



EMPLOYMENT TRIBUNALS

Claimant: Mr I Francis

Respondent: Hampshire Fire and Rescue Service

Heard at: Southampton **On:** 29 November, (mention)
1, 4, 5 and 6 November 2019
(deliberations and Judgment)

Before: Employment Judge Hargrove
Members Mr N Cross
Mr N Knight

Representation

Claimant: In Person

Respondent: Miss D Gilbert

JUDGMENT having been sent to the parties on and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant represented himself throughout most of this hearing but was also assisted in cross examination by Mr G Waterman, a fellow Fire Officer. The respondent was represented by Ms D Gilbert of Counsel. 5
2. By an ET1 dated 22 October 2018, the claimant complained of discrimination on the protected grounds of his disability. He had been employed as a Fire Fighter from 20 October 2000 initially at Cobnor until 2008 when he transferred to Green Watch at Cosham.
3. The claimant was off work for a substantial period in particular between March 2017 and March 2018 for 118 days following a spinal fusion operation. Central to the claimant's case, following a meeting on 27 January 2018 with

his watch manager Pearce, he was served with a notification of transfer to Southsea fire station to take effect on 28 August.

4. On 27 August 2018, he went off sick with depression and remained off sick until his resignation on 18 July 2019.
5. At an initial case management hearing on 9 April 2019, the then issues of disability (direct discrimination contrary to section 13, discrimination arising from disability contrary to section 15 and harassment contrary to section 26 of the Equality Act) were identified. At that stage the claimant remained in employment, although on the sick and in receipt of sick pay. Disability was not at that stage admitted and appropriate case management orders were made including for the claimant to provide a disability impact statement, now contained in the bundle at pages 35 (a) and (b). An admission of the claimant's depression as a disability was made by the time of the second case management hearing on 23 August 2019 but the date of commencement of that condition was not identified.
6. At that time the claimant was given leave to add a claim of constructive unfair dismissal (not related to disability). The claimant having resigned a month earlier.
7. The final issues were not fully identified until the commencement of this hearing on 30 October 2019. They are set out in an annex to this Judgment. It is now conceded that the claimant satisfied the test of disability, and the respondent's knowledge thereof, from 26 October 2017, the date of an Occupational Health report at page 50 of the bundle. All of the claimant's claims of disability discrimination post date 26 October 2017.
8. Late in the hearing an issue has arisen as to the extent of the reasons relied upon by the claimant for his resignation which are set out in a letter dated 18 July 2019 at page 256 (a) to (b) of the bundle. There are three distinct headings of fundamental breach of contract referring to the original Employment Tribunal case number.
 - (a) disability discrimination and harassment.
 - (b) Breach of trust and confidence, which relates to an allegation of a breach by the respondent of the subject access request and freedom of information requests.
 - (c) The last straw doctrine the fact and circumstances of the claimant's reduction from full pay to half sick pay.
9. Point (a) was not originally or at the start of the hearing identified as an issue. We have not heard specific submissions from the respondent on it. However, we have considered the matter without submissions and our decision is based upon that consideration.
10. The Employment Tribunal now proceeds to set out a chronology of the main events in which it will identify the relevant witnesses and individuals concerned and the principal issues which the Tribunal had to decide.

Case Number: 1403743/2018

- 10.1 The claimant was employed at Blue Watch Cosham from 2008 onwards. From September 2009 the claimant's Watch Manager and Line Manager was W M Pearce, a witness for the respondent.
- 10.2 The claimant had periods of time off between March 2014 and March 2015 following a spinal fusion operation. He was then off for three months with depression, returning to operational duties in June 2016. He contacted the firefighters' charity thereafter and attended a psychological rehabilitation programme at Harcombe House run by the charity in March 2017. In his witness statement Pearce describes concerns that he had that the claimant had missed refresher courses during his absences and following his return. The claimant claims that he felt that he was treated differently thereafter in particular by Pearce. We are not required to make any positive findings in respect of these events and do not do so. It is of some relevance as background to later events, which are contentious as between the claimant and Mr Pearce.
- 10.3 The claimant was off work for a period of some eighty days from September – 6 December 2017 following an off duty road traffic accident which aggravated his spinal fusion. During this period the claimant was referred to Occupational Health and a report was obtained on 26 October 2017 which included a description of his physical impairments and identified the depression and anxiety as a likely disability under the Equality Act. It is from that date that the respondent admits disability.
- 10.4 The sickness history is helpfully set out in a sickness absence meeting with the claimant conducted by Station Manager Riddell, also a witness for the respondent, on 6 April 2018. He had recently taken over from Mr Larrimore as Station Manager, Mr Larrimore having left sometime in January 2018. Riddell only stayed on as Station Manager at Cosham for some three months. We will describe issues raised by Riddell's evidence later in this chronology.
- 10.5 Reverting to the chronology, on 27 January 2018, there was a "record of discussion" between the claimant and Pearce which gives rise to a series of contentious issues forming the bedrock for the claimant's claims of disability discrimination. There is a note at page 52 and Pearce's note of the discussion at pages 53 – 55. Subsequently, on 31 July 2018 the claimant raised a grievance about this and other intervening events including his forced transfer to Southsea, which was investigated by Station Manager Clements, also a witness for the respondent.
- 10.6 The claimant complains that Pearce's account of the meeting of 27 January 2018 and the notes of two other meetings one in May 2017 and another in July 2018 were not disclosed to Clements and that they were not disclosed to him until after the appeal against the outcome of the grievance to Group Manager Harden, also a witness, in September 2018. More importantly, the claimant claims that Pearce made a remark: "There are too many people on the watch with mental illnesses, and that he the claimant would have to go". This is in dispute. The claimant also claims that there had been an earlier

