EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hurle**

Respondent: **London Fire Commissioner**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **21, 22, 23 October and**
12 November 2020 (in chambers)

Before: **Employment Judge Moor**
Members: **Ms M Long**
Mr B Wakefield

Representation
Claimant: Mr J Franklin, counsel
Respondent: Mr B Uduje, counsel

RESERVED JUDGMENT

1. **The unanimous judgment of the Tribunal is that the Respondent discriminated against the Claimant contrary to section 39(5) of the Equality Act 2010 by failing to make the reasonable adjustments of:**

    1.1. **Adjusting the policy and practice to allow a Station Manager on development be put forward for transfer; and**

    1.2. **putting forward the Claimant for the Station Manager vacancy at Feltham.**

2. **The unanimous judgment of the Tribunal is that the Respondent discriminated against the Claimant contrary to section 15 and 39 of the Equality Act 2010 by:**

    2.1. **subjecting him to the disciplinary procedure; and**

    2.2. **dismissing him.**

3. **The claims under section 13 and section 39 (direct discrimination because of disability) of the Equality Act 2010 are not well-founded and do not succeed.**

REASONS

1. The Claimant has been a firefighter for most of his career. From 2 January the Claimant was employed as a Fire Station Manager (Development) by the Respondent, the employer of those working at the London Fire Brigade ('LFB'). He was dismissed on 24 October after a long sickness absence.

2. The Claimant brings claims of disability discrimination relating to this dismissal and a failure to make adjustments.

Preliminary Matters

3. This liability hearing was heard remotely via a Cloud Video Platform. We thank the representatives for their preparation of a searchable PDF bundle and witness statements. There were no major connection difficulties, but at one point we 'lost' Mr Uduje for a few minutes, after which we ensured he was informed of the evidence that had been given in his absence. In discussion with counsel, we set a rough timetable for the evidence and submissions, and we thank them for meeting it.

4. The Respondent provided some documents to the Claimant in response to his Subject Access Request on which the names of individuals were redacted. On disclosure of documents relevant to the issues in this case, the Respondent did not provide unredacted versions. The Claimant's representatives made a request for them to do so and some unredacted documents were provided a few days before the hearing, but not all. On the first day we made an order that the remaining relevant documents should be disclosed without redaction and the Respondent complied with this order (Bundle X).

5. On 27 January 2020, at a point when the Claimant was not represented, EJ Jones assisted the parties in drawing up a list of issues (42-44). On 17 June 2020, EJ Lewis allowed an amendment to the claim to add the section 15 claim to the issues (83-84). The Respondent provided particulars of the legitimate aims it relies on for its defence to the section 15 claim (88).

6. The Respondent made an application on the first morning of the hearing that the claim under section 15 of the Equality Act 2010 ('EQA') should not include a complaint about dismissal. We heard submissions on this application but concluded that EJ Lewis had allowed an amendment of the claim to include dismissal and the principle that there should be finality in litigation meant we would not reconsider her decision, there being no good reason for the delay in the Respondent's application.

7. The Respondent now admits that the Claimant was a disabled person from February by reason of depression.

8. The Claimant no longer relies on his symptoms of PTSD as a disability. The Claimant no longer relies on discrimination by association.

9. We have altered the numbering of the list of issues below and made minor alterations (underlined) to ensure we address the issues in a logical order and that they reflect the provisions of the EQA. We have not included issues no longer in dispute.

List of Issues

Reasonable Adjustments (EQA sections 20, 21 39(5) and Sch 8)

10. Did the Respondent know, or could it have been reasonably expected to know, about the Claimant's disability? From what date?

11. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: a practice of not transferring staff if they are on 'development'?

12. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he could not be transferred until the development activity was completed?

13. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?

14. What steps could have been taken to avoid the disadvantage? The Claimant suggests that:

    14.1. the Respondent should have allowed the Claimant to transfer to a vacant post in order to reduce his commute from 3 hours to 1 hour as it would have alleviated the substantial disadvantage he faced and it was recommended in a medical report;

    14.2. the Respondent should have adjusted the policy that says that middle managers are not moved during development. The Claimant was off sick and could not begin his development plan and the Respondent refused to transfer him until he had completed it;

    14.3. working at Chingford station made his health conditions worsen and severely affected that of his wife and daughter. The Respondent should have followed section 19.4 of the Managing Attendance Policy which does allow a disabled person to be transferred.

15. Was it reasonable for the Respondent to have to take those steps and when?

Discrimination arising from disability (EQA section 15 and 39(2))

16. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date?

17. Did the Respondent treat the Claimant unfavourably by:

    17.1. subjecting him to a disciplinary process; and

    17.2. dismissing him?

18. Did the following things arise in consequence of the Claimant's disability: the Claimant's sickness absence, his inability to work or attend at work, or his attendance record?

19. Was the unfavourable treatment because of any of those things?

20. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent relies on the following legitimate aims:

    20.1. Providing a safe and reliable service to the public, ensuring that employees sickness absence causes minimal disruption to a statutory service delivery (in accordance with the Fire and Rescue Services Act 2004);

    20.2. To ensure that additional pressure is not put on colleagues who have to cover workload which has the potential to cause low morale and reduce the efficiency of the service;

    20.3. To ensure that employees are able to perform their duties without endangering their health or that of other workers or public service users

    20.4. To ensure that the employees can maximise their attendance at work and perform their substantive roles and;

    20.5. To ensure that additional financial pressure is not put on the organisation from employee absence, where there is scrutiny of reducing budgets and how public funds are spent.

21. The Tribunal will decide in particular:

    21.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

    21.2. could something less discriminatory have been done instead;

    21.3. how should the needs of the Claimant and the Respondent be balanced?

Direct disability discrimination (Equality Act 2010 section 13 and 39(2))

22. Did the Respondent know, or could it have been reasonably expected to know, about the Claimant's disability? From what date?

23. Did the Respondent do the following things:

    23.1. Refuse to transfer the Claimant to a vacant post at Feltham which was 1 hour, 15 minutes from his home as opposed to Chingford which was a 3-hour trip.

    23.2. Decide to progress straight to Stage 3 of the disciplinary procedure and dismiss him.

24. Was that less favourable treatment because of disability?

25. The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was. He relies on a hypothetical comparator.

Findings of Fact

26. Having heard the evidence of the Claimant, Ms C Gibbs, Head of HR Advice and Employee Relations; Mr S Prasad, former Borough Commander for Waltham Forest (the Claimant's line manager); Mr A Perez, Deputy Assistant Commissioner, North-East Area; and Mr T Powell, Director People Services, and having read the documents to which we were referred, we make the following findings of fact. (Dates are unless otherwise stated.)

27. London has 103 fire stations, managed in four areas. Each station has at least 1 fire appliance, operated by a crew of 4/5 firefighters including a Leading Firefighter who manages that appliance. They report to a Sub or Station Officer who manages the watch and station day to day (in some regions known as a Watch Manager). Above them the Station Manager has responsibility for the station. The Station Manager reports to the Borough Commander who is responsible for several fire stations in an area. A Deputy Assistant Commissioner manages each of the 4 areas. An Assistant Commissioner (fire stations) has overall control of fire stations.

28. As can be seen from this structure, the Station Manager is the link between the unit of the fire station and higher management. This makes it an important job as well as because each employee's work at LFB contributes to an organisation whose statutory role is to protect Londoners. We have not heard a great deal about what station managers do day to day, except that they have both management time and firefighting on-call time.

29. The Claimant has been a firefighter for most of his career, about 21 years. At the age of 18 he was appointed as a retained (on-call) firefighter in Hampshire, becoming a Leading Firefighter at the age of 21. He became a full-time firefighter with the Respondent from 2003 to 2005, based at Westminster fire station. He was then employed by Hampshire Fire and Rescue Service ('Hampshire') as both a whole-time and

retained firefighter. By the time of his application to LFB he had been promoted to and was working as Watch Manager in both roles.

30. The Claimant was appointed to the role of Station Manager (Development) with the Respondent on 15 November 2018 with effect from 2 January 2019. This was a development role during which he was expected to progress through a training programme. His letter of appointment stated:

> *Your initial posting will be to Chingford Fire Station, 34 The Ridgeway. E4 6PP. However, the LFC reserves the right to transfer you to any post in the London Fire Brigade which is appropriate to your role either on a temporary or permanent basis. The LFC will endeavour to take your individual preferences into consideration, but this will not always be possible and you may be required to work at any station within the London Fire Brigade to meet the business needs of the LFC.*

31. At Hampshire the Claimant had been experiencing workplace stress because of alleged bullying and malicious disciplinary allegations. By his successful application to the promoted role with the Respondent, he saw that he could continue his firefighting career and remove himself from those sources of stress.

32. We find the Claimant did not mislead the Respondent on his health questionnaire: it is completely consistent with his GP notes. He experienced stress at work in 2016 and 2017 and told the Respondent.

Acceptance of Employment

33. The Claimant accepted the position of Station Manager at Chingford, in north east London.

34. The Claimant's line manager was Borough Commander (BC) Prasad, who was managed by Deputy Assistant Commissioner of the NW area (DAC) Perez, who was managed by Assistant Commissioner (AC) Roe.

35. On 19 November 2018, he emailed BC Prasad, stating that had discussed with recruitment his hope for a vacancy in the south west to make his commute to work '*as least impactful as possible*'. He referred to his young family and long commute, estimated to be 2 ½ to 3 hours each way. He was happy to take the post at Chingford, but stated '*the travel time is something that is not sustainable in the long term*.' In his letter he made clear his commitment to work and to establishing himself as a station manager. By long term the Claimant meant a matter of a few years.

36. Thus, the Claimant intended to continue living in Romsey, Hampshire, around 90-100 miles from Chingford. He had a daughter at secondary school whose education he did not wish to disrupt by moving as she had poor mental health. He was aware, from his previous employment, of the commute into Westminster, about 1 hour 40 minutes. But he also knew that transfers within the LFB were possible. This email was a continuation of the discussions he had had with recruitment and is

unsurprising given the statement in the letter of appointment that preferences would be taken into account if possible.

37. We accept the Claimant's evidence that he was not alone among his colleagues in travelling a long distance into London to work: he knew of some employees coming from as far as Yorkshire. Nor did the Respondent, as some organisations do, require its employees to live within a certain distance from work, except in relation to 24 hour shifts when the Claimant, like others, would 'camp out' at a London fire station.

