# EMPLOYMENT TRIBUNALS

**Claimant**
Mr. P. Holland

**Respondent**
Buckinghamshire and Milton Keynes Fire Authority

v

**Heard at**: Watford

**On**: 25 to 29 March 2019 +
in chambers: 7 and 15 May 2019.

**Before:** Employment Judge Heal
Ms J. McGregor
Mrs A. Brosnan

**Appearances**

**For the Claimant:** Mr. E. Kemp, counsel
**For the Respondent:** Ms E. Misra, counsel

## JUDGMENT

The complaints of unfair dismissal and disability discrimination are dismissed.

## REASONS

1. By a claim form presented on 7 December 2017 the claimant made complaints of unfair dismissal and disability discrimination.

***Evidence***

2. We have had the benefit of an agreed bundle in two volumes running to 762 pages. We have also had a medical bundle running to 133 pages. Pages 74a and b and page 434 a were added to the main bundle in the morning of the second day of the hearing, and 187a was added on the morning of the third day of the hearing by the respondent, all by consent.

3. We have heard evidence from the following witnesses in this order:

Mr Paul Holland, the claimant;
Mr Trevor Newton, retired Deputy Chief Fire Officer and sometime National Official for APFO;
Mr. Glen Ranger, retired Deputy Chief Fire Officer;
Mr Michael Osborne, Deputy Chief Fire Officer/Chief Operating Officer;
Mr Julian Parsons, Head of Service Development;
Mr Neil Boustred, retired Head of Service Delivery;
Ms Kerry McCafferty, Head of Human Resources and
Mr Jason Thelwell, Chief Fire Officer and Chief Executive.

4. Each of those witnesses gave in evidence in chief means of a prepared typed witness statement which we read before the witness was called to give evidence. The witness was then cross-examined and re-examined in the usual way.

***Issues***

5. The issues had been broadly identified at a preliminary hearing on 4 May 2018. On the second day of this hearing we spent time with the parties working through those issues to ensure that we knew exactly what this case was about before we started to hear oral evidence.

6. The issues agreed with the parties are these:

*Unfair dismissal*

6.1 It is not in dispute that the claimant qualifies to claim unfair dismissal, his claim was in time and he was dismissed.

6.2 What was the reason for the claimant's dismissal? The respondent did not rely upon misconduct, but upon reputational damage/future reputational risk associated with the claimant's continued employment. The respondent says that this is 'some other substantial reason.'

6.3 The claimant agrees that 'some other substantial reason' is potentially fair but disputes whether this case was even potentially a case of 'some other substantial reason'.

6.4 The claimant says that the reason for dismissal was wrongly categorised. The claimant disputes that the respondent believed that there was reputational damage, i.e. that that was in fact the reason for the dismissal. The claimant does not put forward any alternative or ulterior reason for the dismissal but says that the letter of dismissal gives the reason as conduct.

6.5 If the respondent proves the reason for dismissal, was the dismissal unfair in that:

6.5.1. The respondent should have followed a process akin to a capability process as an alternative to the disciplinary process;

6.5.2. Did the respondent have reasonable grounds to consider that its reputation had been damaged by the claimant's actions and that the claimant's continued employment would discredit and undermine the confidence of colleagues, reports and partners, including other blue light services, as well as the public, in the fire service in these circumstances?

6.5.3. Did the respondent properly consider mitigation put forward by the claimant?

6.5.4. Was there inconsistency of treatment between the claimant and previous employees of the respondent and if so, what is the relevance of this? The claimant relies upon the case of 'firefighter A'.

The claimant lists further allegations of unfairness at paragraph 68 (a) to (m) of his claim form, however he has today withdrawn (d), (e), (h), (i) and (j), so as to leave the following:

6.5.5. The respondent suspended the claimant with no justification for doing so; there was no evidence that the claimant would reoffend or seek to interfere with the investigation and indeed the available evidence pointed to the opposite;

6.5.6. The respondent maintains that the suspension was reviewed but there is no evidence to substantiate this: the claimant submits suspension should have been reviewed on receipt of the occupational health report of 9 May at the latest;

6.5.7. The investigation focused on entirely irrelevant facts despite the claimant's admission of facts immediately following the incident;

6.5.8. Mr Osborne failed to investigate the claimant's contractual terms, incorrectly finding that the claimant was required to be on permanent recall duty when in fact this was not the case; [Mr Kemp for the claimant withdrew this issue in written submissions on day 5 of this hearing]

6.5.9. Mr Osborne failed to seek medical evidence before concluding the disciplinary stage, despite the claimant's references to, 'dark thoughts' and, 'emotions shutting down';

6.5.10. When asked to disclose information relating to other disciplinary cases concerning individuals convicted of drink-driving - related offences, the respondent responded to say that the claimant would need to pay the respondent £5,775 for processing the request;

6.5.11. Mr Thelwell conducted the appeal hearing despite having committed an act of victimisation against the claimant as set out below;

6.5.12. The respondent failed to adjust its process to accommodate the reasonable adjustments recommended by Professor Gerada.

6.6 The respondent does not rely upon contributory fault.

6.7 What is the percentage chance of a fair dismissal in any event and if so when would such a dismissal have taken place?

*Disability discrimination*

6.8 The claimant relies upon depression and post-traumatic stress disorder ('PTSD').

6.9 The respondent disputes that this impairment amounted to a disability only in that it says that it did not have a substantial adverse effect on the claimant's day to day activities.

6.10 The respondent does not take a point about whether that effect was long-term.

6.11 The claimant says that the impairment hindered the claimant's participation in a part of his professional activities that is, responding to his pager for emergency calls.

6.12 So the claimant says that the tribunal should consider this matter under the Framework Directive which should be read down into the Equality Act 2010.

***Section 15: Discrimination arising from disability***

6.13 The "something arising in consequence of the claimant's disability" is that the claimant says that his actions in getting into his car and driving off intoxicated on 6 May 2017 arose in consequence of his depression and post-traumatic stress disorder. No comparator is needed.

6.14 Did the respondent dismiss the claimant because of the "something arising" in consequence of the disability?

6.15 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on public confidence in the fire service. The claimant agrees that this is potentially a legitimate aim but disputes that it was in fact of the respondent's aim

6.16 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

***Reasonable adjustments: section 20 and section 21***

6.17 Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely:

6.17.1 the provision in the respondent's disciplinary procedure that employees have the right to be accompanied by a work colleague or trade union representative;

6.17.2 the practice of appointing an appeals manager to chair the appeal hearing who may question the employee at the hearing?

6.18 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

6.18.1 as the claimant had depression or PTSD he was placed in a stressful situation in being asked to recount his story compared to someone without the disability (the claimant relies on paragraph 90 of Professor Gerada's report as evidence;)

6.18.2 Did the respondent take such steps as were reasonable to avoid the disadvantage? The adjustments asserted as reasonably required are identified as follows:

6.18.2.1 PCP 1: allowing the claimant to be legally represented at the hearing;
6.18.2.2 PCP 2: the questioning at the hearing being taken by a suitably competent and qualified individual who was trained in questioning people with mental illness.

6.19. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out at 6.18.1 above?

***Section 27: Victimisation***

6.20 Has the claimant carried out a protected act? The claimant relies upon the following:

6.20.1 The letter of appeal dated 31 August 2017 contained a paragraph (at page 329 of the bundle), which said:

> '*This position is recognised by the Authority's occupational health Department in a report dated 9 May 2017 which it confirmed that it is likely that I am suffering from a disability and made several recommendations, many of which appear to have been ignored. Further it is clear that the Authority did not consider what reasonable adjustments may have been appropriate in relation to the procedure adopted and its implementation and the ultimate sanction imposed*.'

6.20.2 The respondent confirmed on day 4 of this hearing that it did not dispute that this amounts to a protected act.

6.21 If there was a protected act, has the respondent carried out any of the treatment identified below because the claimant had done a protected act?

6.21.1 Mr Jason Thelwell wrote a letter to High Wycombe Magistrates Court dated 1 September 2017;
6.21.2 Mr Jason Thelwell decided to approve a press release which made no mention of the claimant's mental health issues.

***Concise statement of the law***

*Unfair dismissal*

7. We have to determine the reason for the dismissal. It is for the respondent to prove that reason.

8. A reason for the dismissal of an employee is a *set of facts* known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. (*Abernethy v Mott Hay and Anderson* [1974] ICR 323).

9. There is an explanation of this principle set out in the judgment of Langstaff J in *Robinson v Combat Stress* UKEAT/0301/14/JOJ. Having referred to the original wording of section 98(1), and a summary of the *Abernethy* principle, Langstaff J said this at paragraph 18:

'*The section requires identification of that reason not whether there might have been a good reason for the dismissal which in fact occurred. Second, the reason is not 'capability' or 'conduct' or 'redundancy' or 'breach of enactment', though it must be capable of falling within a category to which some one of those labels would be appropriate. They are broad summary categories. The reason to be focused on by the Tribunal is the reason which the employer actually had, not the one which he might have had albeit the same broad label could be applied to it*.'

10. At paragraph 19, Langstaff J refers then to section 98 (4). He says,

'*The determination thus has to have regard to the reason. The reference to the reason is not a reference in general terms to the category within which the reason might fall. It is a reference to the actual reason*.'

11. There is a distinction then between the facts which amount to the actual reason and the category into which that reason is then placed. First, we have to ask whether the respondent has proved on the balance of probability its belief in the facts which amount to the reason and then we ask into which category that reason falls so as to determine whether it is potentially fair. We then deal with whether the employer acted reasonably or unreasonably by having regard to that reason: that is the totality of the reason which the employer gives. (*Robinson* paragraph 21.)