Case Number: 1403743/2018

incident some two days before when Pearce had told him to “fuck off”. This too was in dispute. What is not in dispute is that Pearce expressed the view that the claimant was detached, referred to the previous incident, describing him as difficult to manage and confrontational, and that there was a clique between him and firefighter Waterman; and that the atmosphere within the watch in part at least due to the claimant’s attitude was such that two firefighters (Goffin and Tyler) had requested a transfer.

- 10.7 The claimant claims that Pearce told him that he was to be transferred and asked him to put in a transfer request, and he, the claimant, stated that if Pearce put in his reasons for transferring the claimant, he would sign it off but that it would not be a voluntary request.
- 10.8 The specific heads of claim arising for this meeting are set out in the list at paragraphs 3 and 4 (a) – (c) as instances of direct discrimination; at paragraphs 7 (a), (b) and (c) as discrimination arising from disability contrary to section 15; at paragraph 11 (a) as harassment: at paragraph 11 (b) the claimant also claims as harassment that Pearce ignored him for six months from 27 January 2018.
- 10.9 After the meeting of 27 January 2018, the claimant was off sick with depression until 8 February 2018. Pearce enquired of the claimant by text of the reasons for his absence and there was a trail at pages 63 (a) – (c).
- 10.10 By way of background, but not directly relevant to any of the claimant’s heads of claim, the claimant was served with notice of disciplinary investigation on 12 February 2018 relating to the alleged fraudulent misuse of the Cycle to Work scheme. A disciplinary investigation report was prepared on 28 February by the Group Manager at Portsmouth, Mick Thompson (also an important witness for the respondent in relation to the later transfer issue). There was a disciplinary notification by Thompson on 11 April 2018 that it was being escalated to level 3 which could have resulted in the claimant’s dismissal. The hearing took place on 19 July 2018 before Mr Avery, Area Manager and the claimant was in fact given a final written warning for eighteen months (see pages 94 – 97 for the outcome letter).
- 10.11 In the meantime, the sickness absence meeting had taken place between the claimant and Riddell on 6 April referred to above at 10.4. An action plan was agreed with two three monthly reviews, and a target was set of a reducing limit on the number of days absence during that period. Originally, in his heads of claim, there was an allegation that Riddell had tried to persuade the claimant to transfer voluntarily (see issues 4 (d) and 7 (d)) but the claimant withdrew those during the hearing. However, Riddell’s evidence of his conversations with the claimant and of the claimant’s attitude at paragraphs 5 – 11 of his statement remain relevant to the transfer issues in the case.
- 10.12 Other important events took place in July 2018, prior to the disciplinary hearing.

