been tried but was unsuccessful and so he needed another specialist clinical review where further treatment options would be discussed. That review sounds from this description more like a discussion than any active treatment although in fact it was a surgical examination.

49. It also mentions the FRU role, but Mr Muller also accepted during the hearing, having

heard the evidence from Ms Roberts on this point, that this was not viable, and we agree. He would be a first responder dealing alone with all manner of emergencies and required to manage a good deal of heavy equipment.

50. As to other roles, it is accepted by Mr Muller that one he applied for unsuccessfully in transport was not suitable.

51. The other alternative raised by Mr Muller is that he could have been a third member of an ambulance crew. When paramedics are returning to work after absence, or being trained, they may go out with a third person. There will be two who are being supervised and one supervisor. Mr Muller says he could have done this, and done most of the clinical tasks, just not the heavy lifting. The Trust's witnesses disagreed. They were firmly of the view that all members of a crew have to be fully fit in case of emergencies, and we accept that that is the case. It will simplify matters therefore to state at this stage that the only realistic possibility of a temporary role was in the Clinical Hub.

52. The Capability Hearing took place on 28 February 2017. Mr Norton was accompanied by a Ms Greta Jenkins from HR and Mr Muller by a Trade Union representative. Ms Roberts presented the management case, as described above. She also provided the new Occupational Health report, and so these various issues were gone over. The decision appears to have been the result of a discussion between Mr Norton and Ms Jenkins rather than a sole decision but no complaint was made about that.

53. The fact that there was no return to work date was considered a bar to any reassignment, a point repeatedly emphasised in the evidence before us. It was also felt that there had to be a vacancy, one could not simply be created for him. The only realistic option was in the Clinical Hub and Mr Muller had been turned down for that role. It is also apparent that Mr Norton did not approach the matter on the basis that Mr Muller had a disability, and said in his evidence that the word was not mentioned at any stage.

54. He did not think it appropriate either to adjourn until after the assessment on 14 March 2017 as it was just a meeting to consider options. His reasons, as summarised in his witness statement were that:

    a. Mr Muller had been off work for 11 months;

    b. There was no return to work date;

    c. His GP had not signed him fit for amended duties; and

    d. Ms Roberts had already looked into alternative duties.

55. The outcome letter in fact records that they were 11 months on and no further forward, which was not in fact correct, as it had taken 8 or 9 months to obtain a definite diagnosis and now treatment was in hand.

56. There is some dispute over the notes of that meeting. They record that he was asked if there was to be *further* treatment apart from the injection and he said no. He denies this, and it seems to us that there must have been some misunderstanding on this point. The injection was the previous month so it may be that this was discussed in the context of the treatment he had had to date, rather than in the future; but the fact that he had the further appointment the following month was known and was stated in the recent Occupational Health report. Given how recent this was, this must have been the key document under consideration at that appeal and Mr Norton was aware of it, so on any view he knew that there was to be further treatment.

57. The reluctance to adjourn for a short further period for this further appointment struck us as significant. Although we must not substitute our view, the fact was that Mr Muller's treatment was now on track, after the long period without a diagnosis, and so the Trust's policy in those circumstances required a different approach. There is no recognition of this fact anywhere in the management case or the outcome letter. Instead there are repeated references to the length of the absence overall, and Ms Roberts stated at this hearing that she thought the length of his absence had been sufficient – a phrase indicating a backward rather than a forward-looking view.

58. The dismissal letter did not follow until 10 March 2017, a few days before that next appointment. It dismissed him on notice, expiring on 23 May 2017, so by the time of his appeal hearing on 30 June 17 he had already left the organisation. Again the delay appears to have been simply administrative.

59. At this meeting the management case was presented by Mr Norton. No updated Occupational Health report had been prepared but there had been a change in the GP medical certificates; the latest one, dated 4 May 2017, did state that he was fit for amended duties.

60. Mr Muller attended with his representative and among other points they raised the fact that Ms Roberts had not searched for any alternative light duties for him. The view of the panel was, as before, that the Clinical Advisor role was not suitable because of the requirement to spend two days a month on the frontline. It does not appear that the specific application of the Pregnancy Policy was raised at that hearing, and so it was not put directly to the panel that the Trust's policy expected those in the capability process to be assessed for this role, or that pregnant workers had a dispensation from frontline duties, or that the same should apply to him anyway as a disabled employee. That is unfortunate, but it does not relieve the panel of their obligation to consider and apply the Trust's policies.