12. It may be relevant to ask: at what point in time is that reason to be identified? When does it crystallise? The well-known passage in the judgment of Arnold J in *BHS v Burchell* [1978] IRLR 379 may help, albeit that was a case of a conduct dismissal:

'*What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question… entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had*

*in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds,* ***at any rate at the final stage*** *at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.*' [Emphasis added.]

13. In most cases the reason for the dismissal remains the same at both the original decision and appeal stages. However, in a case where, say, evidence is produced to an appeal which was not produced at the original dismissal stage, the precise factual reason given for the dismissal may change. In those circumstances, the reason for the dismissal - as the above passage in *BHS v Burchell* suggests - may be the reason in the decision-maker's mind at the final stage, usually the appeal. It may be however that when the facts are found and analysed, the underlying factual reason is seen to have remained unchanged.

*Some Other Substantial Reason*

14. 'Some other substantial reason' must be of a kind that justifies the dismissal of an employee holding the job in question. As long as it is not a section 98 (2) reason, any reason for dismissal, however obscure, can be pleaded on grounds of some other substantial reason, with the caveat that it must be a substantial reason and therefore not frivolous or trivial and must not be based on an inadmissible reason such race or sex. To amount to a substantial reason there must be a finding that the reason could - not necessarily does - justify dismissal.

*Inconsistency*

15. Inconsistent behaviour by an employer may make a dismissal unfair. The expression 'equity' used in section 98(4)(b) involves the concept that employees who misbehave in much the same way should be given much the same punishment. A tribunal is entitled to say that, where that is not done, and one person is penalised much more heavily than others who have committed similar offences, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal. *Post Office v Fennell* [1981] IRLR 221.

16. However, there are established limitations to the principle. First, the allegedly similar situations must truly be similar.

17. Second, an employer cannot be considered to have treated other employees differently if he was unaware of their conduct (*Wilcox v Humphreys and Glasgow Ltd [1975] IRLR 211.*

18. Third, if an employer consciously distinguishes between two cases, the dismissal can be successfully challenged only if there is no rational basis for the distinction made; *Securicor Ltd v Smith* [1989] IRLR 356. However, it is not sufficient for an employer to say that this was because different managers dealt with the separate incidents. Consistency must be consistency as between all employees of the employer irrespective of the human agencies through which the employer acts.

19. Fourth, even if there is clear inconsistency, this is a factor which may have to give way to flexibility. Accordingly, if say, an employer has been unduly lenient in the past, he will be able to dismiss fairly in future notwithstanding the inconsistent treatment.

*Bias*

20. The key question when an issue of bias is raised is whether any fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that a decision-maker was biased. There are cases involving small employers in which the size and resources of the employer's organisation might well influence the way this test was applied however we do not consider that this would be such a case given the size and resources of this respondent.

*Disability Discrimination*

21. There is no dispute in this case about the proper construction of section 6 of the Equality Act 2010 or paragraph 2 of schedule 1 to that Act. Therefore, we do not set out that section or paragraph here. Mr Kemp has helpfully set them out for us in his submissions.

22. The respondent says that there is no issue with the 12-month requirement in this case.

23. However, to make his case on 'substantial adverse effect on day to day activities' Mr Kemp relies on the impact on the claimant's professional life.

24. Mr Kemp has relied upon *Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1522 at 62-67. Although the facts before the EAT in that case did not require it to do so, it also analysed the position on the basis of *Chacón Navas v Eurest Colectividades SA* (Case C-13/05 [2007] ICR 1 ECJ which it found to be decisive.

25. According to the headnote of the judgment of the ECJ in *Chacón*, disability in the context of the Directive 2000/78/EC refers to a limitation resulting from physical, mental or psychological impairments which hinder participation in professional life over a long period of time. At paragraph 43, the ECJ said:

'*Directive 2000/78 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of 'disability' must be understood as referring to a limitation which results in particular physical, mental or psychological impairments and which hinder the participation of the person concerned in professional life*.'

26. In *Paterson,* Elias J at paragraph 67 said,

'*We must read section 1 of the 1995 Act in a way which gives effect to European Community law. We think it can readily be done, simply by giving meaning to day-to day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment. Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life*.'

27. Elias J went on to say, at paragraph 68,

'… *The only proper basis, as the Guidance makes clear, is to compare the effect on the individual of the disability, and this involves considering how he in fact carries out the activity compared with how he would do if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial*.'

**Burden of proof for discrimination including victimisation**

28. We have reminded ourselves in particular of the principles set out in the annex to the Court of Appeal's judgment in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258. It is the claimant who must establish his case to an initial level. Once he does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if he had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of a protected characteristic or act. What then, is that initial level that the claimant must prove?

29. In answering that we remind ourselves that it is unusual to find direct evidence of discrimination or victimisation. Few employers will be prepared to admit such motivation even to themselves

30. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly and fairly* infer discrimination or victimisation.

31. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which he places reliance for the drawing of the inference of discrimination or victimisation, actually happened. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

32. If unreasonable conduct therefore occurs alongside other indications that there is or might be discrimination/victimisation on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination or victimisation.

33. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding *'the reason why'*. That conclusion can only be reached however once the basis for the treatment of the claimant has been established. Some cases arise (See Martin v Devonshire's Solicitors [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

***Facts***

34. There has been very little disputed fact in this case in any event, however where disputes arise, we have made findings of fact on the balance of probability.

35. The respondent is the fire authority for Buckinghamshire.

36. On all the respondent's headed notepaper there appears the slogan, 'Buckinghamshire and Milton Keynes Fire Authority MAKING YOU SAFER, PREVENTING PROTECTING RESPONDING'.

37. There is also a standard slogan that appears at the bottom of many of the emails sent in the respondent's business, including those sent by the claimant, which says,

'*Our vision is to make Buckinghamshire and Milton Keynes the safest areas in England in which to live, work and travel*.'

38. The claimant began his employment with the respondent on 24 March 1997 when he was 19. The claimant worked hard and was ambitious.

39. In 2008 the claimant was promoted to station commander with, 'flexible duty officer' requirements, which meant that he took operational responsibility at emergency incidents. He was therefore required to attend emergency incidents across Buckinghamshire to take on an operational command, functional support or an operational assurance role at emergency incidents.

40. After about a year, he received a promotion to a role as the Chief Fire Officer's staff officer. In 2010 as part of this role he worked in a major change programme for the senior management team, focused on transforming the fire service.

41. On 5 September 2010 the claimant led part of the search of a burning house in Fishermead, Milton Keynes. The claimant was told incorrectly that a mother and child had been located and were safe. In fact, they both died in the fire. Subsequently, it fell to the claimant to listen to a call made to the control room from the incident. He had therefore to listen to the recording of the mother and

child as they died. The bodies of the mother and child were subsequently found by a window which had been boarded up.

42. By letter dated 22 October 2010 the respondent wrote to the claimant offering him counselling with John Kelley following the Fishermead incident. Mr Kelley had retired from the respondent a few years earlier and retrained as a counsellor. The claimant declined this offer because he thought Mr Kelley would be judgmental of his operational and professional role in the incident.

43. The respondent did then offer the claimant counselling with another counsellor but the claimant only attended one session. At the time, the claimant thought that counselling was a waste of time because he did not think that there was anything wrong with him.

44. On the balance of probability, we consider that the claimant developed PTSD as a result of the Fishermead incident. We do so because there is a joint statement by two psychiatrists which give as their opinion that he developed PTSD from this cause. We note that the respondent expressly did not submit that the diagnosis of PTSD was wrong.

45. Inevitably, there was an investigation and the claimant was questioned extensively as part of that process. He attended a Crown Court Hearing in March 2011 where the incident was again relived. A Coroner's Court inquest took place in June 2012 during which the claimant was again required to recount the events and his role in the search.

46. By email dated 9 March 2011, the claimant gave feedback to the Group Commander (Community and Business Safety Policy). His feedback was warm and positive about the support he had received from the respondent during his court appearance. He confirmed to us that he was very happy with the support he received from the respondent at this stage.

47. From May 2011 to October 2013 the claimant was seconded to the National Fire Service Training College. This was, in effect, also a promotion.

48. In May 2011 the claimant met some soldiers who had returned from Afghanistan. They spoke openly about the tragedies they had witnessed and the support they were receiving. The claimant was impressed by their approach to psychological support.

49. On 13 June 2013 a car scheme for FDS officers became effective. This enabled FDS officers to lease vehicles for both business and private use. The respondent was responsible for the lease costs. Disqualification or suspension from driving for a period in excess of two months would (at the discretion of the Chief Fire Officer) lead to cancellation of the lease agreement and the return of the vehicle.

50. In May 2014 version 4.0 of the respondent's discipline procedure was produced. In its list of examples of gross misconduct, this document included

bringing the Authority into disrepute and also serious breach of health and safety.

51. The discipline policy also provided, at clause 17, that an appeal would consider whether the original decision, on the evidence available at the time, was fair or reasonable. Only in exceptional circumstances would a complete re-hearing take place. An appeal was to be made within 7 calendar days of receipt of the original notification letter following the hearing. The employee must put full details of the grounds of appeal in writing to the original appeal manager. The grounds of appeal should be clearly outlined.

52. In around May 2014 and March 2015, the claimant was taking the lead in improving the services provided by the respondent to support the health and well-being of all employees. This included provision of mental health services and raising awareness of those suffering from stress. He was well aware of the availability of occupational health support as a result.

53. The respondent's substance misuse policy version 3.0 was issued in November 2014. This stated that someone convicted of drink driving in his or her own time had a duty to report this to his or her manager. The person would then be immediately removed from driving duties and expected to comply with the fine. If banned from driving the person was expected to find alternative means of getting to work.