- 10.13 On 19 July 2018, W M Pearce spoke to Group Commander Mick Thompson, the Group Commander at Portsmouth who had conducted the disciplinary investigation which led to the disciplinary hearing on 19 July. Mr Thompson was aware as the investigation officer of the outcome of the disciplinary hearing, a final written warning. The claimant had not been dismissed nor had a transfer been ordered as a disciplinary measure.
- 10.14 Following the outcome, Thompson drove to Cosham to speak to Pearce. The notes of that meeting are at pages 132 (a) – (c). Thompson claims that Pearce was upset to hear that the claimant would be returning to Cosham and that he could no longer continue to work with the claimant if he were to return and that Pearce would seek a transfer to remove himself from the situation. He also claimed that there were a number of other live transfer requests from watch members. Thompson sets out in the note his thinking that it would be best for all if the claimant was transferred to another station where he could make a fresh start. There is then a note of a conversation with Avery, the Disciplinary Officer and at page 132 (c), following a further drive to Southsea, a note of a conversation with SC Buchanan Lee, who was the SC at Southsea and also a witness for the respondent, and who indicated that the claimant would be a good fit at Southsea with the same shift patterns as he had previously had at Green Watch Cosham. Thompson then spoke to Steve Jenkins, also a witness for the respondent, who had taken over from Riddell as Station Manager at Cosham in June 2018. According to the note, Jenkins said that he had spoken to the claimant in a one to one earlier about a possible move to gain a fresh start. It was at this stage that Thompson claims he told Jenkins that if the claimant would prefer to transfer it could be organised much more quickly, but that if he did not choose to transfer, he would be given thirty days notice under the Service Order for transfer, which is at pages 299 – 301.
- 10.15 The claimant claims that Thompson's decision to transfer, or to require the claimant to transfer, to Southsea was contrary to the transfer policies and procedures and without consultation with him. Issues 4 (e) and 7 (e)
- 10.16 A meeting of the Portsmouth Group Management Team was due to take place the next day, 20 July, the notes of which are at pages 91 – 93. Thompson's note at page 132 (c) indicates that that he discussed the case again with Buchanan Lee and Jenkins, both of whom attended the team meeting. The notes of the group meeting at page 192 describe the matter thus. "Collective discussion summarising the individual conversations MT had with SBL and SJ agreement that moving Ian Francis to Southsea would be the best most expedient solution to issues on Green Watch 23. The claimant claims that there was a breach of confidentiality in that his personal circumstances of mental health were discussed at that meeting.
- 10.17 Jenkins claims that he had noticed that relationships within Green Watch at Cosham were strained when he had joined in June 2018 and describes conversations he had with Pearce and the claimant. He says he spoke to them about exploring mediation but thought a

positive outcome was not likely to produce results. The claimant's case is that he was open to mediation but that it had not been explained why it should not take place.

- 10.18 On 27 July 2018, Jenkins spoke to the claimant and there are notes at pages 100 and 101. The issues which arise from this meeting are as follows:
- 10.19 The claimant claims that he was given an ultimatum that unless he consented to a transfer within one hour he would be subjected to a compulsory requirement. Jenkins puts a slightly different interpretation on it. It is not in dispute however, that the claimant had the opportunity to go away to discuss with his trade union representative on the telephone whether he should consent to a transfer; that he returned after some ten minutes and refused to consent. Whereupon, at 9.59am the claimant was served with a notice of transfer to Southsea with effect from 28 August 2018 (thirty days notice) as required by the transfer rules at page 99. This event gives rise to issues 7 (e) and (f).
- 10.20 There are notes of a meeting on 29 July between Watch Manager Pearce and the claimant, also attended by Firefighters Monday and another, at which the claimant raised complaints about his transfer and being ignored by Pearce. (see page 103 onwards).
- 10.21 The claimant's grievance. The claimant raised a grievance in writing on 31 July pages 107 – 144 which was addressed to Group Commander Thompson and Station Manager Jenkins by email (see page 117). Thompson initially intended to appoint Jenkins to investigate it but on the claimant's objection instead appointed Station Manager Clements, then Safety Delivery Manager at Redbridge Fire Station. The claimant's first in a series of complaints is that the appointee should have been at a level higher than the subject of the grievance complaint (see grievance policy at page 270 onwards and the individual grievance procedure in the Grey book at 330) especially at the formal stage in paragraphs 2 and 3. Thompson gave reasons for appointing Clements in his witness evidence and Clements adopted those reasons as his own.
- 10.22 The claimant's complaints are also as to the adequacy of the investigation. This is encapsulated in issues numbered 4 (f) (i) – (ix) as direct discrimination; and repeated at 7 (g) as discrimination arising from disability.
- 10.23 The Clements investigation. We accept that he compiled an investigation plan at pages 115 and 116, which he updated as he proceeded with his investigation, having gained guidance on how to conduct a grievance from HR. Thus it contains a list of witnesses whom he interviewed, or obtained statements from if not available for interview. The list indicates that out of a total of fifteen on Green Watch at Cosham, seven were interviewed and made statements. Two further electronic statements were obtained from Pearce on 16 August and CM Monday on 30 August. In addition, statements were taken by Clements from Thompson on 9 August (page 124) and there

Case Number: 1403743/2018

was a statement on 16 August which we have referred to. We accept that Clements sent out a request to those members of the Watch whom he was unable to arrange a meeting with.