38. On 6 December 2018, the Respondent confirmed to the Claimant that, after enquiries had been made with the area DACs regarding available positions, that the only vacancy at that time was at Chingford.

39. On the same day, DAC Perez wrote to BC Prasad stating, '*What I would like to get to is posting [the Claimant] to the south* ***as soon as something comes up*** *and the area DAC is happy to accept him'* (X79) (our emphasis). We find, therefore, that at the start of the Claimant's employment, DAC Perez's intention was to transfer the Claimant as soon as suitable vacancy arose and subject to the agreement of his opposite number. The alleged shortage of staff in the NW was not an obstacle to this.

Contract of Employment

40. The Claimant signed a standard contract of employment drafted by the Respondent, which made his employment subject to the satisfactory completion of a 9-month probationary period.

    40.1. Clause 1 provided his previous employment with the Respondent and Hampshire would be treated as continuous employment for redundancy purposes only.

    40.2. The Grey Book (the Scheme of Conditions of Service of the National Joint Council for Local Authorities' Fire Brigades) was incorporated into the contract by clause 3.

    40.3. Under the title 'Probation', clause 7 provided:

    > *Your appointment is subject to the satisfactory completion of a probationary period of nine months. We may, at our discretion extend this period for a further two months. During this probationary period, your performance and suitability for continued employment will be reviewed at regular intervals by your line managers, who will take account of various factors including your performance, attendance and conduct.* ***Should any issues arise at any time during this period, the LFC's Discipline Procedure will apply****.*

    40.4. There was a mobility clause at 8 and 11.

    40.5. Under the title 'Collective Agreements', clause 27 provided

> *During your employment with the LFB your terms and conditions employment will be in accordance with [Collective Agreements]. … From time to time your terms and conditions will be subject to variation in accordance with collective agreements … the agreements* ***may affect your terms and conditions of employment including in respect of the following… Discipline and Grievance Procedures.***
>
> (Our emphasis)

41. Thus, disciplinary procedures were incorporated into the contract and were the subject of change by collective agreement.

42. The Respondent's witnesses maintained that he was on probation but not subject to the probation procedure because he was a transferee from another Brigade. Plainly the Claimant's service in another force was relevant to the Respondent, and understandably so because it established that he was trained and qualified to a certain level and had years of experience. While he was new to this role, his training was going to be dealt with by the development programme, and he was not a new firefighter or manager. His move from one Brigade to another was recognised by the Respondent as a transfer. He was therefore unlike an ordinary probationer.

Start of Work

43. The Claimant worked the Flexible Duty System (FDS), covering both on-call and managerial shifts over a 4-week cycle. The Claimant had no more than 2 days per week of 24-hour shifts as a firefighter, when he would have to stay in London 'camping out' at Shoreditch station. Otherwise, he was on '9s': 9-hour shifts of management time. The '9 minus' was 7am to 4pm; the '9' was 8am to 5pm; and the '9 plus' was 11am to 8pm. Managers were also expected to mobilise, which might mean that, if they were out on a 'shout', they might not leave at the expected time.

44. We find the Claimant's estimate of travelling time to be accurate at 2.5 to 3 hours from home to Chingford. He knew that it would take less time for him to travel to stations in the south west as they were far nearer the end of the M3 and he would not have to drive the busy North Circular around to the opposite side of London. We find the travelling time to Feltham, in the south west, was a minimum of 1 hour and 20 minutes (as the Claimant's estimate was outside rush hour traffic). We find the difference between the north west and south west was about 1 to 1.5 hours each way i.e. 2 to 3 hours a day less travelling time in total.

45. The Claimant started work with an induction in Southwark from 2 to 10 January.

46. On 13 January, the Claimant emailed BC Prasad to inform him that, because of his daughter's distressing response to his leaving home early for work, he had decided to apply to return to Hampshire and sought his support for a reference. He said the matter was a '*difficult personal issue'* that he was finding '*quite difficult to talk about'* because he *'might*

struggle to put across verbally due to the emotion involved'. He referred to his daughter's mental health issues and her distress at the time he was away from home, that she had become withdrawn, was getting up early to see him off, making her tired for her school day. He said this was an '*unforeseen and unexpected outcome'*, which made him feel '*selfish'* and the matter '*was weighing heavily'* upon his mind. He recognised what a '*poor show'* on his part his decision was to try for Station Manager at his old brigade and apologised. Ultimately, he was unsuccessful in this application.

47. The Claimant then worked until he was absent with a chest infection from 29 January until 12 February.

48. The Claimant returned to work on 13 February. BC Prasad offered him flexible start times on the days that he was 'on 9s', suggesting that the Claimant could choose his start time rather than be subject to the 4-weekly cycle. BC Prasad thought that, for example, if the Claimant started all his 9s at 11am (the 9 plus), it would reduce the time that he had to be in rush-hour traffic. Whereas the Claimant suggested this would make no difference, we find that for the days he was on management time, if he had chosen to start at 11am this would have meant he did not need to get up so early and it is likely to have reduced commuting time at both ends of the day because the worst of rush hour would have been avoided. But he would have had no time with family at the end of the day, which was likely difficult for him. Nor would this travelling time have somehow created parity with to the south west, a far shorter journey.

Request for Transfer

49. The next day, on 14 February, the Claimant wrote to Mr Wainwright in the Establishment and Performance Team ('EPT'), who was responsible for administering transfers, making an '*urgent'* transfer request. He detailed the same personal circumstances as he had described to BC Prasad and went on to state they were '*having an impact on my own wellbeing as it is causing me distress'*. He asked to be transferred as soon as possible to one of the 5 stations in the south west. The Claimant had to make his request in this way because he could not do so using the online transfer request system because he was on development.

50. On 20 February, Mr Wainwright told the Claimant there were no current vacancies and that moves had to be sanctioned by DAC Perez. Mr Wainwright said they would let DAC Perez know of the options i.e. vacancies.

51. BC Prasad wrote in reply to Mr Wainwright on 20 February (X5):

> *I am aware of the situation regarding Antony and I have made [DAC Perez] Adrian [DAC for south west] and [AC] Roe aware of the situation. However as no vacancies exist no movement can be facilitated. I'm hoping that once the GM round has completed we will be able to get him moved.*

52. We find, again, at this early stage both line manager and DAC were happy with an early move to the south west.

Diagnosis of Depression – Stress Assessment - Further Sickness Absence

53. On 19 February, the Claimant's GP diagnosed him with depression and prescribed Sertraline for a month initially. He told BC Prasad about this on 20 February.

54. BC Prasad immediately asked the Claimant to carry out a stress risk assessment. The form is part of the Respondent's Managing Attendance Policy ('MAP')**.**

55. The Claimant identified he was under high stress in relation to adequate sleep because he was worrying about his situation and having to get up at 4.15am for work. He identified four areas of intolerable stress: (1) in his close relationships because of his daughter's mental health illness, his wife's medical conditions for which he supports her. He expressed extreme worry about his future if he had to leave his job if his health failed. He summed up by saying '*all of these circumstances have left me feeling broken. I've had some stress before but I have never felt this low. I feel hopeless at my situation as I can't see a clear way out that will be best for my family, the Brigade and myself. I do not want to risk my fire service career… But it seems that leaving is a possibility. I have never really been an emotional person but find myself almost daily fighting back tears and I'm finding it very hard to talk about my situation. I had hoped to thrive in my new role as I always have but feel instead as if I am hanging on by my fingertips*.'

56. On 21 February, the Claimant told BC Prasad that he was unable to control his emotions, was desperate for medication to return to some stability and that his health had failed him badly. He informed him of the side effects of the medication.

57. On 25 February, the Claimant was signed off sick until 4 March with '*depression side-effects of medication'*. At this point he was unable to drive with dizziness and poor vision. He described these side-effects to BC Prasad.

58. On 28 February BC Prasad referred the Claimant to Occupational Health ('OH').

59. On 4 March, the Claimant requested adjustments to return to work, which BC Prasad forwarded to DAC Perez (X13). He made it clear his ability to drive was no longer affected (later confirmed by OH), which left a '*battle with depression*'. In the immediate term he requested a phased return and one hour less at the beginning and end of the day. In the medium term, he requested an expedited delivery of a fleet vehicle to save him returning his pool car. And in the long term a transfer to a station in the south west of London, saving between 1-2 hours of commute each way.

60. On 4 March, DAC Perez emailed HR, BC Prasad, AC Roe, Mr Amis, Head of Wellbeing in People Services, saying '*we need to review this whole case ASAP and decide next steps*' (X12).

61. We find from this evidence that the Claimant accepted the role always intending to ask for an early transfer but equally intending to manage the long commute for the first few years. He knew that transfers were possible in the LFB. This is consistent with the statements of DAC Perez and BC Prasad in the internal correspondence. It was only after the impact on the Claimant's mental health, (from mid-February) that the journey to work became much more difficult for him. The Claimant accepted that anyone with a family in Hampshire would have experienced difficulty of being away from family with such a long commute, but he contrasts that with his much worse mental health and states this made it far harder for him. We agree.

OH Referral

62. On 7 March, the Claimant had a meeting with OH. The OH report by Dr Isherwood stated that the Claimant would be likely to be fit for his substantive role but was unfit at that time. She described him as developing '*increasing anxiety'*. He was '*extremely anxious'* that day. Under prognosis OH advised '*I think that his current commute is severely affecting his mental health and I would suggest consideration to a move to a station closer to home would be beneficial*'. She hoped after 3-4 weeks the medication would assist and suggested a review in 2 months: '*I think he will require this length of time off to rebuild his emotional resilience and gain the help and support he needs.'* The Claimant's managers received a copy of the OH reports. (our emphasis)

63. The Claimant also started counselling with the Respondent's Counselling and Trauma Service ('CTS').

64. Under the Respondent's MAP, clause 17.3, two of the purposes of a referral to OH are to:

> '*try to establish whether there is anything that can be done to assist the individual's recovery and return to work'* and
>
> '*whether the absence is attributable to a disability as defined by the Equality Act 2010'* (124)

65. Subsequently on 7 March, Mr Amis informed DAC Perez, AC Roe, Mr Powell and BC Prasad that he was also '*seeking to arrive at a mutually acceptable position with OH regarding advice about working close to home.'*

66. We find that Mr Amis in this email is referring having a negotiation with OH in order to reach an agreed position about whether it continued to advise about working closer to home. We do not consider there is any real ambiguity in what Mr Amis is referring to. He is not, as some Respondent witnesses have suggested, merely doing what employers often do which is to provide information to OH to assist them. Mr Amis is not referring to the provision of information but to arriving at a '*mutually acceptable*' position. That must mean acceptable to OH and acceptable to the Respondent. This is not management information being provided but a negotiation about the ultimate advice OH is to offer. It is plain to us that this was the Respondent meddling. Mr Powell, now Head of People

Services, agreed that, if the Respondent were doing so, this lacked integrity. Mr Powell told us he was particularly concerned about integrity. He stated that many emails passed across his screen and he did not read them all carefully: it may be, therefore, that he did not read this one.