54. Before Christmas 2014, the claimant's wife moved out. This damaged the claimant's self-esteem: he felt alone and isolated.

55. The claimant says that from 2013 to 2015 he continued to throw himself into his work. He did not visit his GP or seek a medical certificate. He says that every time his bleeper went off, he would feel a sense of panic until he knew what the reason was: a request for information or a need to respond to a live incident. He says that anything involving operational fire service gave him a feeling of anxiety as if he were to be judged on everything he did.

56. On 6 March 2015 the claimant received a temporary promotion to the position of area commander. He remained in this temporary position until his dismissal.

57. In this role the claimant was on the 'gold rota'. More senior officers were on 'permanent recall'. These were the Chief Officer, the Deputy Chief Officer and the Heads of Service. The claimant was paid an additional sum to be on the gold rota. On that rota, he was subject to recall to duty as necessary. He could therefore be called out unexpectedly to drive to attend a major incident. He was expected to co-ordinate the strategic 'gold' response to an incident which could involve liaising with other blue light services, the council and other third parties to bring the situation under control.

58. Other 'blue light services' were of course the ambulance service and the police. In liaising with them at a major incident, the claimant needed to have the respect of officers in those services.

59. The respondent's Code of Conduct for all employees of the authority including temporary staff, version 2.0, was issued in August 2015. This states that all employees are required and expected to show professional conduct and behaviour in all aspects of their employment. A climate of mutual confidence, trust, loyalty and respect between managers, employees and other partners is critical to achieving the respondent's corporate aims and providing a high quality of service. Employees are expected to perform their duties with honesty, integrity, impartiality and objectivity.

60. More specifically, the respondent expects employees to work within the law. Unlawful or criminal behaviour at or away from work may result in a loss of trust and confidence in the employee or the authority. All employees must never break or disregard a law away from work which could damage public confidence in them or the Authority, or which makes them unsuitable for the role they do.

61. In around February 2016, there was a public meeting of the Combined Fire Authority. The meeting was conducted in a hostile atmosphere because at issue was the closure of a fire station. The claimant had to make a presentation and was nervous. It was the first time he had presented in such an atmosphere. In the circumstances it is unsurprising that he was somewhat detached.

62. On 29 February 2016 the claimant's substantive post changed to group commander prevention and protection. He remained however in his temporary role as area commander.

63. On 1 July 2016 the claimant's temporary position as area commander was extended.

64. On 1 August 2016 the claimant became Head of Service Delivery.

65. At about this time (25 March 2017) a Mr Cawley, a senior fire brigade manager for the Cleveland Fire Service drove while under the influence of alcohol (3-4 pints of lager) and drove into a fence causing damage. He was at the time seconded as a director to a community interest company. His 'Linked In' page says that he was employed by the Cleveland Fire Brigade from 2008 to April 2018.

66. In April 2017 the claimant was in Hong Kong on holiday. He had started a relationship with someone which lasted to October 2017. An email chain sent by him on 10 April 2017 says that he had missed his flight home and jokingly suggests that he had been having too much fun at the rugby 7s.

67. On 14 February 2017 the claimant's temporary promotion was extended.

68. On 24 April 2017 an incident took place at a residential property near High Wycombe. The claimant's work bleeper went off at 3.40 am. He answered it and was told that there had been two deaths. His impact statement says that he felt dread and felt tense, but he decided not to attend the incident. He says that he began to question whether he had what it took to make the necessary difficult decisions quickly. The impact statement itself says that he justified this

to himself on the basis that he was some distance from the property and did not feel he could add much assistance at an operational level. We prefer the evidence of his statements to the June 2017 investigation and Professor Gerada (pages 214 and 392) that in fact he did make a judgment call not to attend because, at the Fishermead incident he thought there had been 'over mobilisation' and given his geographical distance from the incident. Later he began to worry that this may have been the wrong judgment. We notice that the claimant's account of this matter and his thinking at the time has changed.

69. On 4 May 2017 a letter was sent to Firefighter A by Neil Boustred of the respondent. Mr Boustred confirmed the outcome of a disciplinary hearing: A was given a final written warning. (This letter was not before Mr Osborne at the time he made his decision to dismiss the claimant and Mr Osborne was not involved in A's case).

70. A was a firefighter, not a senior officer. He had been convicted of driving under the influence of alcohol. The facts were that he had been drinking on the evening before his arrest and then had got up to go to work the following day. He still had alcohol in his system over the legal limit, 15 minutes before he was to report for duty.

71. There were also mitigating factors in A's personal life, however we have not been given evidence about them. There was no press interest in the incident and A did not represent the authority at a strategic level.

*The incident*

72. On Friday 5 May 2017 after a day at work during which nothing out of the ordinary had taken place, and the claimant's pager had not gone off, the claimant went out for a drink with two colleagues in Stony Stratford. There is no evidence that he had been drinking before they reached Stony Stratford. The claimant drove his colleagues. He parked his car in a well-lit position expecting to leave it overnight, take a taxi home and cycle to collect it the following day.

73. He drank 5 pints over the evening. Nothing untoward happened that evening. His colleagues took taxis home and one of the colleagues called a taxi for the claimant.

74. However, the claimant got into car and set off to drive home, a distance of about 7.5 miles. He lost control of the car on a bend and banged his head and leg. He got out of the car; a member of the public asked him if he was all right and said that the police were on their way.

75. The police arrived and arrested him for driving under the influence of alcohol. The claimant admitted from the outset that he was guilty of drink driving.

76. At 13.05 on 6 May the claimant sent a text message to Mr Osborne requesting a private conversation. Mr Osborne telephoned the claimant at 13.11 and took notes. The claimant told him that he had been arrested and charged with drink driving. The claimant said to Mr Osborne that he did not know why he had got

into his car instead of calling a taxi. (There was no mention of an 'out of body experience.)

77. The claimant's colleague Mark Ridder called him on the Saturday to ask if he wanted a lift to collect his car. He then went to see him on 7 May. The claimant told him that he had been a '*very silly boy'* and told him what had happened. At first Mr Ridder was shocked and disbelieving. He did not believe that the claimant would have done something like that. The claimant then '*unpacked his life on the kitchen table'*.

78. By text message dated 8 May 2017 the claimant told Mr Osborne that he was going to stay away from work that day because he was feeling, *'irrationally emotional'*.

*Suspension*

79. By undated letter (which the parties agree was sent on 8 May 2017) Mr Neil Boustred told the claimant that he was suspended to allow for a full impartial investigation into the events of the weekend of 5 and 6 May. The claimant was told that the suspension was not punitive but was a precautionary and preventative measure. The claimant was reminded of the Employee Assistance Programme.

*Occupational health*

80. On 9 May 2017 the claimant met Sandra Furlong, an Occupational Health Nurse Adviser of Occupational Health. Although distressed, the claimant was able to give Ms Furlong a precise history of events. He told her that he now recognised that he had probably been carrying unresolved psychological issues, relating back to events of 2010. He also mentioned numerous difficulties in his domestic situation. He told Ms Furlong that the catalyst for recognising this was the incident of 6 May. He did not say, and nor did Ms Furling conclude, that the claimant's psychological state was the cause of the incident on 6 May.

81. Ms Furling recommended one to one counselling and psychotherapy and thought that the claimant was likely to be considered to have a disability. There was no mention of PTSD or of an out of body experience in Ms Furlong's report. Ms Furlong reported that the claimant was fit to attend any meetings with his employer and made no mention of any need for reasonable adjustments.

*The Magistrates' Court hearing.*

82. On 19 May 2017 Mr. Jason Thelwell sent a letter to the claimant's solicitors (those acting for him in the magistrates court) giving the claimant a positive character reference. Specifically, he said:

'*Paul Holland is a Temporary Area Commander leading on Projects and Transformation for Buckinghamshire Fire and Rescue Service, and has been a member of the Service since 24th March 1997.*

*Paul is a hardworking officer who has always displayed high levels of integrity and has excellent performance reports in the roles he has undertaken, both in service and whilst on secondment.*

*Paul has always upheld the very best traditions of public service whilst in our employment*.'

83. On 22 May 2017 the claimant attended High Wycombe Magistrates' Court where he pleaded guilty to a charge of drink driving. This was a public hearing. Mr Neil Boustred attended to support the claimant and to take a note on behalf of the respondent. The claimant was convicted of drink driving and disqualified from driving for 17 months.

84. During his plea in mitigation the claimant's counsel said on his behalf that he had no clear recollection of why he got into the car that evening but his poor recollection was due to his mental state. He said that the claimant had a clear understanding of the damages of drink driving. He had sought help and 'has been diagnosed with PTSD, a recognised disability.' Counsel referred to the claimant's role as a senior Fire Officer and Mr Thelwell's character reference was read out to the court. The fact of the claimant's PTSD was taken into account by the magistrates in sentencing the claimant.

85. The claimant had not been diagnosed with PTSD at this point, but the claimant did not correct his counsel either during the hearing or afterwards.

*Second visit to Occupational Health*

86. On 23 May 2017 the claimant again met Sandra Furlong of Occupational Health for an Occupational Health Assessment. This was the last time he met with Occupational Health. No diagnosis was made of PTSD. The claimant told Ms Furlong that he was now receiving appropriate psychological support and was making progress. He was fit for modified duties. Ms Furlong said that she had nothing further to add at this time.

*Investigation*

87. By letter dated 23 May 2017 the respondent told the claimant that there would be an investigation. He was told that possible outcomes could be no further action, a written warning, a final written warning or dismissal.

88. A file note created by Kerry McCafferty dated 23 May 2017 records a review of the suspension decision as a result of which she and Mr Osborne decided that the suspension was to remain in place for the time being.