- 10.24 These were on 30 August firefighters Munday, Pettifer, Tyler and Randall. They set out the subject or topics which Clements was asking them to deal with. Munday's response of the same date is at page 145. There does not appear to have been a response from Pettifer, Randall or Tyler, who was one of the two who Pearce alleged had put in applications for transfer, the other being Goffin. Clements claims he sent a request by email to Pearce but that request is not in the bundle. However, Pearce's response of the 16 August is in the bundle at page 129. It is clear that at the time of that email Pearce cannot have had in front of him his notes of the meeting, which he describes in the email as in January 2018 with Pearce. This was the meeting of 27 January. Nor of the meeting with Pearce on 29 July, which he describes wrongly as having taken place on 22 July.
- 10.25 Pearce did not disclose the original notes of these meetings to Clements and they were not disclosed to the claimant until after the grievance appeal outcome letter from Harden of 4 December. Harden had ordered those notes to be disclosed by HR to the claimant.
- 10.26 We have no reason to doubt that Pearce did make notes of the meetings of 27 January 2018 and 29 July 2018 shortly after they took place. As to the interview notes with the other members of Green Watch, at page 138 there is a note of firefighter Waterman's interview, at page 139 Goffin's interview, page 40 Mitchell's interview, Chris Clements at page 141, Laine at page 142 - he was the claimant's brother-in-law, Tallak at page 143 and Alchen at page 145. Also as part of the investigation, the claimant was interviewed by Clements on 16 August 2018 (see notes at pages 127 and 128).
- 10.27 We accept that the purpose of that meeting was to enable Clements to identify the specific issues upon which the claimant sought a grievance investigation, that matter not being entirely clear from the very lengthy six page grievance letter that he had sent on 31 July.
- 10.28 The claimant claims that not all fifteen of Green Watch were interviewed. Clements' explanation for that is that he was due to go off on annual leave for two weeks from 6 September; that the remainder of Green Watch was not available for interview because of annual leave or sickness absence, hence his email requests them; and that he was anxious to complete his report before he went off.
- 10.29 Also on 21 August 2018, Clements copied Thompson into an email where he raises that the claimant had queried whether his transfer due on 28 August should be suspended pending the outcome of the grievance. Thompson responded the same day in effect asking Clement to complete his report as soon as possible because there were crewing pressures at Southsea, where there was an existing vacancy to be filled. It was decided, but not by Clements, that the transfer notice period should continue as before. The claimant complains Thompson was rushing Clements to complete the report.

- 10.30 On 28 August 2018 the claimant did not attend Southsea but went off sick. He remained off sick until his resignation on 18 July 2019.
- 10.31 Clements' report dated 4 September is at pages 148 – 157. An outcome meeting was scheduled for 6 September which the claimant asked to be adjourned because his representative was not available. Clements declined to adjourn it. There is in fact no complaint made by the claimant about that matter.
- 10.32 The outcome letter confirming the decision is dated 6 September 2018 at page 159. Clements identifies the main grievance points as being (i) the transfer to Southsea contrary to the service order (ii) ineffective management and lack of support for the claimant's mental health condition.
- 10.33 Clements gave detailed reasons and findings for rejecting these points. We consider their merits later.
- 10.34 The claimant appealed by letter of 12 September (page 162) in which there were ten points raised. Group Manager Harden was appointed to hear the appeal. He was the Group Manager Eastleigh, Fareham and Gosport. The claimant asked for the grievance appeal hearing to be recorded because of his mental state and it was recorded. The hearing was scheduled for and took place on the 27 November.
- 10.35 In the meantime, there was a further Occupational Health report which confirmed the diagnosis of depression and anxiety; that it was likely to be a disability and that the claimant remained unfit for work. It does not suggest that the claimant was unfit to attend the appeal hearing nor was that suggested at the hearing, the notes of which are extremely lengthy. They were transcribed and occupy forty-eight pages of the bundle. By way of further detail, the claimant has complained that he was not given the original tape recordings to check, but the claimant cannot come up with any details of any particular inaccuracy within the transcript and it is not usual, nor is it required by ACAS Guidelines on the conduct of grievances, that such hearings should be tape recorded or transcribed. The outcome of the grievance was confirmed in writing by letter of 4 December 2018.
- 10.36 By way of summary, points 1 – 4 were rejected, point 5 was upheld, points 6, 7 and 9 were partially upheld, point 8 was described as "opinion" and he was unable to find either way on point 10.
- 10.37 We will make findings of fact concerning the adequacy of the grievance process as a whole because complaints are made not only about Clements' conduct at the first stage, but also Harden's conduct of the appeal. These complaints are not only part of the complaints of discrimination, but also of conduct contributing to the claimant's claimed breakdown in trust and confidence amounting to unfair dismissal. It is specifically claimed at paragraphs 14 (d) that Clements Harden ignored the claimant's request for proof of allegations of poor behaviour or conduct.