67. The Respondent purchased OH advice from a separate company. OH physicians could complain to the Respondent if they felt they were being pressured to give advice according to the Respondent's wishes. Unfortunately, it was Mr Amis to whom they could complain: he who had negotiated with them. Thus, there was no robust system protecting the OH provider from influence.

68. As will be seen below, the later OH reports omit any reference to working nearer to home and use the much blander phrase that prognosis depends on 'a resolution of the issues'. This is a surprising change: especially given one of the express purposes of a referral to OH under the MAP was to try to establish whether anything could be done to assist recovery and return to work. We infer from this change and the wording of Mr Amis' email that this more anodyne phrase was the position which was acceptable to the Respondent. This leads us to the conclusion, reinforced by our later findings, that managers did not want the Claimant to be able to use OH advice to advance his case for a transfer: it irked them that OH had made such a suggestion.

69. On 8 March, the Claimant's GP signed him off work for two months with '*low mood/depression'*.

Investigation into Claimant's Eligibility for the Role

70. On 19 March, AC Roe's Staff Officer wrote to DAC Perez and AC Roe, stating that HR '*had managed to secure some info from [the Claimant's] former employer's payroll team. She is still trying to get this in writing'.* This information raised a question about his eligibility for the Station Manager role. (It was later established that the Claimant was eligible.)

71. AC Roe wrote to DAC Perez and Ms Gibbs, on 28 March, '*I think we need to ask him permission to see his Hampshire records, which are likely to show he made his application under false premise [sic] to LFB*' (X28).

72. On 24 April, AC Roe wrote again to DAC Perez, BC Prasad and HR in reference to a case conference that had taken place about the Claimant: '*There is a plan. … The Claimant … be asked to provide permission to access his service records from Hampshire as well as starting to address what is an unacceptable level of absence particularly taking into account he is still on probation.*'

73. Some Respondent witnesses have referred to AC Roe's involvement using the same phrase, that he took '*a keen interest*' in the case. We criticise the use of 'cut and paste' in witness statements: they should be in the witness's own words. This phrase and the unredacted documents initially obscured the detail of AC Roe's involvement but the documents now allow us to make findings. DAC Perez suggested AC Roe was 'just enquiring' and he initially objected to the idea that AC Roe was unhappy

with the Claimant's attendance levels. Some witnesses objected to the idea that AC Roe had a negative view of the Claimant. But this evidence cannot hold in the light of AC Roe's own words: first, he assumed, on very little evidence, that the Claimant had been dishonest (which was not the case); and second, he stated a clearly negative opinion about the level of absence. Plainly AC Roe had reached a negative view of the Claimant. One of the main factors for this view was the Claimant's sickness absence, as can be seen from his email of 24 April.

74. On 26 April, BC Prasad wrote to the Claimant *'regarding your current employment with the London Fire Brigade'*. He stated that it was a requirement of the post that he was a competent Watch Manager and serving as a whole-time officer (Watch Manager). He went on:

> *It has recently come to light that the information you provided on your application form and confirmed by your referee may not be correct ... This information has been provided over the phone and cannot be confirmed in writing without your consent.*
>
> *This brings into question the authenticity of the information provided as part of your application… And could affect your continued employment*…'

75. This letter caused the Claimant a great deal of distress. He saw it as an extension of the bullying he alleges he had experienced at Hampshire. He thought his job was in jeopardy. He sent a full response to BC Prasad on 2 May, setting out what roles he had held at Hampshire. The Claimant gave written consent for his Hampshire records to be accessed. He referred to his depression and how difficult he was finding it to function day to day and loss of confidence. In that context he informed the Respondent of the traumatic impact of this further letter: that it was '*devastating'*, that he had not been able to sleep for worry and that he '*had considered taking his own life'*. He asked whether he was to be suspended, given the seriousness of the allegations. He asked BC Prasad what had prompted the investigation. We accept the Claimant's account of the impact of the letter of 26 April on his mental health. It is consistent with the GP record on 10 May.

76. In his reply, BC Prasad expressed his concern and offered his support via telephone.

77. DAC Perez accepts this letter was copied to him and that, by 2 May, the information in it showed the Claimant was eligible for the role, but the investigation continued.

OH 7 May

78. OH reported again on 7 May. The advice was that the Claimant would be likely to be fit for his substantive role but was unfit at that time. The Claimant remained symptomatic—significant psychological impairment was present. After 3 months, the medication was not proving beneficial but was to be increased. OH suggested it would be '*at least 6-8 weeks before'* the response to medication can be assessed and prognosis

depended upon '*resolution of issues and response to treatment*'. OH advised a review in 8-10 weeks i.e. mid July.

AC Roe's Expectations

79. On 10 May, AC Roe wrote to managers and Mr Amis and Ms Gibbs (X34):

> *In the context of what I see as an unacceptable approach to what was a clearly contractually defined posting and a resultant level of absence almost from commencing employment please can we consider how as an HR function we commence management action to address this again taking into account Mr Hurle is on probation please. I would like that to start immediately as an absolute priority*. (our emphasis)

80. We find that the wording here shows AC Roe thought that the Claimant had gone off sick in order to get a transfer, that this was unacceptable, and he wanted his managers to take action. We make this finding because AC Roe says the absence is the **result** of what he regards is the Claimant's unacceptable **approach** to the posting. He is not just saying here: 'the absence is too long deal with it', though that clearly is one of his concerns. He is going further. We refer back to his assumption that the Claimant has been dishonest in his application form. It will be seen from our findings, having seen far more evidence than AC Roe, that we disagree with his view, but it was plainly a view he had reached.

81. On the same day, Mr Amis replied to AC Roe, referring to '*the managing attendance policy which provided clear guidance on how long-term sick cases should be managed'* but went on to suggest that because of the Claimant's

> *particular circumstances and his recent transfer from another Brigade the case is best managed via use of the Policy 480 – Probationary Procedure and paragraph 3.2 'Where there are concerns during initial training over conduct, attendance and/or performance then action under this procedure, including dismissal, may be brought forward in line with steps laid out in paragraphs 5.5.-5.7 and 5.11.*

82. On the same day AC Roe replied to the managers, Mr Amis and Ms Gibbs, copied to the managers and Mr Powell, that

> *as discussed with Tim [Powell] and Catherine [Gibbs], in the context of [the Claimant's] unacceptable absence during probation I would expect a robust application of the procedure*. (X33)

We find in this email AC Roe again makes his expectations clear and that the managers reading it will have understood him: he wanted the Claimant removed. Robust means tough or strong. This was not AC Roe asking managers to follow the procedure to whatever conclusion they wished: he was asking them to be tough in their application of it. Again, the cut and paste nature of the witness statements does not help the

witnesses here. DAC Perez is obviously mistaken in his witness statement that this was an email he sent. At the time he knew what his manager's expectations were. When we asked him, in the context of his decision to dismiss, whether offering the Claimant a further review period instead of dismissal, he indicated that would not have been a robust application of procedure.

83. Mr Powell could not remember emails sent to him but we find it likely he did remember the discussion he had with AC Roe about this case. AC Roe was at a very senior level. The case was relatively unusual: a person going off sick so early in their employment. We think it likely Mr Powell did remember AC Roe's attitude towards the Claimant and his expectation that he be removed.

17 May Brief Return to Work and Attendance Support Meeting

84. On 14 May, the Claimant sought a phased return of 2 days per week to be reviewed after a month. He provided BC Prasad with a list of the things that would help him get back to work, including a transfer '*as soon as possible to a south west station to reduce travel time'*.

85. DAC Perez saw the Claimant's requests. He wrote to BC Prasad: '*Just to note NE ops/[Waltham Forest] is the employment location when LFB offered the post*'. This echoes AC Roe's reference to the contractual posting and represents a change from DAC Perez's initial aim for an early transfer.

86. The Claimant returned to work on 17 May. Mr Prasad held an Attendance Support Meeting with the Claimant. Such meetings are held under the MAP. He organised a phased return. It was not exactly what the Claimant had requested but we accept BC Prasad's evidence that it was open to further discussion and review. He also nominated a very experienced Station Manager as the Claimant's mentor. In writing on 17 May BC Prasad told the Claimant that employees unable to achieve reasonable attendance targets would be supported and managed through the MAP.

87. The Claimant then went to LFB headquarters. There he bumped into a friend who asked how he was. He became emotional and she sought the help of DAC Rhys Powell. The Claimant told him about the letter of investigation putting his job in jeopardy and that it had triggered suicidal thoughts. He was sent home. DAC Powell stated in an email '*it was very clear to me that he was in no state to be at work*'. Although the Claimant had coped in the meeting with BC Prasad, he had struggled to cope with his return and this had culminated in him being sent home later on that day.

Further sickness absence and OH Report

88. On 19 May, the Claimant wrote to Commissioner Cotton informing her that he began to struggle with his mental health and broke down in February. He told her about the day upon which he had thought to take his own life; his request for a transfer and his attempt to return to work, which '*took every piece of energy I had …I really struggled to hold myself together fighting back tears*'. He explained his fear of losing his career

and that he was feeling '*absolutely hopeless'.* He referred to her concern for employees with mental health issues and sought her help. On 20 May AC Roe briefed C Cotton (X39). In her reply of 23 May she informed the Claimant she is not aware of the details. C Cotton plainly had a briefing from AC Roe but we do not know how detailed it was. We cannot therefore find, on the evidence we have heard, that her response was dishonest, as alleged by Mr Franklin.