89. By letter dated 24 May 2017 Mr Ranger told the claimant that he had been appointed to investigate alleged misconduct relating to the events of 5 and 6 May 2017. He suggested dates to meet for the purpose of investigation.

90. An enquiry was made by the press into the incident at some point before 25 May. MK Citizen ran a report - which was also available online - under the

headline: ‘Fire service officer leading Milton Keynes Blue Light hub project fund guilty of drink driving’.

91. On 2 June 2017 the claimant visited his GP. He told the GP that PTSD had been diagnosed by occupational health. In fact, this was not correct. There is no prior record of PTSD or any mental health issues in the GP notes. The GP noted no suicidal thoughts.

92. On 8 June 2017 the claimant was interviewed by Mr Ranger with a welfare officer Mr Ridgely present. The claimant said that says he was anxious about the pager.

93. The claimant said,

‘*We left 00.30 hours, Kevin got a taxi and I got a kebab and then walked back down the High Street. I do not remember my thought process at this stage but I took my car keys out of my pocket and went back to my car, I do not remember the events but I chose to drive from Stony Stratford to my home which was four to five miles away. I lost control of my car on a bend and ended up in a ditch, I banged my head and leg and I was dazed and in shock*.’

94. The claimant did not say anything about an out of body experience.

95. Later in the meeting the claimant said,

*‘It was not about the alcohol but more about my state of mind as it had not been good for a long time. When I look back I am ashamed, this is not something that I would normally do, however, I have accepted the outcome and taken the punishment from the court. For me this is out of character, I have 20 years of service, 23 years of driving with no points or cautions, and during the time spent in the cells are reflected on this to try to understand how I had arrived at this point and I knew I had to do something*.’

96. He added,

‘*I understood the gravity of the situation, and offered my resignation to [Mr Osborne]. I am ashamed of what I have done and how that would look on the Service*.’

97. The claimant explained about the Fishermead incident and the effect that had had on his state of mind.

98. He referred to his wife being nervous when his bleeper went off: as far as he was concerned, he had dealt with it. He did not say that he was nervous when his pager went off.

99. Mr Ranger was using a technique of cognitive questioning in this interview. This technique is used also in police forces. He will ask someone to tell a story, then he will check the facts. He was actively looking for mitigation and asked questions to discover if the claimant’s drink had possibly been tampered with

and/or whether he was in control. It was his role to try to jog the memory of the employee he was questioning.

100. On 16 June 2017 Mr Ranger also interviewed Mr Ridder and Mr Mercer who had been with the claimant on the night in question. Mr Ridder said that he was not aware of any factors from that evening that would have affected the claimant's actions but there was a possibility that there were contributing factors in relation to his mental well-being, including the Fishermead incident. He had picked up vibes that the claimant was not happy but had not understood the extent of how the depressed he was. At one stage in the evening the claimant was elated when talking about his recent trip to Hong Kong.

101. Mr Mercer recounted the evening. He said that the claimant had been a lot happier lately: he had been to Hong Kong and things were going well. He did not know why the drink driving had happened, it was out of character and when the claimant told Mr Mercer about it, Mr Mercer thought he was joking.

102. By letter dated 16 June 2017 the claimant's temporary promotion was extended. It was further extended by letter dated 13 July 2017.

103. In July 2017 Mr Ranger produced his investigation report. He concluded that the claimant had been convicted of drink driving. The prescribed legal limit is 35 miligrams in 100 millilitres whereas the claimant's reading was 68 miligrams/100 millilitres.

104. At paragraph 6.3.4 of the report Mr Ranger quotes the claimant's terms and conditions of employment:

'*Additionally, it is a condition of your employment that you are required to be available at any time to return to duty to respond to emergencies, for the purpose of Gold Command and Command Support, over and above the requirements of the Principal Officers Rota; this is known as Permanent Recall to Duty. The requirement for you to be available for Permanent Recall to Duty will be enforced at all times other than when absent from duty due to sickness (which has been notified in accordance with the Authorities Attendance Management procedure). You will need to ensure that, at any time, your physical location enables you to comply with this requirement'*.

105. At paragraph 7.6 Mr Ranger said that although it could be argued that the claimant deliberately ignored the understood expectation of taking a taxi home, it appeared more probable that the claimant's state of mind affected his judgment. By this he meant that the alcohol had affected the claimant's judgment.

106. At paragraph 7.8 Mr Ranger said that it is highly probable that the claimant was proportionally affected by the Fishermead incident.

107. Mr Ranger recommended that a full disciplinary hearing be initiated.

*Disciplinary hearing*

108. By letter dated 26 July 2017 Mr Osborne invited the claimant to a formal stage III discipline hearing to be held on 17 August 2017. This was to consider allegations relating to the events of 5/6 May 2017 and an alleged breach of the Authorities Discipline Procedure and Code of Conduct.

109. At the hearing the claimant was asked to recount the events of 5 May. He said:

"*Following that, and this is where I am struggling with my decision-making and am still coming to terms with what happened, I made the decision at that point walking back down the High Street with my kebab, to drive. I can't explain it, I don't know why it happened it did happen, I got behind the wheel of my car, I commenced driving home*.'

110. The claimant made no mention of an out of body experience.

The claimant said, '*I made a decision I had been in a bad place for a long time now and I needed to sort this out wanted to look through positive future for myself and wanted to take positive steps going forward.'*

111. He remembered telling Mr Osborne at the time that he was sorry and*,*

*'the potential damage of reputation to the organisation and the significant impact it could have on the organisation and I remember offering my resignation to you on the phone*.'

112. There is a dispute about whether the claimant did in fact offer his resignation to Mr Osborne, but it seems to us that nothing turns on that particular dispute. It was not the basis of any decision made by the respondent.

113. Mr Osborne said to the claimant,

'*5 pints over a period of roughly 4 to and a half hours but would you say you were relatively in an alert and conscious state i.e. you knew what you were doing as you remember everything else quite clearly*

*PH - in terms of do I remember what happened? Yes. Do I remember how the decision was made that's where I am struggling, I'm still trying to work that out with counselling and cognitive behaviour therapy. I still don't understand where my mind was with that as this is not normally something I would normally do. I potentially could have hurt other human beings, not just myself which is just not who I am, never has been, so I'm still trying to understand that.*

*MO -but did you say that you chose to drive home?*

*PH- well of course, I got behind the wheel so I must have made that decision'*

114. Later in the hearing, this exchange took place:

'*MO - you mention earlier your role requires engagement at a very senior level with other blue light services, partners including businesses and other partners providing community safety services, how do you think these events would be or could be viewed by senior members of these organisations?*

*PH - depending on the different organisations, but certainly from a public perspective it could be seen as a negative with a member of a blue light service being arrested for drink-driving, the same with councils as well*

*MO - how do you think your peers, reports or other members of BFRS will or do view the situation?*

*PH - I imagine mixed views, those that know me well would say it is out of character and would be shocked not understand it, much as the reaction of Kevin and Mark when I told them about. Those that don't know me may view it the same way as the members of the public*.'

115. There followed a discussion about the events at the magistrates' court. The claimant said that he was in the dock behind a pane of glass. His counsel outlined some mitigation and the claimant remembered him using the term PTSD. The claimant said when he read the notes, he told his counsel it is 'suspected PTSD and not diagnosed.' The claimant said that counsel had been acting on his instructions and had based his information on the Occupational Health report. The claimant did not challenge this inaccuracy because he was behind a pane of glass.

116. (We note that the Occupational Health report did not in fact say that the claimant had PTSD).

117. Because the claimant said he had been struggling operationally fo sometime Mr Osborne asked him whether he had sought help. In his answer the claimant mentioned an anxiety he felt when pagers went off but said he felt he had to cope and deal with it.

*Mr Osborne's decision to dismiss*

118. After an adjournment, Mr Osborne gave his decision. He took into account the claimant's 20 years unblemished service and his mental health. However, he took the view that the claimant consumed an amount of alcohol beyond the legal limit for driving, he then chose to drive his car, lost control and crashed into a ditch. This standard of conduct fell well below the standard expected of the respondent's employees and indeed its senior officers. The claimant was a senior officer, a role model for many staff, he held a position of trust and responsibility, he had contractual duties which the claimant had accepted that he could no longer do. His conduct was in breach of the respondent's code of conduct and he had brought his own and the respondent's reputation into serious disrepute.

119. Therefore, he decided to dismiss summarily for gross misconduct.

120. He told the claimant that he had 7 days in which to appeal.

121. By letter dated 21 August 2017 Mr Osborne sent the claimant the formal outcome of the disciplinary hearing and told him that he was dismissed with immediate effect on Thursday 17 August 2017.

122. Mr Osborne wrote,

'*You were a long serving member of staff, with 20 years of good service and no previous discipline charges. I have also carefully considered your representations about your mental health.*

*However the fact remains that you chose to drive a vehicle whilst knowingly over the legal alcohol limit, crashing into a ditch. This is a matter of record and not disputed. You were arrested, charged and after a court appearance on 22 May 2017 you were fined and banned from driving.*

*At the discipline hearing you agreed that due to this, you can no longer fulfill your operational role and rota commitments.*

*There is an issue of your barrister telling the magistrates court that you had diagnosed PTSD when there is currently not a diagnosis. From the notes of the magistrates hearing it may be that influenced the length of your ban, but that remains unclear and is not directly related to the discipline hearing.*

*There is also an anomaly over you recalling you offered your resignation on 6 May in our telephone conversation when I rang you, when you never spoke about resigning at all. I do not consider that this is material to the hearing and outcome.*

*In summary this case centres on your behaviour and action which falls far below that expected of an employee as detailed within the Code of Conduct, particularly when you were a Senior Officer holding a position of trust and confidence, who is expected to be a role model.*

*I find this case to be most serious. Your actions were not merely misguided but in clear breach of our Code of Conduct.*

*As outlined at the meeting, the Fire Service is a disciplined uniformed organisation with responsibilities that include working closely with other Blue Light Services, health partners, Local Authorities and Councillors and Members of Parliament. At the hearing you acknowledged that your actions would be deemed unacceptable by many other staff, members of the public and external partners.*

*To conclude, your actions have brought the reputation of this Authority and yourself into disrepute and shown a complete failure to meet the expected standard of behaviour of this Service.*

*Therefore it is confirmed that my decision is to dismiss you without notice on the grounds of gross misconduct*.'