- 10.38 The sick pay issue The claimant went off sick on 28 August 2018 after his enforced assignment to Southsea had taken effect.
- 10.39 The sick pay rules provide that an employee on authorised sick leave shall be entitled to full pay for six months in any twelve month period. Thereafter, the Fire and Rescue Authority may reduce pay by up to half for six months. It does not happen automatically. There is the mandatory sick pay absence policy which is not part of the contract of employment at page 11 of 18, the effect of which we will summarise.
- 10.40 The claimant's line manager at the material time was Lacy Clumley, who has also been a witness for the respondent. We accept that in December 2018 she was notified by HR that the claimant's six months sick pay was due to come to an end. In fact, the initial six month period was due to expire on 27 February 2019 but it, as already indicated, did not end automatically. There was a requirement for the line manager to discuss it with the employee and also to seek advice from HR. The employee is to be given the opportunity to make a written submission for its continuation. Finally, the decision has to be confirmed in writing giving at least one month's notice. If it does not give the full one month's notice, then the sick pay will continue for another month.
- 10.41 It is accepted by the claimant that on or about 14 January 2019, Clumley telephoned him and warned him that his sick pay would be becoming to an end on 27 February. There is no evidence that the claimant made any submissions at that stage or at any stage, at least up to the 27 February. Clumley claims that she wrote a letter to the claimant's Essex address on record. The claimant claims that he was not living there and that he did not receive it. Clumley did not retain a copy of the letter and it has not been provided to the Tribunal.
- 10.42 For unexplained reasons, notwithstanding the telephone call, full pay continued beyond 27 February 2019 and Clumley was not notified of that by HR until early May 2019 (see page 245). Clumley was in regular contact with the claimant during this period but the sick pay issue was not further discussed between them. The result was that the claimant continued to receive full pay from the end of the initial six month period on 27 February until it was ended on 24 June 2019, but with effect from 15 July when half pay commenced. Having been alerted by Clumley that the claimant was still receiving sick pay in May, Buchanan Lee arranged an informal meeting with the claimant in a Park on 6 June 2019. It was arranged that there would be a further meeting to discuss his sickness absence and the issue of sick pay, but Buchanan Lee claims in his witness statement that he told the claimant that he would be sending out a letter confirming that his full sick pay would be reduced to half sick pay on 24 June 2019, which was not the full month's notice.
- 10.43 In his evidence to the Tribunal Buchanan Lee referred to a letter in the bundle from him dated 7 June 2019 and addressed to the claimant at the same Essex address notifying the claimant that he would go on half pay from 24 June (see page 252). In his witness statement the claimant denies that he ever received notification in writing that his

Case Number: 1403743/2018

sick pay would reduce on 24 June 2019, either at the meeting or in the letter sent to Essex, which he denies having received. He claims that the first time he was aware of the reduction in his sick pay was when he checked his bank balance and discovered, on 15 July, that his pay had been reduced.

- 10.44 The claimant submitted his letter of resignation on 18 July 2019 in which he claims, amongst other things, and we have referred to the contents already, that he received no warning of the deduction.
- 10.45 In the list of issues originally agreed at the start of the hearing at paragraph 14 the claimant relies upon the reduction of sick pay and the respondent's failure to consult as being part of the repudiatory conduct upon which he relies in particular as the final straw.
11. This concludes the Tribunal's chronology of the main events we now deal with the statutory provisions.
12. **Direct discrimination.** Section 13 of the Equality Act provides that a person discriminates against another if because of a protected characteristic he treats the other less favourably than he treats or would treat others.
13. Relevant to that head of claim is section 23 which states "On a comparison of cases for the purpose of section 13 there must be no material difference between the circumstances relating to each case." We will explain what that means in due course.
14. Section 15 of the Act describes **discrimination arising from disability** which is the claimant's second claim. "A person A discriminates against a disabled person B if:
- (a) A treats B unfavourably because of something arising in consequence of B's disability.
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
15. Section 26 of the Act defines **harassment**. "A person A harasses another, B if:
- (a) A engages in unwanted conduct related to a relevant protected characteristic (disability).
 - (b) The conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

16. Subsection (4) of 26 continues:

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

 - (a) The perception of B.

(b) The other circumstances of the case.