89. The Claimant also emailed BC Prasad on 19 May informing him of a second mental health crisis over the weekend and that he had been signed off for a further month.

90. He attended OH again on 5 June. The report recorded that he was likely to be fit but '*remains symptomatic and unfit for work. Response to medication awaited and it will take at least 6-8 weeks before it can properly be assessed*.' The prognosis was again that it '*depended upon resolution of the issues and response to treatment'*. A review was suggested in 8-10 weeks Nothing was said about possible adjustments.

91. In summary, and on the basis of all the evidence we have heard, we find that by this stage the Claimant had a significant depressive illness: he struggled with his emotions, struggling to hold back tears on occasions including while driving. He was having trouble sleeping and with his concentration levels. He was still extremely anxious. He had, shortly before, been so low that he had thoughts of taking his own life. At this stage the medication he had been prescribed had been increased and the hope was it would have an effect.

92. OH gave no opinion on whether the Claimant was likely to be disabled, albeit that one of the purposes of an OH referral under the MAP was to do so. Plainly OH had not been asked.

Vacancy at Feltham

93. Sometime before 7 May, the Claimant heard from colleagues that a station manager vacancy might arise at Feltham. He told BC Prasad about this on the phone on 7 May (707) and BC Prasad said he would look into it. On 12 June 2020 the Claimant emailed BC Prasad to see whether a move to Feltham was possible. He stated his understanding that he could not be offered an earlier vacancy at Kingston because he was off sick, which he said, '*puts me in an impossible situation.'*

94. BC Prasad emailed DAC Perez the next day: *With regard to the Claimant's request I am assuming we will not be moving him to Feltham (if a vacancy exists) whilst he is sick.* This reflected his understanding from previous discussions with DAC Perez.

95. Transfers have to be sanctioned at DAC level. The DAC in each area has to be involved--one to sanction the move out of area and one to agree the appointment in their area. BC Prasad acknowledged in his oral evidence that DAC Perez would be involved in decisions about transfer and we find that he is mistaken in his written evidence that DAC Perez was not involved here.

96. DAC Perez did not contact his opposite number in the south west to enquire about any vacancy. He responded to BC Prasad simply by stating that the employment offer was in NE operations.

97. In his written statement DAC Perez gives a number of reasons for deciding not to facilitate a transfer at this time. We deal with them in turn.

    97.1. First, that there were no vacancies. But it cannot be right that had this in his mind at the time, because he had not checked with his opposite number. Also, he told the Tribunal in oral evidence that he was in '*ongoing dialogue*' with Mr Wainwright about vacancies. It cannot therefore be credible that he did not find out about the Feltham vacancy, which from the documents we have seen plainly came up at some point between 20 May and 27 June (see below and 999-1001)**.** We do not accept therefore that lack of vacancies was a factor for DAC Perez not facilitating a transfer.

    97.2. Second, that the Claimant was on development and not in exceptional circumstances**.** At the appeal against dismissal DAC Perez referred to this factor, saying that the Claimant needed to complete his development first (779, 784). We accept that the development policy was in DAC Perez's mind at the time. We note this was a hardening of approach from his initial aim to move the Claimant soonest. We find that DAC Perez initially took the view the Claimant was in an exceptional category but now he was off sick this view had changed (see below).

    97.3. Third, he suggested it was a decision for the DAC in the south west. But he well knew that his opposite number did not get to consider the Claimant for the vacancy unless DAC Perez sanctioned it, so this cannot have been in his mind at the time as a factor for not putting him forward.

    97.4. Fourth, that the Claimant was on sick leave. In his oral evidence he stated that the Claimant needed to be back in the workplace before they considered a move and supported this reasoning by referring to 'Fire Brigade Rules'. We have not been referred to any such rules. We find he probably meant practice: however, in answers to further questions DAC Perez came close to accepting that, if the transfer would get someone back to work, it would be acceptable. While he agreed in oral evidence that he knew of the March OH report recommending a transfer, he thought this was '*just advice to management'*. But it does not appear in his points at paragraph 27 of his witness statement and we are not satisfied that he had considered the OH report at this time.

    97.5. Fifth, he referred to the contract. This is certainly the approach he took in emails after AC Roe's expectations had been established, but it is not logical that he really held this view, given his stated earlier intention to transfer the Claimant as soon as something came up. We find that DAC Perez was therefore also influenced not to facilitate a transfer by AC Roe's expectations.

98. On 13 June BC Prasad informed the Claimant his contractual posting remained at Waltham Forest and that no transfer could be offered while he was off sick.

99. BC Prasad explained the reason for not allowing transfers of someone off sick as operational: because it would leave the newly vacant post without an attending officer and would require to be covered by someone acting-up. When we asked whether this would not already be case in the post that the person off sick currently held, he explained that the post from which they had transferred would also only be filled by someone 'acting-up' temporarily, so it was a worse situation operationally than if only one post was left in this situation. This is because the recruitment of new Station Managers was done in a round rather than in response to individual vacancies.

100. Meanwhile, the Claimant had written on 17 May to GM Kempton, in the south west, enquiring about the possible vacancy at Feltham (999). He referred to the shorter commute and the recommendation from the Brigade doctor of a transfer closer to home. GM Kempton first replied on 20 May that the station manager who was due to retire had not yet handed his notice. He mentioned that there had been 'quite a bit of interest' in this post but he would keep the Claimant posted. On 27 June GM Kempton informed him that the vacancy at Feltham has gone to another individual (1001). He stated

> '*I did explain my preferences to the powers that be but as with most things in LFB, the decision was taken out of my hands.… I'm sorry it's not the outcome you were looking for.'*

Formal Request for Adjustments

101. On 12 June the Claimant made a request for disability support to Miss Stephenson of the Inclusion Team referring to his depression as a protected characteristic under the Equality Act. He said, although a transfer to station in the south west would not solve every issue, he felt it was a solid foundation to get back to work. He said he had learned from a colleague that there was a vacancy at Kingston and Feltham, that he had told his line manager, but had heard nothing. He had subsequently heard that the Kingston post was filled and could not be offered to him as he was off sick. Miss Stevenson was advised by Miss Gibbs to refer the Claimant back to his line management chain (X50) which she did.

102. Ms Gibbs did not suggest that OH be asked about whether the Claimant was likely to be disabled. The evidence is clear to us that no one in management or HR ever asked that question of OH nor did they ask the question whether the adverse effect of the Claimant's condition might well last 12 months, even though the Claimant had been seeking adjustments and even after the Claimant had suggested at this point that he was disabled.

103. On 15 June, the Claimant made a formal request for reasonable adjustments to BC Prasad who forwarded the email up the line of management. In this request the Claimant stated he was experiencing

'*moderate depression'* but was '*desperate*' to get back to work. He referred to his wife and daughter's mental health problems. He referred to his already vulnerable state because of the bullying he had experienced in Hampshire and that the long commute reduced time with his family. He then described his own mental health beginning to fail finding himself '*uncontrollably crying on the way to and from work, something which I hadn't done since a child. I finally broke down mid-February*'… and referred to the depression diagnosis and its impact on his ability to function day to day. He stated he had now been suffering for 6 months '*and there is no current likelihood that I will recover fully from it in the near future. This condition, with its effect on me and the likely timeframe for recovery mean that the impairment I currently have meets the criteria of a disability as identified in the Equality Act 2010.'* He then sets out his reasoned argument for adjustments by reference to the Respondent's various policies on diversity and disability. Including, for example, the purpose of OH to try to establish whether the absence is attributable to an EQA disability. He referred to the MAP, clause 19.4, about consideration of adjustments including '*transferring the disabled employee to another work area*'. He asked where in the transfer policy it stated that transfers could not be facilitated for those on sick leave. The Claimant even offered to return to work against the medical advice.

Decision to Move to Stage 3 of Disciplinary Procedure

104. On 19 June, DAC Perez discussed with BC Prasad how a 'probationary review' should take place (450). But then Ms Gibbs advised that a stage 3 disciplinary hearing should be convened to be chaired by DAC Perez. She relied on clause 7 of the contract of employment.

105. Ms Gibbs knew that the disciplinary procedure was going to be amended from 1 August so that it did not cover attendance issues. Changes to the Grey Book took time and negotiation.

Response to Request for Adjustments

106. On 21 June, the Claimant wrote to BC Prasad more details of his illness. On 28 June he chased for a response to his request for adjustments. On 6 July he provided BC Prasad with more information about how he was feeling: he was averaging about three hours sleep a night and had a constant ball of anxiety in his chest. Mentally he felt completely disconnected from his mind and struggles to be normal day-to-day. He felt no emotion whatsoever. He was exhausted. He couldn't easily engage his brain to perform tasks. He said that the delay in responding to his request made him extremely distressed. He was worried that there was no prospect of change to give him a foothold to begin recovery and get back to work which is where he wanted to be.

107. It was not until late June that LFB wrote to Hampshire enclosing a copy of the Claimant's consent to access his employment records. Upon receiving information from Hampshire in writing on 1 July internal communications show Ms Gibbs decided to drop the allegations about his eligibility for the role and she informed managers of this. But the

Claimant was not informed and this allegation was left hanging over him for several months. It was not pursued before us.

108. On 10 July, following HR advice, BC Prasad emailed the Claimant and informed him the Respondent was not in a position to consider reasonable adjustments because it '*had not seen any evidence to support'* that he was disabled. BC Prasad told him they would be inviting him to a stage 3 disciplinary hearing in the light of his high level of absence.

109. Ms Gibbs advised on this approach. She accepted that she looked at the previous OH reports. She accepted that the 7 May OH report raised a potential question about disability. She also accepted, from that report, that depression could well have lasted for 9 months but was not prepared to say it could well last beyond that. Ms Gibbs did not obtain further OH advice or ask for the GP notes. Later in her evidence she suggested that the Respondent would look at whether there could be reasonable adjustments even if disability was not certain, but it is plain this did not happen in this case.

110. On 20 July, the Claimant submitted a grievance about the failure to make adjustments.

111. On 23 July, the Claimant send BC Prasad his CTS notes.

Impact of Absence

112. The Claimant's Station Manager role has been described as an important one. Each fire station is a centre of operations and the station manager was the lynch pin of that station. He was the link between firefighters and higher management. Fully staffed fire stations gave the most effective cover for the safety of Londoners.