*The lead up to the appeal*

123. By email dated 23 August 2017 the claimant requested a copy of the contemporaneous notes referred to at the disciplinary hearing as well as subsequent conversations and text exchanges.

124. By letter dated 23 August 2017 Messrs Knights solicitors acting on behalf of the claimant wrote to the respondent asking for a short extension of time for the submission of the appeal.

125. By email dated 24 August, Kerry McCafferty refused that request and required the appeal to be lodged by the end of 29 August.

126. The contemporaneous notes requested were sent to the claimant on 24 August.

127. By letter dated 30 August 2017 the claimant's solicitor set out his grounds of appeal. These were that the respondent had adopted the wrong process. He said that it was highly likely that he had been suffering from a previously undiagnosed serious medical condition since his involvement in the Fishermead incident in 2010. He said he received no meaningful support from the respondent after that incident and was left to fend for himself. He said that the occupational health department had confirmed that it was likely he was suffering from a disability and recommendations had been ignored. He said that no one within the respondent appeared to have applied their minds to the question of why he might have behaved as he did. He said the respondent jumped to the erroneous conclusion that this was a misconduct matter. He said that there was no legitimate basis for his suspension; that Mr Ranger's terms of reference did not ask him to consider whether any other process or procedure should be adopted or followed apart from the disciplinary hearing. He said that Mr Osborne was a relevant witness and should not have chaired the disciplinary hearing because there was dispute about whether the claimant had offered to resign. He said Mr Osborne conducted the hearing in an adversarial and not an inquisitorial manner. He said that the sanction imposed on him was unduly harsh and inconsistent with penalties opposed imposed on others. He said that no insufficient weight was given to his considerable mitigation. He concluded that he was currently in the process of gathering evidence to support his grounds of appeal and would submit such evidence as and when it was available.

128. Mr Thelwell was appointed to hear the appeal. When he read the appeal bundle which he had been sent, he realised that the magistrates had been misled by either by the claimant or by his counsel in that the magistrates had been told that the claimant had been diagnosed with PTSD. At that stage there had been no such diagnosis.

129. He therefore considered that he had a duty to the court to do something about it. He had himself had provided a reference for the magistrates' hearing. He stood by that reference, but he could not 'walk past' such a matter as this and not put it right. In his role, he has meetings with judges, with the chief

constable and the ambulance service. He had before him evidence that the claimant had misled the magistrates. He considered that he had to put the matter right.

130. Accordingly, on 1 September 2017 Mr Thelwell wrote to Wycombe Magistrates' Court in this situation to their attention and saying that the claimant did not, contrary to what was averred in court, have a diagnosis of PTSD.

131. By letter dated 4 September 2017 the claimant's solicitors asked the respondent to provide details of the disciplinary sanctions imposed on all employees (both operational and non-operational) of all grades and ranks who had been convicted of drink-driving offences in the previous 10 years.

132. By email dated 12 September 2017, Kerry McCafferty replied that the respondent did not hold a single register of disciplinary sanctions imposed which covered the timespan the respondent had requested. To provide an answer it would be necessary to review each personnel folder of the authority's 462 employees. In terms of ex -employees, in the region of several hundred individuals had left the respondent since 4 September 2007. In respect of those individuals the respondent only retained information relating to core HR data and no records of disciplinary sanctions would be held centrally. To undertake a search of each personnel folder for current employees would require one person spending more than 18 hours in determining whether the respondent held the information, and then locating, retrieving and extracting the information. Ms McCafferty noted that under the Freedom of Information Act 2000 a public authority was entitled to refuse requests for information where the cost of dealing with it would exceed £450. However, she said she would be happy to respond to the request if the claimant paid the fee processing the request of £5,775. This sum was calculated on the basis of a 'conservative estimate' of 30 minutes to review each electronic personal record file for all 462 staff, with time charged at £25 an hour.

133. (Subsequently, the claimant narrowed the request to ask for details of the disciplinary sanctions imposed upon any firefighters convicted of drink-driving in the previous 12 months or any principal fire officer convicted of drink-driving in the previous 10 years. We have not heard further evidence about this, no doubt because the issue before us is about the original request for £5,775.)

134. In September 2017 the claimant visited Professor Clare Gerada, who is, amongst other things, a senior GP and member of Royal College of Psychiatrists. Professor Gerada produced a report dated 18 September 2017. She diagnosed the claimant with (in the period 2010 to 2017) moderate to severe depression and PTSD.

135. At paragraphs 59 and 60 of her report Professor Gerada says:

'*After drinking the 5 pints of beer, Mr Holland has no recollection of why he then went on to drive his car. He does recollect having 'an out of body experience' and seeing himself pick up the keys. He describes feeling detached from himself, watching himself act as if it was not him and the things around him did not appear real.*

*Clearly the alcohol might have accounted for these feelings. However, 5 pounds over the course of an entire evening is not a considerable amount for an adult man whilst it would have caused him to be over the drink drive limit, this amount of alcohol is unlikely to have caused this feeling of detachment*.'

136. Professor Gerada's instructions appear to have asked her whether reasonable adjustments were required for the forthcoming appeal hearing. She said in answer that the claimant was still depressed and suffering from PTSD and as such any situation where he was asked to recount his story would be placed in an unduly stressful situation (and this would include an appeal hearing) should be conducted sensitively. In Professor Gerada's opinion this questioning should be undertaken (in the main) by a suitably qualified and competent individual able to interview someone with mental illness.

137. Professor Gerada gave her view that given the claimant's current mental state he would not be in an ideal position to represent himself at any formal meeting. This will include the forthcoming appeal. She strongly suggested that he asked for legal representation.

138. She concluded that it was her view that the drink-driving should be seen in the context of the claimant's mental illnesses, that is as a symptom of his altered mental state rather than as reckless behaviour.

139. This report was sent to the respondent and received by Mr Thelwell at the end of September.

140. On 6 September 2017 the claimant also attended an appointment with Dr Cristine Losada Perez, a consultant psychiatrist. Dr Losada Perez did not diagnose PTSD but did diagnose a long standing mild-moderate depressive episode characterised by low mood, irritability, anergia and high levels of anxiety. His symptoms had improved with a CBT course.

141. By letter dated 29 September 2017 the claimant's solicitors sent a 516-page appeal bundle. This included, amongst other documents:

Professor Gerada's report
Evidence of 'similar cases'
Witness statements from personal referees, and including statements from the claimant's ex-wife, and from Catriona Morris.

*The appeal hearings*

142. The first part of the appeal took place on 4 October 2017 at Missenden Abbey. Mr Thelwell chaired the appeal. The claimant was represented by Mr Newton.

143. At the outset of the appeal Mr Thelwell told the claimant and his representative that he intended to take the medical report that they had submitted at face value for the purposes of the appeal hearing only.

144. Mr Newton raised some points before they started. He had a concern about Mr Osborne and Kerry McCafferty sitting in on the appeal. He said that the respondent had refused the reasonable adjustments recommended by 'one of the most if not the most eminent psychiatrists in the country'. He said that Mr Thelwell insisted that he was the appeal manager despite concerns raised by the claimant. Those concerns were that Mr Thelwell had written to the magistrates' court two days after the respondent had received the grounds of appeal and that therefore he could not now be perceived as impartial.

145. The claimant's representative suggested that this was an act of victimisation.

146. At one point in the appeal Trevor Newton representing the claimant referred to a suggestion made in Professor Gerada's report that the incident on 5 May might have been a suicide attempt. The notes record him saying,

'*The Authority knew or ought to have known about PH's condition, the Authority did nothing effective to support PH indeed when he embarked upon a potential suicide attempt on the 5 May, see paragraph 83 of Professor Gerada's report.'*

147. Mr Thelwell then asked:

'*Sorry Trevor page 259 for clarity are you saying that the drink driving was a suicide attempt*?'

148. Mr Newton said that Professor Gerada was making it quite clear that it may have been.

149. The claimant covered his mouth and left the room, upset.

150. In cross examination in the tribunal the claimant accepted that Mr Thelwell was simply trying to elucidate what the claimant's representative was saying. This upset the claimant, but it was occasioned by the claimant's representative making a point on his behalf not because Mr Thelwell was unsuited to asking questions of the claimant. Mr Thelwell needed to ask questions, but he put them through the claimant's representative and the claimant agreed that was a considerate thing to do.

151. Mr Newton then again referred to the claimant's behaviour on 5 May being a potential suicide attempt.

152. Mr Newton's central point in the appeal was that the claimant's drink-driving should be seen in the context of his mental illness, that is as a symptom of his altered mental state rather reckless behaviour.

153. Mr Newton referred to Catriona Morris' statement to say that the respondent should have known since 2015 at the claimant was in distress. He also referred to the employee assistance programme from 2015 and said that Mark Ridder in early 2015 had told the claimant to get counselling. He says that

if the authority did not know then it certainly ought to have known; he said that the respondent had not only failed in its duty of care, it went on to punish the claimant in the worst possible way for something that Professor Gerada's report confirmed was a symptom of his serious condition.