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

17. Mention should also be made of section 39(2) of the Act. This is the Section which imports the discrimination provisions into the employment field. Subsection (2) provides that that an employer A must not discriminate against an employee of A's, B, by dismissing B or by subjecting B to any other detriment.
18. Reference should finally be made to the burden of proof provisions in section 136 of the Act. The Act recognises that it may be very difficult to prove that the reason for a person's treatment was because of a protected characteristic. Accordingly, there is an initial burden on the claimant to prove facts, either from his own evidence or from other evidence called, for example, by the respondent and elicited in cross examination , or from documentary evidence, from which a Tribunal could reasonably conclude that he has been treated less favourably or in the case of section 15 unfavourably, because of his protected characteristic or for a reason arising from disability. If he overcomes that hurdle the burden then shifts to the respondent to prove that the reason for the conduct in question had nothing whatsoever to do with and/or was not related to the protected characteristic, in this case disability . Those provisions apply to this case.
19. The next matter which the Tribunal has to consider is the issue of whether or not there was in this case a constructive dismissal. The provisions about constructive dismissal are contained in particular in section 95 (1) (c) of the Employment Rights Act 1996. The burden of proof provisions that I have just described do not apply to this part of the claimant's claim. In short, the claimant has to prove that the respondent, his employer, was guilty of a breach of contract of such gravity that the claimant was entitled to resign and claim constructive dismissal. The breach of contract may be a breach of an express term of the contract or an implied term. In this case, and in all employment contracts, there is an implied term that the employer will not:

(1) Without and proper cause,

(2) act in such a way as to be calculated or likely to cause a breakdown in trust and confidence.

The word “calculated” applies to deliberate conduct by the employer. “Likely” includes conduct which the employer may not intend to cause a breakdown in trust and confidence but has that effect. We have to decide whether we are satisfied by the evidence that the conduct satisfied that test.

20. The claimant has to show that he resigned at least in part due to that conduct. It should be a significant part of the reasons for his resignation.

Conclusions

21. Issue A. The remarks said to have been made by W M Pearce at the meeting on 27 January. We do not accept that W M Pearce made the remark that the claimant attribute to him about there being too many people on the watch with mental health issues. The claimant has claimed that he made his own notes

of the discussion but he has never produced them to the Tribunal. There was a claim that he may have sent them connected to the grievance letter. It certainly was not received and we find it difficult to believe that if he had sent it he did not keep a copy. The claimant did not raise it in the text exchange with Pearce on 5 February 2018, which was certainly an opportunity for him to have done so, and to raise a complaint.

22. The allegation was first made by the claimant at the meeting on 29 January 2018, when Pearce denied it and said that he had said that he had several watch members with mental health problems who had confided in him and that he had to give support to them all. The claimant's note of that meeting at page 102 does not record Pearce's denial. Or that he had made the remark that Pearce says he made about mental health in a different context and the context in which as we accept, Pearce made a remark, was intrinsically innocuous.
23. We regard Pearce's notes at pages 52 – 54 which were made contemporaneously, and which are consistent with the contents of the email from Pearce to station commander Larrimore of the same date, as being a more reliable description of the conversation than that now put forward by the claimant and in his grievance document of 31 July at pages 107 – 114. Pearce's criticism of the claimant's attitude to the Watch reflects the information that he had, and what he genuinely believed, and had nothing to do with the claimant's depression or anxiety.
24. We do not accept that Pearce told the claimant to put in a request for a transfer but did say that he wanted him to transfer to another watch or station. Again, in any event that had nothing to do with the claimant's mental state and we accept Pearce's denial that it was motivated by the fact that the claimant had a disability. In any event we do not regard that Mitchell, who was cited by the claimant in his evidence to the Tribunal as being someone who was not threatened with a transfer and who did not have depression and who had also displayed a poor attitude (see Pearce's email at p page 56), is a valid comparator demonstrating that the claimant was less favourably treated because of his disability. We explain what section 23 of the Act means.
25. The circumstances and abilities of the comparator must be the same as those of the claimant except for the difference of the disability, and their treatment different, in the sense that the treatment of the claimant is less favourable. It is only then that a comparison can be made which may point towards discrimination. We accepted Pearce's evidence that Mitchell, when spoken to by Pearce, had been more accepting in his response than the claimant who we find has demonstrated during this Tribunal hearing that he still does not accept the criticisms made by Pearce of him.
26. There is also the fact that the Clements' investigation of the claimant's grievance uncovered a body of evidence from Watch colleagues supporting the validity of Pearce's criticisms of the complainant at the meeting on 27 January 2018 after the event. There are no criticisms of Mitchell although it is fair to point out that they were not being investigated by Clements during the grievance.
27. There was the claim against Riddell which was, however, withdrawn by the claimant during the hearing.