113. While the Claimant was absent his role had been covered partly by a colleague acting-up and partly by BC Prasad. We accept BC Prasad's evidence that he had more work to do as a result and was under greater pressure. There was an additional cost of paying the colleague to act up. We have heard no evidence of what this cost was. There was also the cost of the Claimant's full pay for 6 months' absence and potentially half pay for a further 6 months.

Invitation to Stage 3 Disciplinary Hearing

114. On 6 August, the Claimant was invited to a Stage 3 hearing under the disciplinary policy the '*offence'* being his '*unacceptable record of attendance'*: 104 working days lost out of a possible 140.

115. We find that Ms Gibbs advised on this letter and the use of the disciplinary procedure and selected the stage. She confirmed her position in her oral evidence that an absence relating to a disability was a '*serious offence'*. In our judgment Ms Gibbs was influenced by AC Roe's emails in reaching these decisions.

115.1. It is very surprising that a senior HR professional should continue to advise on the use of an out-of-date policy. Ms Gibbs well knew that the disciplinary procedure no longer covered attendance. We infer from this that AC Roe's expectations, those of a very senior manager, clouded her judgment.

115.2. It is also very surprising to hear an HR professional describe attendance as a '*serious offence'*. This is not just a matter of semantics. The language an employer uses to describe its concerns has an impact on the employee. It is not surprising that the Claimant expected to be dismissed, given how his absence was described. Again, in our judgment, Ms Gibbs held to this view because she was seeking to uphold the direction of a very senior manager. The Tribunal can see both sides of this: on the one hand understanding her dilemma and on the other observing that her role is to take responsibility for giving managers appropriate advice and pushing back where necessary in order to do so.

116. The Claimant chased a response to his grievance in August and was told this would be dealt with as part of the Stage 3 because they were both about the same issue. The Claimant asked why this decision had been made when paragraph 3.2 of the disciplinary procedure advised that consideration is given to postponing the disciplinary procedure while the grievances dealt with. We have not seen a reply.

117. On 9 August, the Claimant started ACAS Early Conciliation with a view to bringing a claim in the Tribunal. And on 16 August the Claimant registered a company on 'Hampshire Fire and Medical Services Limited'. We accept the Claimant's evidence about these steps: once he had been invited to a 'stage 3', and with the allegations about his inaccurate application form still live as far as he understood it, he expected to be dismissed. He started to make plans for self-employment by creating a company under which he would advise clients about first aid and safety. He had taken no other steps nor done any work for this company.

118. The disciplinary hearing was put off in order to obtain a further OH report. This was provided on 27 August. OH again recorded that the Claimant was likely to be fit for his substantive role but was not currently fit. In their opinion the Claimant was '*not likely to be fit for at least the next three months and it could be longer depending on the waiting time for further treatment and his response*.' The prognosis was again dependent on '*resolution of issues and response to treatment'*. OH suggested a review in 12 to 16 weeks.

Claim to Tribunal

119. On 6 September the Claimant presented his original claim to the Tribunal. We do not accept that this evidenced a decision not to return to work. Rather, the Claimant expected to be dismissed and the time limits for reasonable adjustment claims are short.

Stage 3 Hearing and Dismissal

120. DAC Perez was to hear the stage 3 and the Claimant queried whether he had made decisions about his refusal to facilitate a transfer (X96). BC Prasad replied:

> *As the North East Deputy Assistant Commissioner, DAC Allen Perez has been informed and / or consulted on regarding your requests. However, DAC Perez has not been involved with the decision-making regarding your requests to facilitate a transfer or your request for adjustments.*

121. As we have already found, BC Prasad was mistaken about this.

122. Given DAC Perez' decision not to facilitate a transfer, he should not have chaired the hearing, because that is what the grievance was about. He therefore would be judging his own decision.

123. The stage 3 hearing took place on 27 September. At it the Claimant had to '*admit'* the '*offence'* of unacceptable absence. The Claimant made a written statement for the hearing. It included the following points.

123.1. He set out the evidence that he said demonstrated he was disabled within the EQA, referring to OH and CTS accounts.

123.2. He argued that the earlier failure to transfer him had been a barrier to a sustainable return to work which led to a lengthened period of sickness.

123.3. He made a detailed argument that the Respondent had failed to comply with its policies including the transfer policy; the MAP; the stress at work policy; the Equality and Diversity Policies; and the EQA.

123.4. He contended his request [for a transfer] was reasonable because there was no cost implication: there were vacancies at Feltham and Kingston. He argued that the denial of his request was unfair and unlawful because: the Respondent was reasonably aware of his condition; it met the criteria of a protected characteristic; there was no benefit to the Respondent in requiring him to remain at Chingford; the benefit to the Claimant would have been "*huge in giving me a foothold to manage my condition and recovery, care for unwell family members and improve my work life balance*"; would have avoided the need to pay sick pay; would have reduced the number of sick days lost; the reason for refusal was inaccurate given the information the Respondent had from occupational health and CTS about his illness and the suggestion OH had made in order to promote recovery.

123.5. He objected to the hearing being at level three and to his sickness being described as an offence.

123.6. He relied on OH stating that, although he was unfit for work, he was likely to be so. And the initial OH report that advised a transfer to assist him.

123.7. At the hearing the Claimant confirmed he was only unable to drive from 25 February to 4 March.

124. The management case provided all the dates of attendance; it referred to the contract to justify the choice of disciplinary policy; it relied on the OH reports' uncertainty of prognosis and the lengthy absence.

125. Because of the points the Claimant had made about the level of care he needed to give his wife and daughter and how the travel time impacted on that, DAC Perez sought their medical notes. They did not give consent.

126. The Claimant was dismissed by letter dated 19 October with effect from 24 October.

127. In considering the reason for dismissal we have looked at the dismissal letter and DAC Perez's evidence to us.

127.1. DAC Perez said that he had decided to dismiss because OH had advised the Claimant would not be able to return to work in the foreseeable future and the loss of 138 working days out of a possible 174 was unacceptable. We do not accept that OH had advised the Claimant was not likely to return in the foreseeable future: in fact OH had always advised that the Claimant was likely to be fit for duties. The first report suggested a shorter commute would be beneficial to mental health and the prognosis of all the others was that improvement depended on resolution of issues. The final OH report suggested a review in 12-16 weeks.

127.2. He specifically did not reach a conclusion on disability, stating in the letter: '*you assert that you are suffering from depression… You are of the view that your condition falls within the disability definition as set out in the [EQA*]… *I accept you may be unwell*'. These seems an odd partial acceptance of illness, given the medical evidence that DAC Perez had before him and that the Claimant was not facing an allegation of malingering. In his evidence DAC Perez continued to deny that the Claimant was disabled despite the Respondent's concession. We find he had set his mind against considering disability at this hearing.

127.3. In the dismissal letter he concluded that, even if reasonable adjustments were required, he was not convinced they would overcome the issue of travelling time. In his evidence DAC Perez explained that, in his view, the saving of the travel time the Claimant described would not have significantly increased time with his family because of the 24 hour shifts he would have to undertake. He also relied on the Claimant's contention that he had extensive caring responsibilities for his wife and child and how these would not be relieved because of the full commitments of the job. We find that DAC Perez's view that the difference in travelling time would not have made a difference is unreasonable and not credible. On any level, a saving of 2-3 hours each travelling day is a significant time to be able to spend with family

or undertake the care of them. Furthermore, it is contrary to the specific view expressed by OH in March that a shorter commute would be beneficial and it was the longer commute that was impacting on the Claimant's mental health.

127.4. In the dismissal letter DAC Perez stated that it was made clear to the Claimant '*early on that there were no other vacancies and he was unlikely to be able to be transferred to the south-west in the short or medium term'*. DAC Perez refers to his view that the Claimant was fully aware of what he was committing to when he signed the contract; he relied on the mobility clause. We do not accept that the Claimant was told he would be unlikely to be transferred in the short or medium term: that is not what was said and nor does it reflect DAC Perez's intentions at the time.

127.5. In his witness statement, as justification for the dismissal, he referred to the fact that the Claimant had been advised not to drive. This was again a 'cut and paste' sentence and it appears in the witness statements of Ms Gibbs and Mr Powell. We do not accept that he had this in his mind at the time. It was not set out in his dismissal letter.

128. Looking at the evidence, in our judgment, the main reason for the dismissal was the significant length of absence.

129. In our judgment, DAC Perez gave no real consideration to action short of dismissal because he had been influenced by what he knew to be AC Roe's negative view of the Claimant and understood, from his emails, that AC Roe expected him to dismiss. In his oral evidence, when asked what he understood by 'robustly' in AC Roe's email, DAC Perez illustrated to us that robust could not have included a further review.

Appeal

130. The conduct of the appeal is not an issue before us but Mr Powell has given evidence that he reviewed DAC Perez's decision to dismiss and agreed with it. This evidence may, therefore, be of some relevance to the section 15 objective justification case.

131. At the appeal the Claimant's representative argued:

131.1. the disciplinary procedure should not be used as this was an issue of capability

131.2. he was disabled.

131.3. that if adjustments had been made earlier there was a good chance that the Claimant could have got back to work.

131.4. there was still a possibility that the Claimant would recover.

132. Mr Powell reviewed DAC Perez's decision rather than rehearing it. He says he looked at lesser measures, like a further review period, because the Claimant had significant service as a firefighter and, in his own

words, 'it did not suit anybody's purpose to see it go to waste'. But he was concerned to hear, he said, of the Claimant talking about 'entitlements' rather than what would work. He recalled that the Claimant had '*asserted [he was] not able to return to work in any shape or form regardless of reasonable adjustments*'. Yet, the appeal minutes record that when DAC Perez asked the Claimant why the Respondent was 'obligated' to transfer him, the Claimant responded that it was not obliged but that it was a reasonable adjustment. Further, according to the minutes, when asked about what would happen if he was reinstated, the Claimant told the appeal he would reapply for reasonable adjustments he was not able to say whether reasonable adjustments would get him back to work (780-2). We find Mr Powell's recollection in his evidence to us is at odds with the written record and we prefer the written record as being a near contemporaneous account. The Claimant was referring to the adjustments he contended were reasonable. This was entirely appropriate for him to do. It does not smack of someone not looking at the practicalities. Also it makes sense to us that someone with depression is not going to be able to be definite about the future, but the minutes do not portray the Claimant as being unwilling to consider a return to work. Furthermore it is inconsistent with the case he made for an appeal, that Mr Powell would have seen. To ask for the Managing Attendance Procedure to be applied to him and to query whether the disciplinary procedure should have applied when it was an attendance matter were perfectly reasonable submissions to make. And even if the Claimant had talked of reasonable adjustments as entitlements (bearing in mind that he was also pursuing a grievance), he should not be criticised for this. The Equality Act does sometimes establish obligations and it is entirely open to an employee to argue that those obligations applied to him in a particular case.