154. Mr Newton also said at the respondent was using the wrong process in dealing with the situation because the claimant had suffered from undiagnosed moderate to severe depression and PTSD since 2010.

155. A reconvened appeal hearing took place on 6 October 2017. This hearing was reconvened to explore a point made by the claimant about a previously undisclosed conviction of firefighter A. That hearing ended inconclusively because the respondent did not have firefighter A's written consent to disclose the details of his conviction. In evidence before us the claimant said that the previous conviction was not related to drink-driving.

*The appeal decision*

156. By letter dated 10 October 2017 Mr Thelwell wrote to the claimant upholding the decision to dismiss on the basis of reputational damage to the respondent.

157. He told the claimant that the appeal was held by way of a review not a rehearing. He had to consider whether the original decision on the evidence available at the time was fair and reasonable. He noted the claimant's requests for adjustments to the procedure: that any questioning of the claimant at the hearing be undertaken by an individual suitably qualified to interview someone with a mental illness and that the claimant should be legally represented. Mr Thelwell said that he was not questioning the claimant in the review hearing about his medical condition or asking him to recount his story. Had the matter been referred back to the original decision maker for a rehearing the position may have been different. He said that the respondent was not convinced that the highly unusual step of allowing legal representation would be beneficial especially because the claimant had the benefit of an experienced representative (that is Mr Newton).

158. Mr Thelwell told the claimant that Mr Osborne was present to address the points of appeal: he was the original decision maker who put forward the management case. Kerry McCafferty was present to advise on procedural issues rather than to be involved in the decision-making process. Mr Thelwell did not consider this to be inappropriate because she was not making a decision.

159. Mr Thelwell noted Professor Gerada's diagnosis of moderate to severe depression and PTSD. He noted that she took the view that the drink-driving episode should be seen in the context of the claimant's mental illness rather than reckless behaviour. Mr Thelwell confirmed that he did not ask the claimant questions about this at the hearing because he had decided the matter on other grounds.

160. Mr Thelwell noted that the finding of the disciplinary hearing was that the claimant's actions had brought the reputation of the respondent into disrepute. Therefore, the respondent particularly wanted to hear the claimant's views at the appeal hearing on whether, regardless of any culpability, it was practicable for his employment to continue. The concern was not only in relation to the adverse publicity but also the future reputational risk for the authority.

161. Mr Thelwell noted the significant steps taken by the claimant to rehabilitate himself and to mitigate the symptoms he was suffering. He commended the claimant for this.

162. Dealing with the procedural irregularities alleged, Mr Thelwell said that he believed the suspension had been fair and unavoidable in the circumstances as a precautionary and protective measure, taking into account the organisational reputational risk that arose; he said the suspension was appropriately reviewed and it did not taint the whole process.

163. He pointed out that the terms of reference for the investigation which were followed were for the facts to be established, the issues identified to be considered and recommendations to be made in respect of the outcome of the investigation, one of which was to take no further action to deal with the matter on an informal basis if appropriate. Therefore, he said he saw no unfairness in the terms of reference for the investigation.

164. Mr Thelwell did not consider Mr Osborne an inappropriate person to hear the disciplinary hearing. Although Mr Osborne had had a telephone conversation with the claimant immediately after the offence and there was a conflict of evidence as to what was said (whether the claimant mentioned his resignation or not) that disputed evidence was in no way relevant to the disciplinary hearing or to the outcome.

165. Mr Thelwell referred to the claimant's allegations of inconsistent treatment but said that none were in relation to the conviction of a senior officer convicted of drink drive offences within the respondent authority. There were examples of those in other blue light services cited but there was insufficient detail of the circumstances. In any event even if the claimant had produced good evidence of different treatment in another authority Mr Thelwell was not convinced that that would have made any difference to the decision reached by the respondent because of the respondent's view of the reputational risk.

166. Mr Thelwell said that Mr Osborne had considered the question of mitigation and had noted in the dismissal letter the claimant's 20 years good service and lack of previous disciplinary charges. Mr Osborne had also considered the claimant's representations about his mental health although the claimant at that stage had not had the benefit of Professor Gerada's report.

167. Mr Thelwell said

'*However, regardless of any culpability on your part, (i.e. whether it can be said that you acted wilfully or recklessly), I do believe the reputation of the Authority would be*

*completely tarnished if seen to condone the actions of a senior leader, who should be at the forefront of promoting community safety, by continued employment following a conviction for drink driving. As you are aware drink-driving campaigns feature heavily in our road safety work and strategy and I believe this work would be undermined by your continued employment. That, in my view, would be the case in terms of maintaining credibility with colleagues, reports and partners as well as the public. In summary, whatever the circumstances leading to the decision taken to drive, your conviction for drink-driving inevitably discredits the Fire Service and serves to undermine public confidence in us and other blue light services that we have a duty to collaborate with*.'

*The press statement*

168. By email dated 10 October 2017 Mr Britten of the respondent sent to the claimant's solicitor a short draft press statement which said,

'*Following Paul Holland's conviction for drink-driving it has been necessary to terminate his employment*'

169. Mr Britten told the claimant's solicitor that he was providing him with the proposed text for any observations with the chief fire officer to take into account in the statement. The solicitor forwarded the statements to the claimant and both the solicitor's and the claimant's views were sent to the respondent. Neither requested that the statement include any information about the claimant's mental health.

170. The respondent did not have the claimant's consent to publish any information about his mental health. Accordingly, the statement was published without any reference to the claimant's mental health. In these circumstances we find that the reason why the statement does not have any reference to the claimant's mental health is that the respondent would regard such information as being confidential and sensitive and would not publish the information without the claimant's express consent and because the claimant himself not only did not give that consent but did not ask for the information to be published.

## ***Analysis***

171. We set out our analysis by reference to the issues identified above. The issues are in italics.

*Unfair dismissal*

*What was the reason for the claimant's dismissal? The respondent did not rely upon misconduct, but upon reputational damage/future reputational risk associated with the claimant's continued employment. The respondent says that this is 'some other substantial reason.'*

*The claimant agrees that 'some other substantial reason' is potentially fair but disputes whether this case was even potentially one of 'some other substantial reason'.*

*The claimant says that the reason for dismissal was wrongly categorised. The claimant disputes that the respondent believed that there was reputational damage, i.e. that that was in fact the reason for the dismissal. The claimant does not put forward any alternative or ulterior reason for the dismissal, but says that the letter of dismissal gives the reason as conduct.*

172. When we look at Mr Osborne's decision to dismiss, we see that he has identified the facts which amount to his reason to dismiss. Those facts are that the claimant chose to drive a vehicle knowingly over the legal alcohol limit, crashing into a ditch. He was then arrested, charged and after a court appearance on 22 May 2017, was fined and banned from driving.

173. Mr Osborne then placed two labels on this set of facts. The first was that the claimant's behaviour and action fell far below that expected of an employee as detailed in the code of conduct. This is labelling or categorising the facts as misconduct.

174. Then, Mr Osborne notes that the fire service is a disciplined uniformed organisation with responsibilities that include working closely with other blue light services, health partners, local authorities, councillors and members of Parliament. He notes the claimant's acknowledgement that his actions would be deemed unacceptable by many other staff, members of the public and external partners. He finds as a further element of the set of facts that the claimant's actions had brought the reputation of the respondent into disrepute.

175. These are additional facts which then cause him to label or categorise the initial set of facts as reputational damage: potentially 'some other substantial reason'.

176. We find that Mr Osborne genuinely believed in the set of facts which he gave as the reason for his dismissal.

177. We find that Mr Thelwell genuinely believed in a slightly different set of facts. He did not make a decision about whether the claimant drove wilfully or recklessly, but he did genuinely believe that the claimant drove a vehicle while drunk and was convicted. He also believed (as a fact) that this set of facts brought the reputation of the respondent into disrepute.

178. This set of facts may potentially be labelled as some other substantial reason.

179. Was this set of facts therefore capable of amounting to some other substantial reason? We consider that it is so capable. We bear in mind that the claimant was a senior fire officer. The respondent's business - as summarised in its letterhead and email slogans - is that of maintaining and promoting public safety. We consider that the reason, that is of driving while over the legal alcohol limit, being convicted and so causing damage to the respondent's reputation as

a fire service, is not frivolous or trivial. It is a reason of real public importance, relevant to the maintenance of safety standards on the roads. The reason is not an impermissible one legally. We do not at this stage decide whether the dismissal was fair, but we do consider that the reputational reason given, whether as formulated by Mr Osborne or as formulated by Mr Thelwell, was substantial and falls within the category of some other substantial reason.

180. We consider that the time of dismissal at which we have to assess the reason is primarily the date when the decision to dismiss is taken. However, there may well be events, for example which take place during a notice period or which come to light at an appeal, which could make a previously fair decision to dismiss unfair, or vice versa. In this case Professor Gerada's report was submitted by the claimant for the appeal and shed light on the claimant's state of mind. So, we have to look at the time after that evidence was produced as well. To do otherwise would artificially freeze the time when the 'reason' is shown.

181. So far as is necessary, we apply the passage quoted above from Arnold J in *Burchell*. We think that although at the initial decision-making stage in this case the 'reason' was twofold in terms of *category or label* (that is misconduct and some other substantial reason), at the appeal stage, which is the final stage at which the decision to dismiss was taken, the misconduct label had fallen away and the final decision to dismiss was taken on the basis of reputational damage; that is the label of 'some other substantial reason' alone.