28. G M Thompson's decision to transfer the claimant to Southsea on 19 July. We have described and examined closely the contemporaneous notes produced by Thompson of the conversations that he conducted with Pearce, Jenkins and Buchanan Lee on that day after the outcome of the disciplinary was known, and which set out his rationale for transferring the claimant. These were that it was In the interest of Green Watch and of the claimant himself – to give him a fresh start in a supportive environment. We accept that may indicate that the environment was not as supportive at Cosham but it begs the question whose fault that was. These notes of Thompson reveal the thought processes of each of the managers and, on the basis of that document, there is no basis for reaching the conclusion that any of the participants were motivated consciously or unconsciously to support a transfer because of the claimant's depression.
29. There are nine allegations against the propriety of S M Clements investigation of the grievances.
30. Whilst we considered each on its merits, we make the general observation that even if any of the criticisms were valid, and some of them have at least something in them, the claimant has not produced evidence from which we could reasonably conclude that Clements treated him less favourably in his investigation because of his mental illness and we are satisfied that none of the treatment accorded by Clements to the claimant or his grievance outcome had anything to do with the claimant's disability. That is not the same as concluding however, that Clements' investigation was not open to valid criticism. We take each of the criticisms in turn.
31. (1) Not considering issues relating to the claimant's mental health. We do not agree with Ms Gilbert's submission on this aspect of the case. At the meeting on 16 August 2018, when Clements was trying to ascertain what complaints the claimant wanted investigating, they were identified under the heading "Grievance", two of them being "discrimination due to mental health issues" and "picked on due to mental illness – bullying and harassment". Neither in his original report nor in the outcome letter does Clements appear to have separately investigated the claimant's complaint of discrimination against Pearce. This criticism is allied to issue (2): only considering events up to three months earlier than the date of the grievance, and thus not what happened on 27 January 2018. We regard Clements' interpretation of the three months rule as being highly legalistic. It is apparent from the tenor of the claimant's grievance that the claimant was complaining of events beginning with the Pearce Interview on 27 January 2018 as being acts of discrimination. Whether they were or not is a matter for us to decide but we do not accept that Clements dealt with this aspect during his grievance investigation. Any failure by him in that respect however, was not an act of direct discrimination, nor as we will explain later an act of discrimination arising from disability.
32. There were good reasons why not everyone was interviewed by Clements. They were away and Clements was anxious not to delay the process in light of his holiday plans. Fundamentally, we are satisfied that the content of the interviews and statements of eleven witnesses was sufficient to enable Clements to form a proper view of the claimant's conduct within the Watch.

Case Number: 1403743/2018

It is noteworthy that a statement taken from one of the watch members who has transferred, firefighter Goffin , was particularly critical of the claimant.

33. Issues (5) and (6). The three original and contemporaneous records of discussion by Pearce of 6 May 2017, 27 January 2018 and 29 July 2018 were not produced to Clements nor provided to the claimant until after Harden's appeal outcome. Whatever the reasons for it, we have accepted their contents as being contemporaneous and if they had been produced to Clements it would have made no difference whatever to the outcome of the grievance, indeed it would have supported the outcome of the grievance.
34. Issues (6) and (7). The appointment by Group Manager Thompson of Clements to investigate the grievance , who was senior to Clements and was the subject of part of the grievance. While we accept that the Grey book provides that "where a decision giving rise to the grievance was made to a higher level the grievance will initially be heard at that level", Thompson gave reasons relating to the limited availability of suitable managers at the time to deal with the grievance; the time it would take to deal with the grievance; and his confidence in the independence and competence of Clements. We accept, for example, that when Thompson initially spoke to Clements, Clements immediately started to make a note of what he was saying as part of his investigation. This was a technical breach but we are satisfied that Clements did properly deal with the transfer issue in which Thompson played a major part.
35. In any event, the claimant's appeal was dealt with by Harden who was an appropriate senior officer within the hierarchy (see in particular paragraph 3 of the grievance procedure at page 331).
36. Issue (9) This complaint is that Clements was rushed by Thompson. We do not believe that Clements cut short his investigation in response to Thompson's email to him. He had by that stage completed the enquiries he intended to make. There is a time limit for the completion of grievances within the rules of only seven days. That was wholly unrealistic having regard to the extent of the grievances, but it did imply that the matter should be got on with.
37. We have already indicated that there was sufficient material to justify his conclusions. We do not accept that an enquiry of all fifteen members of Green Watch would have made any difference. An enquiry was made but he did not have a response from a minority of the watch. There is no evidence that it would have made a difference if he had a response from all.
38. The Harden Appeal. The claimant complains that Harden failed to address the claimant's complaint of bullying and harassment in particular of 27 January 2018 and of a forced transfer on 27 July. We reject these complaints. Clements' failure to consider the complaint about Pearce's conduct on 27 January as a separate issue under the three month rule was remedied by Harden who went back longer than 27 January 2018 and, we accept, he conducted his own investigation before the grievance appeal hearing, although we record that the notes of it have not been disclosed to the claimant or to the Tribunal.