133. In his written statement Mr Powell suggested the transfer to a south west station would have only been helpful to the Claimant on a couple of days a week. But he is mistaken about this: we have not heard evidence of there been any week in which the Claimant would only have to drive to and from work twice. Nor is that a conclusion he can have reached on the evidence he heard at the appeal.

134. The Claimant's grievance was supposed to have been dealt with as part of the stage 3 hearing but, in his evidence to us, it was clear that Mr Powell did not even know he had to consider the Claimant's grievance. If he had been considering the matter carefully, he would have seen that this was necessary. This supports us in our conclusion that Mr Powell did not consider the appeal carefully. He reached conclusions about the Claimant's attitude to a return and the issue of reasonable adjustments that were inappropriate and unwarranted on the material before him.

Hypothetical Comparators

135. We accept Ms Gibbs' evidence was that if a firefighter seriously damaged a knee but is on probation he would be dismissed, if he was considered to have no reasonable prospect of a return to work.

Policies

Probationary Procedure

136. Clause 2.2 of the probationary procedure provides: *In the case of an employee who transfers to the Brigade from another Fire Brigade the whole or part of the service in that Brigade may at the discretion of the head of human resource management and the director of operations, be counted towards the completion of his or her probation service in the Brigade.*

137. Clause 2.3 provides that within the framework for any transferee's probation, '*emerging issues may be dealt with under the standard procedures outside of this probation policy*' but clause 2.4 provides: *otherwise, neither [reference to two disciplinary procedures] apply to employees who are on probation.*

138. Clause 2.5 provides: *during the probationary period, performance, conduct and/or attendance, which are below the required standards of the Brigade, could justify dismissal in accordance with this probationary procedure.*

139. Clause 5.3 provides: *The employee's performance, conduct and/ or attendance may be reviewed at any stage during the probationary period. If the required standard of work, conduct or attendance is not met and* ***if there is no reasonable expectation that the employee will improve, action may be taken to terminate*** *the employee's contract of employment in accordance with the probationary procedure outlined.* (our emphasis)

140. Clause 5.4 provides: *Where probationers* ***may*** *have medical conditions that fall within the definition of a disability under the Equalities Act 2010, the manager should seek guidance from a HR adviser in the first instance who will in turn liaise with the Brigade's occupational health providers and the Corporate Management Team, as appropriate…* (our emphasis)

141. Clause 5.5 provides: *If the station commander decides that there are serious concerns which may justify dismissal or other disciplinary action being taken, they will invite the probationer to attend a formal hearing with a group commander and notify a HR adviser immediately.*

142. The Respondent contends the Probationary Procedure did not apply to the Claimant because he had transferred from another Brigade. On the other hand, Ms Gibbs also asserted he was a probationer. Ms Gibbs argued that this disapplication was not by virtue of clause 2.2 (above) but the contract of employment. The difficulty with this is that the contract only refers to a transferee's previous service in the context of redundancy not probation. We find that as a matter of construction, the contract does not exclude the probationary procedure.

Disciplinary Procedure

143. From 1 August the Respondent decided that attendance was not to be managed under the disciplinary policy and references to it were removed from this date. This was part of the Grey Book negotiations. Ms Gibbs knew that this was going to change. And admitted that she did so when the letter of invitation was written to the Claimant. She knew that the reason was that the use of disciplinary procedures in cases of absence was thought to be punitive.

Managing Attendance Policy ('MAP')

144. Ms Gibbs agreed, and we find, that the MAP refers to four of the legitimate aims proposed by the Respondent as justifying any unfavourable treatment, at clauses 1.2, 1.3 and 6.5. Its aims are to maximise attendance at work; minimise disruption to service delivery caused by absence; and ensure timely intervention to provide support to those who are absent.

145. Under 'Application' the MAP it states it applies to all employees. It defines long term sickness absence as 28 days or more.

146. Clause 6.5 provides '*It is recognised that long periods of sick absence from work have the potential to increase stress and anxiety levels of an individual. Simple adjustments on modified duties can enable employees to return to work safely before symptoms completely disappear. The line manager in conjunction with HR should discuss and explore this option involving the individual and in consultation with [OH].*'

147. Clause 13.5 and 13.6 provide:

> *The Brigade needs to balance the needs of the employee with the need to maintain an efficient service. Prolonged absences away from work or from the substantive role, particularly in the light of a history of previous illness, may in certain circumstances, cause such severe difficulties that a decision has to be made on whether or not the employee's contract of employment can continue. Each case is individual and all circumstances must be considered including: the expected length of absence; the prognosis for the return to work; OH opinion; personal circumstances; attendance history; whether the employee has a disability; impact on service delivery.*

148. Clause 19 applies to disabled employees:

148.1. Clause 19.1 provides there will be occasions when, as a result of an illness or injury, and employee becomes disabled. In such cases the Brigade must, wherever possible, facilitate the employee's continuing employment.

148.2. Clauses 19.3 and 19.4 refer to the need to consider making reasonable adjustments to the relevant role including for example transferring the disabled employee to another work area.

148.3. Clause 22.4 refers to dismissal being a last resort.

148.4. Applying this policy, a manager would progress through 3 stages after six months, nine months, and 12 months of absence.

149. The respondent had a **transfer** policy, which provides that:

> *Where an operational member of staff in the role of Station Manager… wishes to transfer from one location to another, the request must be made in writing… To the establishment and performance team (EPT). The process and decisions will be made on the skills, experience and suitability for the post.* ***Unless in exceptional circumstances, staff will not be allowed to apply for a transfer whilst they are on development*** …(our emphasis)

150. The Claimant described C Cotton as championing mental health issues during her time as Commissioner. Ms Gibbs and Mr Powell gave evidence of particular initiatives the Respondent had taken to give more support to firefighters who experienced mental ill health.

Submissions

Respondent

151. Mr Uduje provided an extensive summary of the authorities in writing.

152. He properly reminded us to take a structured approach to the issue of reasonable adjustments and to first look carefully at whether and when the Respondent had knowledge of his disability.

153. He submitted that the Claimant had always wanted a transfer even before being diagnosed with depression and the only difference after this diagnosis was that he 'turned up the dial' by adding to his reasons for that request. Mr Uduje did not suggest in this that the Claimant was improperly using his disability. He argued that here the problem was not any PCP applied by the employer but the Claimant's decision to undertake a long commute that took him away from his family.

154. He submitted that, even if DAC Perez had enquired about vacancies in June, it was not a reasonable adjustment to transfer the Claimant at that stage because he was not in a fit state to return. And, by the time of the dismissal, there was no reasonable adjustment to be made that had a prospect of enabling the Claimant to get back to work.

155. He submitted that there was no evidence the dismissal was because of disability. He argued any non-disabled comparator with the equivalent amount of time off would have been dismissed. If we looked at the 'reason why' then absence was the obvious answer coupled with the uncertainty of any return to work. He contended the idea that dismissal had been orchestrated because of disability was misplaced. We had to look at the reasons in the mind of the decision-makers, DAC Perez and Ms Gibbs. He suggested there was 'no evidence' of AC Roe directing their decisions, such a case was 'unsustainable'.

156. He submitted that the decision to move to Stage 3 in the disciplinary procedure was plainly because of the provisions of the contract of employment.

157. In relation to section 15, he argued that the 'something', namely absence, was not arising from disability but an inability to commute the distance required.

158. In any event he argued that dismissal and the selection of the disciplinary process stage 3 were proportionate here to meet the legitimate aims relied upon:

158.1. he referred to the impact of the absence: that the role was critical and there was an impact on BC Prasad;

158.2. there were no lesser measures to dismissal, given the level of uncertainty of the prognosis. He submitted, 'there might be an improvement, there might not be';

158.3. the Claimant had no intention of returning to work, given his claim to the Tribunal and registering of the new company. Later in submissions Mr Uduje referred to the Claimant as being 'non-committal' about returning.

Claimant

159. Mr Franklin provided written submissions which he supplemented orally.

160. He argued that the Respondent had constructive knowledge of the Claimant's disability long before the formal request for reasonable adjustments on 15 June. He relied on the details on the stress risk assessment form 21 February; what he told BC Prasad on 21 February; the OH report 7 March; the emails to BC Prasad of 2 May and to Commissioner Cotton describing coming close to taking his own life and the struggle that it took to get into work on the single day in mid-May; that it was clear to DAC Powell on 17 May that the Claimant should not have been in work; that the Claimant had informed the Respondent of a further breakdown on 21 May ; the OH report of 7 June. He argued that Ms Gibbs saw this report before advising BC Prasad on how to respond to the request. And that, given her evidence was that she thought the illness could well have lasted longer than 9 months, she ought to have considered it could well have lasted 12 months or more. This was especially so, given that no one had consulted OH on the question of disability even though the MAP provided that this is one of the purposes of OH and even though the Claimant had raised the prospect of disability in his request.

161. The Provision, Criterion or Practice of not considering a transfer while a person is on development was plainly applied by DAC Perez: he referred to his witness statement at paragraph 27. He relied on BC Prasad's evidence that transfers do not happen while people are off sick as showing the Respondent did not consider the Claimant to be an exceptional case. He argued that there was a vacancy at Feltham in May/June that the Claimant could have been transferred to but that,

because of AC Roe's negative view of the Claimant, DAC Perez had set his face against that outcome.

162. This put the Claimant at a comparative substantial disadvantage so far as securing an early transfer because non-disabled persons were less likely to be absent off sick during development and therefore more likely to have been considered exceptional cases.

163. A transfer in May/June would have had a real prospect of getting the Claimant back to work because a saving of travelling time would have improved his chance of managing the journey. This would have had a real prospect of avoiding dismissal. It was a red herring to argue that the Claimant had concerns about the posting prior to the diagnosis of depression. Once the commute had an adverse impact on his mental health this made the matter far worse: the extent and speed of his decline could not have been anticipated.