182. We find that the *reason* in terms of underlying facts remained the same at both stages (save that at the appeal stage Mr Thelwell did not decide whether the claimant acted knowingly). However, the categorisation of the factual reason changed at the appeal stage. Therefore, we consider that the reason for dismissal in terms of category or *label* in this case was 'some other substantial reason' because that was the final label. The respondent has therefore proved its factual reason for the dismissal and that it falls within one of the potentially fair categories.

*If the respondent proves the reason for dismissal, was the dismissal unfair in that:*

1. *The respondent should have followed a process akin to a capability process as an alternative to the disciplinary process?*

183. In this case, the facts as they first presented to the respondent were those of apparently a clear conduct issue: that is driving under the influence of alcohol. It was within the reasonable range of responses for the respondent to regard that as potentially a conduct issue and therefore to commence the process using its disciplinary procedure. We note that the respondent's own terms of reference permitted either no action or no formal action to be taken: this would have enabled the respondent to take into account medical or any other evidence which mitigated or explained the apparent conduct and to act with flexibility or clemency as appropriate. The respondent did not have a 'process akin to a capability process' so that it would have had to create a

specific procedure to do as the claimant suggests. It did not, until the appeal stage, have detailed psychiatric evidence and on the basis of the evidence it had and the flexibility allowed by its own procedure it was within the range of reasonable responses for it to proceed as it did. As the respondent knew, the claimant had pleaded guilty at magistrates' court; he had not pleaded 'not guilty' on the basis of diminished responsibility or any other basis.

2. *Did the respondent have reasonable grounds to consider that its reputation had been damaged by the claimant's actions and that the claimant's continued employment would discredit and undermine the confidence of colleagues, reports and partners, including other blue light services, as well as the public, in the fire service in these circumstances?*

184. The claimant says that there is no evidence at the dismissal stage that the reputation of the respondent was in fact damaged. However, the claimant accepted at the disciplinary hearing that his actions would be deemed unacceptable by many other staff, members of the public and external partners. Mr Osborne and Mr Thelwell knew that the claimant had pleaded guilty at a public court hearing. The risk of harm to the respondent's reputation was taken for granted by the claimant and not disputed: for example at the investigation meeting on 27 June the claimant had said, '*I am ashamed of what I have done and how that would look on the service*.' On that basis, it was within the reasonable range of responses for the respondent to consider that its reputation had been damaged by the claimant's actions and that his continued employment would discredit and undermine confidence in the fire service in the circumstances.

*2. Did the respondent properly consider mitigation put forward by the claimant?*

185. The investigation report produced by Mr Ranger already contained many of the mitigating circumstances relied on by the claimant, as Mr Osborne noted during the dismissal hearing. At the dismissal hearing, the claimant took a full opportunity to set out his mitigation at length. It is evident from the notes that Mr Osborne listened and on occasions asked questions about what he was being told. After an adjournment, Mr Osborne prompted the claimant further because he was not sure that the claimant had finished what he wanted to say. Mr Osborne took his decision shortly thereafter while the claimant's mitigation would have been fresh in his mind. When he gave his oral decision, he referred expressly to the mitigation and in particular the claimant's 20 years of unblemished service and to his mental health. The fact that he decided nonetheless to dismiss on the basis of the very serious facts before him does not mean that he did not take into account the claimant's mitigation. The evidence before us shows that the respondent did properly consider the mitigation in the sense that it did so within the range of reasonable responses.

*3. Was there inconsistency of treatment between the claimant and previous employees of the respondent and if so what is the relevance of this? The claimant relies upon the case of 'firefighter A'.*

186. Mr Osborne did not know about the case of firefighter A at the time he took his decision, so he did not consciously distinguish between the two cases. However, we do not consider that the claimant's case is sufficiently similar to firefighter A's for there to have been unfair inconsistent treatment. The most significant difference is that the claimant was a senior officer whereas A was a firefighter. The claimant was also involved in policy at a strategic level and therefore had public exposure as a representative of the respondent. It was therefore considerably more damaging to his reputation and that of the respondent for him to be convicted of drink-driving than it was for firefighter A. Moreover, there was a difference in the circumstances of the original offence. On one view it was less serious for firefighter A to get up the morning after he had been drinking and set off to drive to work than it was for the claimant to drive immediately after drinking. In any event, there were also personal issues in the case of A of which we have no evidence.

*The claimant lists further allegations of unfairness at paragraph 68 (a) to (m) of his claim form however he has today withdrawn (d), (e), (h), (i) and (j), so as to leave the following*:

*4. The respondent suspended the claimant with no justification for doing so; there was no evidence that the claimant would reoffend or seek to interfere with the investigation and indeed the available evidence pointed to the opposite;*

187. The decision to suspend had no bearing upon the decision to dismiss. Therefore, we consider this point to be irrelevant. In any event, we consider that it was within the reasonable range of responses to suspend the claimant. At the point of suspension, the respondent would have been unable to predict how the claimant would behave during the investigation: the purpose of suspension is as a precaution to prevent the opportunity for interference in investigation.

5. *The respondent maintains that the suspension was reviewed but there is no evidence to substantiate this: the claimant submits suspension should have been reviewed on receipt of the occupational health report of 9 May at the latest*;

188. Again, we consider that the review of the suspension has no bearing upon the decision to dismiss. In any event we have found suspension was reviewed on the basis of the evidence before us. This was within the reasonable range of responses.

*6. The investigation focused on entirely irrelevant facts despite the claimant's admission of facts immediately following the incident;*

189. We have found that Mr Ranger used a system of cognitive questioning which is used also within police forces. We consider that it is within the reasonable range of responses to use a professionally recognised method of questioning as he did. In any event, our own experience shows that it is in the very nature of an investigation that the investigator cannot always predict what answers and responses he is going to receive. It is therefore within a reasonable range of responses for him to proceed accordingly. Mr Ranger asked questions designed to discover for example whether the claimant's drink

had been tampered with or whether the claimant was on any medication and indeed whether the claimant was the driver. This was a reasonable approach and, in the event that his questions turned out to be irrelevant then those questions and answers fell away and they did not taint the resulting decision to dismiss.

8. *Mr Osborne failed to investigate the claimant's contractual terms, incorrectly finding that the claimant was required to be on permanent recall duty when in fact this was not the case; [Mr Kemp withdrew this in written submissions on day 5 of this hearing];*

9. *Mr Osborne failed to seek medical evidence before concluding the disciplinary stage, despite the claimant's references to, 'dark thoughts' and, 'emotions shutting down';*

190. It was open to the claimant to produce medical evidence to Mr Osborne if he felt that that would be helpful to his case. It was also open to the claimant to urge Mr Osborne to seek medical evidence, but he did not do so. In those circumstances it is within the range of reasonable responses for Mr Osborne to conduct a dismissal hearing as he did without seeking medical evidence that the claimant had not asked for or suggested was necessary. Ms Furlong's reports had established that the claimant was fit enough to attend hearings, although no adjustments were suggested before the point when Professor Gerada reported. There was nothing in Ms Furlong's reports or the way the claimant was presenting his case before Mr Osborne, that suggested, for example, that his defence was that a mental health condition over-rode his judgment so that he did not make a decision to drive.

10. *When asked to disclose information relating to other disciplinary cases concerning individuals convicted of drink-driving - related offences, the respondent responded to say that the claimant would need to pay the respondent £5,775 for processing the request*;

191. Given the findings of fact that we have made above, we consider that Ms McCafferty was within the reasonable range of responses in asking for a payment of £5,775 for an exercise of research into personnel files which would have been very substantial and time-consuming in the circumstances.

11. *Mr Thelwell conducted the appeal hearing despite having committed an act of victimisation against the claimant as set out below;*

192. For the reasons set out below, we do not consider that Mr Thelwell committed an act of victimisation. Before us however this issue became one about bias. Putting aside the issue of victimisation, on the facts that we have found we do not consider that Mr Thelwell was actually biased against the claimant or that the fact that he wrote the letter to the magistrates' court showed that he was. As a question of fact, Mr Thelwell wrote that letter because he considered that he was ethically obliged to do so.

193. Having considered all the facts, we do not consider that a fair minded and informed observer who knew about Mr Thelwell's ethical concerns would conclude that there was a real possibility that he was biased because he had written to the magistrate's court as he did.

12. *The respondent failed to adjust its process to accommodate the reasonable adjustments recommended by Professor Gerada*.

194. We deal with this matter in our analysis under disability discrimination below.

195. Having analysed the issues using the criticisms raised by the claimant, nonetheless we also ask ourselves the question whether this dismissal was fair or unfair within the meaning of section 98(4), remembering that it is not for us to substitute our view for that of the respondent.

196. On the facts that we have found and given the reason that we have found was the reason for dismissal, we consider that what the respondent did was within the range of reasonable responses. Whatever procedure was used and whatever category or label was put upon the case, the fact is that the claimant knew exactly what was the respondent's concern about his behaviour and also the potential damage to its reputation which resulted. The claimant had a full opportunity at the investigation, at the hearing before Mr Osborne and again at appeal to set out his case in answer to the respondent's concern first about his behaviour and second also about the potential damage to its reputation. We consider that at all stages the respondent's decision makers listened to the claimant's defence and mitigation with open minds.

197. The claimant was given an opportunity to appeal which was a fair opportunity. The decisions made were reasonable decisions based upon the evidence before each decision-maker at that particular time. It was within the reasonable range of responses for Mr Osborne to regard the matter as one of misconduct given that he did not have the medical evidence which later was produced and given that the claimant admitted the facts of the offence and admitted that he must have made the decision to get into the car.

198. It was also within the reasonable range of responses for both Mr Osborne and Mr Thelwell to decide that the risk of damage to the respondent's reputation was so great that dismissal was a reasonable sanction. In the case of Mr Osborne, who on the evidence before him reasonably regarded the matter also as one of misconduct this was a more straightforward decision.