61. The ultimate conclusion was very much as before: that there was no definite return to work date and this was now 15 months on and nothing had really changed. They noted that surgery had been arranged for 20 July 2017 but record Mr Muller as saying that it was exploratory.

62. That operation was not merely exploratory. The repair was done. Mr Muller's consultant's advice about it was given in writing to his GP on 15 March 2017 and explained that a repair would be attempted but that the prospects of resolving everything were 50/50. That letter was not provided to the panel but we doubt in those circumstances that they were told that it was merely exploratory, although the word may have been used to indicate this uncertain position, rather than suggesting it was just an examination.

63. So at that stage there was, as a minimum, a significant further step to be taken as part of the process of treatment a few weeks later, which might well have resolved things – as indeed it did – and allowed a return to work within a reasonable further period. It is certainly not the case therefore that all options had been exhausted, as the Managing Attendance Policy requires or expects.

64. A further passage from that policy deserves to be set out. At paragraph 13.6 it details the considerations to be taken into account at the dismissal stage, which of course only follows the failure of permanent redeployment. It states:

> "In considering dismissal, the Chair of the panel should take into account: the member of staff's length of service; past performance; likelihood of a change in attendance; the availability of suitable alternative work and the effect of past and future absences on the organisation. If the eventual decision is to dismiss, then the Chair should first satisfy her/himself that the Trust acted reasonably and that the member of staff has been given sufficient opportunity to improve their attendance or in the case of ongoing long term absence, to return to work."

65. It is clear from this that a person's past attendance record is a factor, but very much a subsidiary factor. The rest of the options are predominantly forward-looking and dismissal is implicitly a last resort. Taking them in turn:

    a. Mr Muller had 17 years' service;

    b. there was no concern over his past performance;

    c. there was more than a likelihood of a change in his attendance – it had been regarded as a certainty for some time;

    d. suitable alternative work was available in the Clinical Hub;

    e. but, he had had a length absence and this was likely to continue for a matter of months.

66. The balance of factors appears therefore firmly against dismissal, and in any event he had not been given sufficient opportunity to improve his attendance by a return to work in the Clinical Hub.

67. Finally, we note Mr Buchanan's evidence was that he and the panel actually knew of

the disability - the appeal notes mention reasonable adjustments repeatedly - but it does not appear that they realised that Mr Norton was not when he made his decision, and that a fundamental reassessment might be needed. The significance of having a disability is less marked in a case where the employer has a policy of this nature which makes or appears to make every allowance for this situation, but the duty to make reasonable adjustments means that even a policy of this sort may have to be relaxed or disapplied if it would place the employee at a substantial disadvantage.

Application of the law to the facts.

68. We will start with that complaint, the main one advanced by Mr Muller, the failure to make reasonable adjustments. The Trust argues that the duty never arose in this case as the duty is not triggered without a return date, following the case of **Doran v Department of Work and Pensions** UKEATS/0017/14. That was factually similar, and it was held that the duty was not triggered because the claimant would not have become fit to work with the application of reasonable adjustments. She had given no sign of return "and painted a picture that she was not coming back any time soon". In short, there was no duty to make reasonable adjustments as they would have done no good. That is not the case here. Mr Muller was asking for an assignment to the Clinical Hub. Whether that is regarded as a reasonable adjustment to the normal policy or simply the application of the policy, it would have enabled him to return to work. The stated aim of temporary reassignment under the Managing Attendance Policy was to assist with achieving the outcome of a return to work. Hence, we do not accept that it would be in any way futile to have done so, and so the duty to make reasonable adjustments was engaged. This argument appears to have more ingenuity than force, and it is surprising that an NHS Trust would seek to argue, in a case involving a fairly typical example of long-term absence, that it had no duty to consider reasonable adjustments.

69. The starting point under section 20 Equality Act 2010 is to identify the provision, criterion or practice. Those relied on are set out in the list of issues and the first is the four-week point – the practice that temporary reassignment is only available if a return to work was expected in the next four weeks. It is clear that there was such a practice in this Trust, although it is not part of the Trust's formal policy. It seems to us to make no difference whether this was an inflexible rule as suggested by Mr Muller or a general approach, as we find. The provision, criterion or practice is the same in substance, and that was the reason given for not exploring a transfer to the Clinical Hub at that stage, as would have happened for a pregnant employee. The duty in respect of a disabled employee is no less onerous. Ms Roberts had constructive knowledge of the disability, i.e. the Trust has conceded that she ought to have known of it, and had she actually known of it, it seems to us inevitable that, if properly advised, she would have waived this requirement. Failing to do so placed him at a substantial disadvantage and this would have been obvious.