39. Harden dealt with the transfer point and rejected it at appeal point (2) on page 220 of the outcome letter. On the narrow point that the claimant made that he was given only one hour to decide whether to transfer voluntarily, or he would be required to transfer, we reject the claimant's interpretation. We accept that Thompson had already made the decision that the claimant would be required to transfer if he did not volunteer and so instructed Jenkins. We accept the rationale that both Jenkins and Thompson genuinely considered that it was in the claimant's interests as well as that of the Watch, for him to transfer and that, if he chose to do so, it could be immediately effected, whereas if he refused, the requirement could only be put into effect on thirty days notice when there was an existing vacancy which Thompson was anxious to fill at Southsea. The claimant was given a choice and ample opportunity to take advice. One hour was in fact more than enough. In any event, there is no evidence whatsoever that circumstances of that discussion had anything to do with the claimant's disability or matters arising from it.

The Section 15 Claims

40. There is a difference between a direct discrimination claim and discrimination arising for something to do with disability. To give a rather elementary example, supposing a postman suffers a serious injury to a leg which amounts to a disability. If the postman is dismissed simply because he has that disability and someone who also has a similar difficulty in doing his runs who did not have that disability, would not have been dismissed, that is direct discrimination and it cannot be justified. If however, the postman is dismissed because of the length of absences he has had because of his leg injury constituting a disability, that is capable of being discrimination arising from disability because the absences are related to the disability. The connection between the something arising and the disability and the treatment does not have to be direct. It can be indirect provided there is a link between the two.
41. A section 15 claim covers conduct which is unfavourable to someone with a disability and does not require a comparator to test if the conduct is less favourable. The "something arising" from his disability may be several steps away from the disability itself, but there must be something connecting. The something arising in this case is said to be the claimant's sickness absence record and difficulties in managing the claimant.
42. As to the first, we do not accept that any of the acts which the claimant relies upon as acts of discrimination and which we have detailed above were done because of the claimant's sickness absence record or because of any likelihood that that might continue. The fundamental reasons behind the decision to move the claimant to Southsea had nothing to do with his sickness record but had everything to do with management's perception of the claimant's conduct within Green Watch which were the subject of lengthy grievance processes. The claimant does not assert that his conduct had anything to do with his disability. In fact he denies the conduct. There is no medical evidence to support the contention that he behaved as he did because he was depressed. The essential link is missing. There is no need and nothing for the respondent to justify in respect of its conduct in that respect.
43. We can deal with the harassment issues quite shortly as a result of our findings of fact about what Pearce said at the meeting on 27 January. What

we found he said did not satisfy the test of harassment as defined in section 26 (1) of the Act.

44. As to the second point, the claim that Pearce ignored the claimant after that meeting of 27 January that is not factually established. It is clear that the relationships were strained as between them. Pearce found the claimant difficult to manage and Mr Pearce clearly entertained a grievance, justified or not, about the way he had been treated on 27 January. Clearly they were not the best of friends but we do not accept that Pearce ignored him. There were discussions, business went on, the claimant continued to work at least until July, and we do not consider that the conduct of Pearce amounted to Harassment under the Act.
45. We now deal with the constructive dismissal issues. we can state them quite shortly. Issue one encompasses the matters about which we have given our decision at some length. We do not accept that in any respect the respondent acted without reasonable and proper cause in respect of the matters about which the claimant complained in his first ET1. There are criticisms of the conduct of the grievance by Clements but we have to consider the process as a whole and such complaints as are made were adequately dealt with and covered by Harden's appeal.
46. As to the failure to comply with freedom of information requests and failure to disclose documents, the evidence which we have seen does not establish that the conduct was without reasonable and proper cause. There may have been delays but we know from our own experience that when a whole series of freedom of information act requests are made, it takes time to comply. No specific failures have been identified to us so as to support a claim of conduct likely to cause a breach of trust and confidence.
47. Finally, there is the sick pay issue. We have recounted a close chronology of what took place. The only defect appears to have been that the letters warning of were not received. We have doubts about whether they were in fact not received, but we accept that they were sent and sent to an address where they ought to have been received . We also accept that the claimant was given verbal notice in January that his full sick pay would end, on 27 February, and the claimant knew the procedure. It is clear from later emails. He failed to make any written submissions against, which he was entitled to do, whether he received a letter or not. For unaccountable reasons the claimant continued to receive sick pay for five months after the six month period had ended. Even if he failed to receive the letter dated 7 June, which was sent, we note, to the same address as the address on the claimant's letter of resignation of 18 July, he still had the opportunity to have made representations because we accept that he was also told at the meeting on 6 June that consideration of the continuation of his full sick pay was under consideration.
48. In all of these circumstances we do not accept that, even if there was a technical failure to comply with the rules, they did not have the status of a term of a contract. Of itself that did not amount to conduct on the part of the respondent which was calculated or likely to destroy trust and confidence.
49. For each of these reasons the claimant's claims fail.

Employment Judge Hargrove

Date: 19 February 2020