164. On direct discrimination he argued that the Claimant had been the subject of unfavourable treatment in that from March a process had begun to remove the Claimant instigated by AC Roe. From 24 April there was a plan that, from the documents, first to try to prove that the Claimant had given false information in his application and when that did not work then a plan to manage him out because of his attendance. By 10 May AC Roe required this to be dealt with '*robustly'*. On the ground, BC Prasad had been following the MAP, but there was a hardening of position and a strained interpretation of the contract led to the use of the disciplinary procedure and decision to go straight to Stage 3.

165. He argued that this was because of disability and used the hypothetical comparator of someone also not subject to the probationary policy who had taken unexpected absence but who was not disabled. He suggested it was inconceivable that such a comparator would have been dealt with in the same way. For example, someone who had broken a limb but was expected to recover within 12 months.

166. In relation to the section 15 claim. He argued that on 19 June, the date of the decision to proceed under stage 3 of the disciplinary hearing, the Respondent knew or ought to have known of the disability. In any event, the 27 August OH report should have removed any doubt. No one consulted with OH at that stage about whether the Claimant was disabled.

167. He argued the decision to move to Stage 3 and dismiss were plainly for a reason relating to disability, namely absence.

168. He submitted that the Respondent had failed to prove objective justification.

    168.1. All of the legitimate aims the Respondent relied upon were expressly addressed by the Managing Attendance Policy and it was not proportionate therefore not to follow it. Within the MAP was an express direction to balance employer and employer needs. Under the MAP, for example, dismissal was a '*last resort*' only after all support mechanisms had been implemented; the

MAP's guidance as to timings of each stage were not followed, the final stage arriving only after 12 months; and the Respondent had not considered adjustments when requested in June.

168.2. The disciplinary policy itself was not followed. The guidance provided for a staged progression to stage 3 in cases of absence (134). Going straight to stage 3 was only meant for issues of misconduct. Natural justice was not followed in the selection of DAC Perez and Mr Powell as they had been involved in prior decision making and knew of AC Roe's desired outcome.

168.3. The true construction of clause 7 of the contract was not that adopted by the Respondent. And even if it were right, the policy at the date of being informed of the action should have applied and at that date the disciplinary policy excluded attendance issues, and Ms Gibbs knew this.

168.4. Mr Franklin submitted that there had been dishonesty in the application of procedures to the Claimant – he addressed us orally that this was a further reason why they could not be objectively justified.

Legal Principles

169. Under section 120 of the Equality Act 2010 ('EQA') the Tribunal has jurisdiction to determine a complaint relating to employment under Part 5. The complaint here is that the Respondent discriminated against the Claimant: by subjecting him to a detriment; or by failing to comply with a duty to make reasonable adjustments, contrary to section 39(5), sections 20-21, as read with Schedule 8.

170. 'Detriment' is broadly defined. We must ask whether, 'by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work', see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL. An unjustified sense of grievance cannot amount to 'detriment' but nor is it necessary to demonstrate some physical or economic consequence.

Knowledge and Constructive Knowledge of Disability

171. We remind ourselves that a person is disabled under section 6 of the EQA if they have an impairment that has a substantial and long-term adverse effect on the ability to carry out day to day activities, section 6. The effect is long-term if it is likely to last for 12 months (Schedule 1(2)). The question of the effect of the impairment is considered as if the person was not taking medication (Schedule 1(5)).

172. The required knowledge is of the *facts* of the disability, not whether those particular facts meet the legal definition: Gallop v Newport City Council [2013] EWCA Civ 1583 at paragraph 36. As Rimer LJ put it:

> *Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a*

> *substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1.*

173. An effect is likely to last 12 months if it '*could well happen*' that it lasts that long. The test is not whether it is more likely than not to happen. As this is the crux of the knowledge point in this case, it is worth setting out part of the reasoning in the relevant case, SCA Packaging Ltd v Boyle [2009] UKHL 37. At paragraph 70, Lady Hale rejected the submission that '*likely'* meant more likely than not. She observed:

> *But predictions are very different from findings of past fact. It is not a question of weighing the evidence and deciding whom to believe. It is a question of taking a large number of different predictive factors into account. There are cases … in which the doctors can predict with all too much confidence what will happen to the patient. But in many others, putting numbers on what may happen in the future is a guessing game. Who can say whether something is more than a 50/50 chance? That is what the doctor in Latchman found so difficult. But assessing whether something is a risk against which sensible precautions should be taken is an exercise we carry out all the time. As Girvan LJ put it in the Court of Appeal, at para 19:*
>
> > *The prediction of medical outcomes is something which is frequently difficult. There are many quiescent conditions which are subject to medical treatment or drug regimes and which can give rise to serious consequences if the treatment or the drugs are stopped. These serious consequences may not inevitably happen and in any given case it may be impossible to say whether it is more probable than not that this will occur. This being so, it seems highly likely that in the context of paragraph 6(1) in the disability legislation the word "likely" is used in the sense of "could well happen".*

174. We remind ourselves therefore that the question is whether the substantial adverse effect of the condition is likely to last 12 months: if it could well happen that it will last that long, even if better managed by medication. It is the effect on day-to-day activities that is key, which does not necessarily coincide with whether the Claimant would be well enough to work.

175. Mr Uduje relied on CLFIS(UK) v Reynolds [2015] IRLR 562, that the knowledge of OH cannot be imputed to the decision maker. But of course this is not relevant to those parts of the OH report the decision maker (as here) has seen. An OH opinion on prognosis may be an important element of the employer's knowledge.

176. Knowledge can also be established by 'constructive knowledge': where an employer reasonably ought to have known of the disability (or disadvantage). The Equality and Human Rights Commission Code of

Practice on Employment 2011 ('the Code') advises, at paragraph 6.19, that employers '*do all they can reasonably be expected to do'* to find out this information.

Direct Discrimination

177. An employer directly discriminates against an employee when its dismissal or the detriment it subjects him to, are less favourable treatment because of disability.

178. The appropriate comparison is with someone in the same or not materially different circumstances who is not disabled. In London Borough of Lewisham v Malcolm HL [2008] IRLR 700 it was decided the circumstances must include the reason for the treatment but not the disability. In the case of an absence-related dismissal that means someone in the same circumstances as the Claimant who had the same amount of sickness absence but who is not disabled.

179. When considering the reasons for an act, the Tribunal must ask itself what was in the mind of the decision maker/actor. In some cases, it can be useful to go directly to this 'reason why' question. But we bear in mind that it is rare for anyone to admit discrimination even to themselves. In some cases, therefore, it will be appropriate to first consider whether the Claimant has proved facts from which a finding of discrimination could be made (a difference in treatment and a difference in the protected characteristic in comparison with someone whose circumstances are not materially different and 'something more') and then consider the employer's reason for the act.

Section 15

180. The Claimant argues that he was subject to unfavourable treatment because of something arising from his disability, contrary to section 15 EQA.

181. Section 15 recognises that a disabled employee may be adversely treated for something that other employees would be adversely treated for, but where that something arises '*in consequence of their disability'* the disabled employee is afforded greater protection. The employer does not need to know of the connection.

182. Section 15 does not apply if the employer shows that it did not know, and could not reasonably have been expected to know, that the employee had the disability.

183. Section 15 does not give the disabled employee complete protection: the employer can avoid liability if it can 'objectively justify' the treatment.

    183.1. First, it must identify that the treatment was in order to pursue a legitimate aim: a real, objective consideration or real need on the part of the business.

183.2. Second, it must satisfy us that treatment was a proportionate means of achieving this aim: both an '*appropriate means'* of achieving it and '*reasonably necessary'* (not the only possible way but we should ask whether lesser measures could have achieved the same aim). This requires an objective balancing exercise between the effect of the treatment and the importance of the aim. This is an objective test and does not matter if employer did not have these reasons in its mind at the time.

184. We have had regard to paragraph 5.21 of the Code: *'if an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified*.'

Failure to make adjustments

185. The duty to make reasonable adjustments arises:

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

186. The duty does not arise if the employer did not know the Claimant was disabled; and did not know or could not be reasonably expected to know that the Claimant was likely to be placed at that disadvantage compared to non-disabled people. The Claimant is not required to suggest the steps that should have been taken, but a failure to do so could however be relevant to the question of the employer's knowledge of the disadvantage.

187. Contrary to popular assumption, it is not to every disabled person that a duty to make adjustments arises. It is important that we take a structured approach to this analysis by checking whether each part of the test is satisfied.

188. We must first identify whether a PCP was applied, and applied to all. Paragraph 4.5 of the Code states that PCP '*should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.*'

189. Mr Uduje referred to Kenny v Hampshire Constabulary [1998] ICR 27 to argue that the PCP had to be job-related. In that case the EAT construed the scope of '*arrangements'* under previous legislation and held they had to be job-related. It is now clear, under Schedule 8 of the EQA, that the PCP has to be applied by the employer.

190. We must then identify whether the Claimant was put to a comparative substantial disadvantage by this PCP. Substantial means '*more than minor or trivial*', section 212(1) EQA. The comparison is with a non-disabled person, see Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265.

191. We must then consider whether the proposed adjustment would have avoided the substantial disadvantage in question. This is an objective question, the focus being on the practical result. The adjustment does not need to be completely effective, see Noor v Foreign & Commonwealth Office UKEAT/0470/10 paragraph 33. Nor does success have to be guaranteed. If there is no prospect of success then that is insufficient. If there is a prospect or a real prospect of removal of some of the disadvantage then it may be reasonable to take the step. A mere opportunity to avoid the disadvantage is insufficient. (See HHJ Clark's summary of the relevant authorities and principles at paragraph 24 of London Underground Ltd v O'Sullivan UKEAT/0355/13/DM.)

192. Any uncertainty in the effectiveness of an adjustment is to be weighed as a factor in whether it is reasonable, see Griffiths (above) paragraph 29.

193. The Respondent relied upon Home Office v Collins [2005] EWCA Civ 598, but in London Underground v Vuoto [2009] UKEAT/0123/09 Cox J held that Collins did not establish any general proposition of law that an employer's duty to make reasonable adjustments does not arise until an employee indicates when they will be able to return to work. Collins is an example of a case where the proposed adjustment had no prospect of enabling the employee to get back to work.