70. The next provision, criterion or practice relied on is the Managing Attendance Policy itself. That appears to reflect some confusion on the claimant's side. The Policy itself

cannot in our view be criticised. It provides for disabled employees and did not put him at any disadvantage. It was only the failure to follow it that did so.

71. The provision, criterion or practice in such cases can be quite general, as the Court of Appeal made clear in *Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA*. In that case Elias LJ held that the appropriate formulation was that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That was the provision, breach of which might end in warnings and ultimately dismissal. It was clear that a disabled employee whose disability increased the likelihood of absence from work on ill health grounds, was disadvantaged in more than a minor or trivial way.

72. That is therefore the normal position countenanced by the Equality Act 2010 and that appears to us the main and obvious provision, criterion or practice in this case. It may be said that that is not the provision, criterion or practice contended for by Mr Muller in the list of issues. The importance of such lists was reinforced by the Employment Appeal Tribunal very recently in **London Luton Airport Operations Limited v Levick** UKEAT/0270/18/LA, which held that

> "Parties are entitled to expect that employment litigation will be conducted in accordance with issues which have been defined at a preliminary hearing. The list of issues can of course can be amended or augmented; but whether to do so is a matter of case management which should not be ignored."

73. That case involved a major change to the issues. Despite objection from the respondent, and without any amendment of the ET1 or the list of issues, the Employment Judge adjudged that the Claimant was a disabled person by reason of suffering with depression, although his claim was to be suffering a physical impairment. Substituting the PCP in this way does not seem to us to be in the same category and no prejudice can result to the Trust from this different formulation.

74. Several others were advanced, although these seems to be subsidiary. One is having to sign up for permanent redeployment, which again is a departure from the Managing Attendance Policy. That should have been avoided but there was no evidence that this was a practice or informal rule. There was also the requirement that he be fit within six months of appointment to the Clinical Hub. That is an express provision, although it is arguable that it did not place Mr Muller at a substantial disadvantage as he might well have been able to meet this requirement, depending on when he was appointed. The next provision, criterion or practice relied on, and the main reason that he was not appointed to the Clinical Hub, was the insistence that he be able to do frontline duties for two days a month. That does appear to be a PCP, one that placed him at a substantial disadvantage and one that could easily have been waived or avoided, as it was for pregnant paramedics. Lastly there is the requirement that there be a vacancy in the Clinical Hub.

75. Drawing these threads together therefore, the relevant PCPs therefore are:

    a. the requirement to maintain a certain level of attendance;

    b. the general rule that temporary reassignment is not allowed unless there was a return to work date in the next four weeks;

    c. The criterion of spending two days per month in the Clinical Hub on frontline duties

    d. The need for there to be a vacancy in the Clinical Hub before staff can be reassigned.

76. No significance appears to us to attach to the fact that paramedic "lines", i.e. their place on their regular crew, are normally only kept open for a year.

77. In each case, it appears to us reasonable to have removed the substantial disadvantage in question, i.e. by waiving the unwritten four week rule or the other obstacles to reassignment to the Clinical Hub. Although not formally admitted, it also seems self-evident in the circumstances that if the Trust's managers ought to have known of the disability, they ought also to have known that these requirements placed Mr Muller at a substantial disadvantage, and so there was here a failure to make reasonable adjustments.

78. Turning to the duty under section 15 of the Equality Act 2010, discrimination arising from a disability, the unfavourable treatments have been set out extensively in the list of issues. There are 14 of them, although most are procedural, such as having to attend a sickness review meeting in September 2016. That seems to be part of the normal process and as stated, no objection can be taken to the policy. The scheme section 15 is that any unfavourable treatment has to be because of "something arising" in consequence of the disability, i.e. Mr Muller's absence from work. Again, it seems an overcomplication and inaccurate to suggest, for example, that he was not reassigned to the Clinical Hub "because of" his absence. His dismissal on the other hand clearly was unfavourable treatment because of his absence, which brings us to the main question which is whether this decision was justified, i.e. that it was a proportionate means of achieving a legitimate aim.

79. Here, the aim is accepted, to manage sickness absence appropriately to ensure that it did not have a detrimental impact on other staff and to ensure that services were delivered to the public at an appropriate standard. As to proportionate means, the EHRC Employment Code gives some guidance. It notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

80. Mr Caiden referred us to the Supreme Court decisions in **Homer v Chief Constable of**

West Yorkshire Police [2012] UKSC 15 and **Seldon v Clarkson Wright and Jakes** [2012] UKSC 16 which found that there was a balance to be struck between the discriminatory effect and the aim being pursued. Further, in **Kapenova v Department of Health** UKEAT/0142/13/SM the Employment Appeal Tribunal reiterated this and held there was no simple rule that the defence must fail it there was a less discriminatory means.