199. The case of Mr Thelwell's decision is less straightforward because there was evidence before him which suggested that there were reasons to do with the claimant's mental health which had overborne his free will so that he did not consciously make a decision to get into the car and drive. Mr Thelwell did not make a clear decision about that medical evidence but he did make a decision

that notwithstanding that evidence, the risk of reputational damage was so high that dismissal was appropriate.

200. We consider that decision was within the reasonable range of responses. We think that because the claimant was a senior fire officer with a public safety role. The respondent liaises regularly with other blue light services. Moreover, the respondent deals with the practical results of drink-driving. The respondent's credibility would be seriously damaged in the circumstances if it continued to employ a senior fire officer who had a conviction of drink-driving. If it continued to employ the claimant, the respondent would risk being in a position repeatedly of having to justify his employment in the circumstances. Moreover, we do not consider it likely that the general public or the other services with which the respondent works, or indeed other firefighters and fire officers, will always look deeply into the detail of the claimant's medical history or make anything other than a surface judgment of his situation. The respondent cannot always control or influence the conclusions that may be drawn. What the public and other services will see is that the claimant has a conviction for drink-driving.

*The respondent does not rely upon contributory fault.*

*What is the percentage chance of a fair dismissal in any event and if so when would such a dismissal have taken place?*

201. This issue does not now arise.

*Disability discrimination*

*The claimant relies upon depression and post-traumatic stress disorder ('PTSD').*

*The respondent disputes that this impairment amounted to a disability only in that it says that it did not have a substantial adverse effect on the claimant's day to day activities.*

*The respondent does not take a point about whether that effect was long-term.*

*The claimant says that the impairment hindered the claimant's participation in a part of his professional activities that is, responding to his pager for emergency calls.*

*So, the claimant says that the tribunal should consider this matter under the framework directive which should be read down into the Equality Act 2010.*

202. We consider that the claimant did have a disability. The matters set out in Mr Kemp's written submissions do amount to a substantial adverse effect on day to day activities. These matters appeared in the claimant's witness statements but were not challenged. We accept them and they are consistent with the mental health conditions of which he complains.

***Section 15: Discrimination arising from disability***

1.1. *The "something arising in consequence of the claimant's disability" is that the claimant says that his actions in getting into his car and driving off intoxicated on 6 May 2017 arose in consequence of his depression and post-traumatic stress disorder. No comparator is needed.*

203. In their joint statement the two experts instructed by the parties, Professor Gerada and Dr N. De Taranto, accept that on the balance of probabilities the claimant's actions in getting into his car and driving whilst intoxicated on 5 May 2017 arose in consequence of his depression or post traumatic symptoms. The claimant has discharged the burden on him to prove this element of his case.

1.2. *Did the respondent dismiss the claimant because of the "something arising" in consequence of the disability?*

204. Yes.

1.3. *Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on public confidence in the fire service. The claimant agrees that this is potentially a legitimate aim but disputes that it was in fact the respondent's aim.*

205. The claimant has agreed that maintaining public confidence in the fire service is a legitimate aim. We have found that this was genuinely the respondent's aim.

206. Was it proportionate? It is of very high importance that the public retain their confidence in the fire service: the public rely upon the fire service to be available in the most extreme circumstances, to enter their premises and homes, to drive fire appliances safely upon the roads especially in emergencies, and to set an example as part of their work in deterring the behaviour which causes significant road accidents.

207. It is equally of high importance as an aspect of public confidence that the fire service retains the confidence of the other blue light services with which it works. It is of vital importance that when senior fire officers speak in public about the dangers of drink-driving they do so with credibility. The claimant was a senior fire officer with a conviction for drink-driving. Even though there is medical evidence that his actions getting into his car on 5 May 2017 arose in consequence of his depression or PTSD, that is unlikely to be information readily available or accessible to the general public. The readily available information will be that he has a conviction for drink-driving. It is the fact of the drink-driving on 5 May 2017 and the fact of the conviction that will cause critical judgments to be formed and to undermine public confidence in the claimant and the fire service that employs him.

208. Although the impact on the claimant of his dismissal was of course significant and devastating in personal terms, we consider that the aim of

retaining public confidence in the fire service is so important for social reasons and for the purpose of minimising the likelihood of serious road accidents in the future as well as for the purpose of optimising the ability of blue light services to work together, as to substantially outweigh the discriminatory effect on the claimant on the facts of this case.

209. It is impossible to measure or predict the likelihood of a single additional road accident or the impairment of blue light services' ability to respond to a road accident because of the message sent by continuing to employ the claimant. The fact is however that continuing to employ the claimant as a senior fire officer carries a serious risk of sending out a message that drink-driving is acceptable. That carries an inevitable risk of loss of life.

210. There might indeed be – as the claimant has suggested - imaginative ways of using the claimant as a mental health champion going public as to his disability. However, it is not the primary purpose of the respondent's service to work to promote mental health. It is its primary purpose to save lives and to reduce the risk of loss of life.

*Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?*

211. This is now academic, however from Ms Furlong's report on 9 May 2017, though not before, the respondent had some knowledge that the claimant was a person with a disability. It could reasonably have been expected to know from that date.

***2. Reasonable adjustments: section 20 and section 21***

2.1. *Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely:*

*2.1.1. the provision in the respondent's disciplinary procedure that employees have the right to be accompanied by a work colleague or trade union representative;*

212. Yes.

*2.1.2. the practice of appointing an appeals manager to chair the appeal hearing who may question the employee at the hearing.*

213. Yes

2.2. *Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:*

*2.2.1. as the claimant had depression or PTSD he was placed in a stressful situation in being asked to recount his story compared*

*to someone without the disability (the claimant relies on paragraph 90 of Prof Gerada's report as evidence;)*

214. The claimant was not placed at this disadvantage. He was at no difficulty in recounting his story at the dismissal hearing. The claimant has argued before us that this adjustment should have been made at the appeal stage, pointing to the incident in which the claimant left the room. However, Mr Thelwell expressly did not question him by asking him to recount his story at the appeal. In any event the incident in question at which the claimant became upset and left the room arose not because of Mr Thelwell asking him questions to recount his story but because Mr Newton made a point that the incident of driving was in fact a potential suicide attempt. The notes of the appeal show that where the claimant did speak (on a very few occasions) he was able to do so and make his points clearly. He was able to read a prepared statement.

2.3. *Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:*

*2.3.1. PCP 1: allowing the claimant to be legally represented at the hearing;*

215. This would not be a reasonable adjustment. The claimant was represented by Mr Newton, an extremely experienced and able trade union representative. We have already found that there was no disadvantage but even so, we do not think that the presence of a legal representative would have avoided it in circumstances where Mr. Newton himself could not have avoided it.

*2.3.2. PCP 2: the questioning at the hearing being taken by a suitably competent and qualified individual who was trained in questioning people with mental illness.*

216. This adjustment would not have avoided the alleged disadvantage. The claimant hardly spoke during the appeal hearing. Mr Thelwell did not question him save to ask whether something was also his recollection. Mr Newton did the majority of the speaking and the claimant voluntarily added points. Even if the claimant needed to be questioned by someone trained in questioning people with mental illness, the fact is that the need did not arise, so the presence of such a qualified individual would not have avoided any disadvantage.

2.4. *Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out at 2.2.1 above?*

217. From the point of receipt of Professor Gerada's report the respondent knew of her suggestions about these matters.

**3. *Section 27: Victimisation***

3.1. *Has the claimant carried out a protected act? The claimant relies upon the following:*

*3.1.1. The letter of appeal dated 31 August 2017 contained a paragraph at page 329 bundle, which said:*

*'This position is recognised by the Authority's Occupational Health Department in a report dated 9 May 2017 which it confirmed that it is likely that I am suffering from a disability and made several recommendations, many of which appear to have been ignored. Further it is clear that the Authority did not consider what reasonable adjustments may have been appropriate in relation to the procedure adopted and its implementation and the ultimate sanction imposed*.'

218. The respondent confirmed on day 4 of this hearing that it did not dispute that this amounts to a protected act.

3.2. *If there was a protected act, has the respondent carried out any of the treatment identified below because the claimant had done a protected act?*

*3.2.1. Mr Jason Thelwell wrote a letter to High Wycombe magistrates' court dated 1 September 2017;*

219. No. The 'reason why' Mr Thelwell wrote this letter was because he felt it was his ethical duty to write that letter, as our findings of fact show.

*3.2.2. Mr Jason Thelwell decided to approve a press release which made no mention of the claimant's mental health issues.*

220. Mr Thelwell did not draft the press release, although he had sight of it and of the claimant's comments on it before it was released. We find that it was drafted as it was because the claimant's mental health was a sensitive issue which a drafter would not have included, as a matter of course. The claimant and his solicitors did not ask for the mental health matter to be included. In those circumstances we think it did not cross Mr Thelwell's mind to include information about the claimant's mental health. It would have been inappropriate to do so. He accepted this statement as it was because he regarded it as factual and fair and accurate.

221. There is in any event no evidence from which we could properly and fairly conclude that the press release only included the information it did was because the claimant carried out a protected act. There is no evidence that the respondent reacted negatively or with any hostility to the claimant because he carried out that act.

222. However that may be, the 'reason why' the wording was as it was, was that Mr Thelwell regarded the statement as factual, fair and accurate, there was

no consent to provide mental health information and the claimant did not ask for it.

223. For all those reasons we dismiss the claims.

_____
Employment Judge Heal

Date: ……30.07.19……..

Sent to the parties on: ..05.08.19.....

.....
For the Tribunal Office