81. The first point we would make in addressing this balancing exercise is that there was no specific evidence of any particular impact to the Trust caused by Mr Muller's absence, although Mr Norton gave evidence about his experience of the disruptive effect of absences in general. Mr Muller says on the contrary that there are arrangements for cover and so the service continued at a satisfactory standard. No doubt there was some strain on staff and resources, but it is not the sort of case in which an employee's absence causes any acute problem for the organisation that cannot be managed over the short or even medium term.

82. Secondly, the Managing Attendance Policy was designed expressly to achieve this legitimate aim. For the reasons already given, elements of the policy were overlooked or simply disregarded, including in making the decision to dismiss, particularly in the premature referral to a Capability Hearing, the failure to allow reassignment to the Clinical Hub and in applying section 13.6 of the policy, quoted at paragraph 63 above, which sets out the criteria for dismissal. The failure to apply that policy (and the Pregnancy Policy) made the decision disproportionate in this case and so unjustified.

83. The last complaint of discrimination was of direct discrimination on grounds of sex and disability. This was not pursued with any conviction. Mr Morgan conceded that there was no direct evidence of any link between Mr Muller not being assigned to the Clinical Hub and being male, whereas "something more" is required, and there is nothing to suggest that the label of disability which attached to Mr Muller led to the decision to dismiss him. Indeed, Mr Norton was unaware of it. Those complaints are therefore dismissed.

84. Turning to the complaint of unfair dismissal, we will try to avoid repeating our previous findings and conclusions. The nub of the matter is that the Managing Attendance Policy applies to all employees, regardless of disability, and so the fact that Mr Muller's condition amounted to a disability made no difference to the approach required and the failures identified. A reasonable employer of this sort (i.e. one of the same size and administrative resources, having these policies) would therefore reassigned to another role, would have waited longer, and taken into account the same factors before dismissing him. No reasonable employer would have disregarded these policies, at least not without some good reason, and so even applying the range of reasonable responses test, the dismissal has to be regarded as unfair.

85. In practical terms, had he been reassigned to the Clinical Hub and treatment options explored, he would have been able to keep his job as a paramedic. We make no definite

finding yet about his likely return to frontline duties, although its seems that he would have been able to do so at some point between November 2017 and January 2018. Given his 17 years' service, and given that the overwhelming predominance of the NHS as an employer in the health sector in the UK, he would in our view almost inevitably have remained in their employment today, and the chance that he would have been dismissed if the policies had been followed in this way can be excluded.

Time Limits

86. The Trust's case is that any act or omission before 27 February 2017 is out of time, i.e. outside the primary time limit for bringing claims, allowing for early conciliation. There is no issue that the dismissal was in time, and so the unfavourable treatment under section 15 Equality Act 2010 was too. The failure to make reasonable adjustments as identified above was also a continuing act. Clearly, the requirement to maintain a satisfactory level of attendance continued until dismissal and so the duty to make reasonable adjustments likewise continued.

Remedy

87. This hearing was not listed to deal with remedy, and complex pension calculations may be required. Accordingly, further case management was carried out and a remedy hearing has been listed on **16 May 2019** at this hearing centre. We therefore made the following case management orders by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The claimant is to notify the respondent in writing by 4pm on **29 March 2019** whether he seeks reinstatement, re-engagement or compensation only.

2. If the claimant seeks reinstatement or re-engagement, the respondent is to notify the claimant and the Tribunal by 4pm on **5 April 2019** in writing of its position.

3. The parties are ordered to complete disclosure of documents relevant to remedy, by list and copy documents, so as to arrive on or before **19 April 2019** including details of the claimant's injury allowance, efforts to find alternative employment and any state benefits received.

4. In relation to pension loss, the parties are referred to the Presidential Guidance

   https://www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions

5. Chapter 6 of the above document sets out the case management principles and at page 80 the relevant information for calculation of pension loss is identified, as discussed at the hearing, which must be disclosed so far as relevant.

6. The respondent has primary responsibility for the creation of the single joint bundle of documents on or before **3 May 2019**, limited to 100 pages plus Tribunal documentation.

7. Both parties may present further witness evidence, if so advised. Any further witness statements shall be exchanged so as to arrive on or before **10 May 2019,** limited to 3,000 words in total on each side.

Employment Judge Fowell

Date 23 March 2019