194. The Tribunal considers a wide variety of factors in deciding reasonableness: the size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustment; the logistics of making the adjustment; the nature of the role; the effect of the adjustment on the workload of other staff; the other impacts of the adjustment; the extent it is practical to make (see 6.28 of the Code). Plus, the uncertainty of effectiveness of any adjustment is also a factor.

195. We also note that just because the employer has already made adjustments does not mean that there are others that it is obliged to make.

Application of Facts and Law to Issues

Reasonable Adjustment Claim

Issue 10: Did the Respondent know, or could it have been reasonably expected to know, about the Claimant's disability? From what date?

196. In our judgment the Respondent reasonably ought to have known that the Claimant was disabled by 19 May the day he wrote to C Cotton.

197. By this date the Respondent knew that the Claimant had depression. The Respondent also knew from the Claimant how this depression was affecting him. On the basis of the following we find that by 19 May the Respondent knew the Claimant had a mental impairment that had a substantial adverse effect on his day-to-day activities:

    197.1. He informed them at various times that his mental health had broken down, that this was seriousness, and he had never felt

like that before. In his stress risk assessment he referred to feeling '*broken'* that he had had stress before but had never felt so low, that albeit not normally an emotional person he was finding himself almost daily '*fighting back tears*'. On 21 February he referred to his inability to control his emotions. This was confirmed in the early OH report: on 7 March OH described him as being extremely anxious on that day and having developed increasing anxiety. His current commute was '*severely affecting his mental health*'. At that point he needed 2 months to build emotional resilience and gain help and support. This was confirmed by a sick certificate for 2 months on 8 March.

197.2. He described the further impact on his mental health of the April letter querying the authenticity of his application. While the cause of the further distress is not relevant, certainly the Claimant informed the Respondent of further mental ill health. In the 2 May email he described a loss of confidence and difficulty functioning day to day and that he had considered taking his own life. He referred to these matters in detail again in his email to C Cotton of 19 May. The Respondent has not doubted these reports as being genuine and did not appear to do so at the time. Indeed BC Prasad expressed his immediate concern and offered support. If it had had any doubts about the genuineness of those symptoms, it would have been reasonable to enquire of the Claimant's GP, and it would have discovered they were consistent GP record of 10 May. The OH report of 7 May, which the Respondent saw, was also consistent with the Claimant's experience significant psychological impairment.

197.3. The Claimant's appearance on 17 May at Head Quarters was described by DAC Powell that it was clear he was in no state to be at work. The Claimant informed BC Prasad on 19 May that he had experienced a second mental health crisis over the following weekend.

197.4. We have no doubt that all of these symptoms had an adverse effect on day-to-day activities – any that required the Claimant to make decisions, communicate verbally and concentrate. He was overly anxious, overly emotional and had lost his confidence.

198. The dispute in this case was whether it could be said the Respondent reasonably ought to have known that this adverse effect could well have lasted 12 months.

199. The OH reports always suggest that there was a likelihood that the Claimant would be fit for duties but that is not the same thing as whether there was going to be an ongoing adverse impact on his day-to-day activities if he did not take medication. There was obviously here some uncertainty in the prognosis for a return to work. The 7 May OH report suggested at least a further 8 weeks before the impact of the increased medication could be assessed. A review was suggested in 8-10 weeks. Thus, OH were reporting that there was a chance the increased medication could have worked by then. There is no opinion in this report

about the Claimant's underlying depressive state and the prognosis for its recovery (minus the effects of medication).

200. We consider that by mid-May it was reasonable for the Respondent to have asked OH about the prognosis for the adverse effects of the depression itself. We have taken the following factors into account: the Respondent was being told that another review should happen in July, 6 months from the diagnosis. The Claimant was on long-term sick leave: a matter of significant concern. The MAP identifies that one of the purposes of OH is to assist with the question whether a person is disabled. If he was disabled, then a question arose as to whether there were adjustments it might have to make. This was a large employer with the means (OH) at its disposal to look into the question. From what the Respondent had been told this was a serious depression which was not currently resolving. Now that the illness looked as if it was going to keep the Claimant off work for 6 months, then the Respondent ought reasonably to have asked more questions about whether it was likely to amount to a disability.

201. We also take into account, to confirm the view that we have already reached, Ms Gibbs' acceptance in her oral evidence that the 7 May OH report should potentially have put her on notice of disability. Ms Gibbs has a senior role in HR advice at the Respondent. She was advising managers on the Claimant's case at the time. What this means, in our view, is that on receipt of the OH report she ought to have asked more questions about those areas she was unsure of, namely whether the adverse effect was long-term.

202. If the Respondent had done so, bearing in mind the difficulties of prediction identified by Lady Hale (above), we find that, knowing what they knew at the time, the physician was likely to say that the impairment, uncontrolled by medication, could well last 12 months. This is because the impairment was serious and by then lasting several months, and even a return to work was under review at 6 months. While some individuals recover from depression within a year, others do not. The length of absence was likely to be an important indicator as to whether this was going to be a relatively short-lived crisis or a longer-term condition. In addition, there had, as yet, been no improvement in symptoms: the second crisis in April was likely to have put the Claimant's recovery back. The prognosis for a return to work was based in part on the likelihood that increased medication would work but this is to be disregarded in the question about disability. For these reasons, a doctor is likely to have advised the adverse effect (minus medication) could well last 12 months.

203. If we are wrong about 'constructive knowledge' by mid-May then we find that certainly by 12 June the Respondent could no longer contend it was not reasonable to ask further questions. By this stage the Claimant himself was referring to disability and the Equality Act. In our judgment, the Respondent could not in all conscience state that it had 'no evidence' of disability. It had bags of evidence of a mental impairment with a substantial adverse effect on day-to-day activities. There was uncertainty about prognosis and it ought reasonably to have asked OH and/or the

Claimant's GP further questions about this before closing its mind to the idea that the Claimant was disabled. If it had done so then in our judgment, knowing what they knew at the time, the physician was likely to say that the impairment, uncontrolled by medication, could well last 12 months, for the reasons we set out above. We would describe the Respondent's approach to finding out about disability at this point as 'wilfully blind'.

204. In reaching this view we have rejected the Respondent's submission that the Claimant misled them about his illness prior to his appointment. The evidence before us is that the Claimant had a significant breakdown in February and a further mental health crisis in April. When Mr Uduje referred to the Claimant '*turning up the dial*' on his requests, this is because he was progressively more unwell.

Issue11: A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: a practice of not transferring staff if they are on 'development'.

205. Plainly the Respondent had the policy of not transferring staff while on development. We have also found as a fact that DAC Perez applied this policy when deciding not to facilitate the Claimant's transfer.

206. There is an exceptional case exemption to this policy. In our judgment, DAC Perez thought the Claimant was an exceptional case before his sickness absence: in December 2018 DAC Perez expressed the wish to see him moved as soon as something came up. But, equally plainly, the Claimant stopped being seen as an exceptional case because of his sick leave: BC Prasad's evidence is that he understood this to be the case from discussions with DAC Perez, who, likewise, referred to the sickness absence as one of his factors for not facilitating a transfer.

Issue 12: Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he could not be transferred until the development activity was completed?

207. We consider here whether the policy of not allowing a transfer during development except in exceptional cases put the Claimant to a comparative disadvantage.

208. In accepting employment at Chingford, the Claimant knew he had a long commute: between 2.5-3 hours each way, each time he had a management shift i.e. not every working day of the week but the majority. We are under no illusions that this would have been a tough commute for a non-disabled firefighter manager. We know that other firefighters in London undertook similarly long commutes, from as far afield as Yorkshire. We know also that the Claimant did not expect he could sustain such a commute in the long term, which he put at a matter of years. In our judgment, it was the decline in his mental ill health that made this commute even more difficult: the OH report identified a move closer to home as being beneficial to his recovery. And the impact of his mental ill health on his levels of concentration, fatigue and emotional lability undoubtedly would have made a long commute more difficult than it would have been if he were well.

209. It is also clear to us that, if the Claimant could have secured a transfer to a station in the south west, his commute would have been significantly reduced. We have not accepted DAC Perez's thinking that it would make little difference. We have heard evidence and accept that his journey to work would have been reduced by between 1 to 1.5 hours each way. We find also, on the strength of the OH report of March, that a move to a station in the south west would have benefitted his mental health.

210. Thus, having to wait for the prospect of a transfer for 18 months would therefore have been comparatively worse for the Claimant because he would have had to sustain a difficult commute, far harder for him with poor mental health than a non-disabled firefighter manager. His expectation of coping for a few years was defeated by his having had a breakdown.

211. The fact that the Claimant had requested a transfer before the onset of his depression is not a complete answer for the Respondent. We have to look at comparative disadvantage. All firefighter managers in his position are likely to have been seeking a transfer, but a delay in being put forward for one would have disadvantaged those with a mental health disability more so because of their inability to cope in the interim.

212. Part of the application of the policy was the practice of excluding those who are off sick from the exceptional case exemption. This meant that the Claimant was also comparatively substantially disadvantaged by the application of the policy. A non-disabled firefighter manager would be less likely to have been off sick and therefore had the chance of arguing he was an exceptional case. Just as, in fact, DAC Perez had treated the Claimant prior to his illness.

Issue 13: Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?

213. In our judgment the Respondent knew, or ought reasonably to have known, that the application of the transfer policy placed the Claimant at a substantial disadvantage compared to disabled people:

    213.1. a bald application of the 'no transfer while on development' policy put the Claimant to a disadvantage. The March OH report had informed the Respondent that his lengthy commute had a significant impact on his mental health and that move to a station in the south west where there was a shorter commute would assist: the development policy was an obstacle to this;

    213.2. the disadvantage was more than minor or trivial: we have not accepted DAC Perez's view as reasonable that the difference in commutes would not have made much difference;

    213.3. had the Respondent addressed its mind to this it ought reasonably to have known that refusing to consider transfer while on sick leave put disabled employees to a comparative disadvantage to non-disabled employees. This is because disabled employees are more likely to have sickness absence.

Issue 14: What steps could have been taken to avoid the disadvantage? The Claimant suggests:

> *That the Respondent should have allowed the Claimant to transfer to a vacant post in order to reduce his commute from 3 hours to 1 hour as it would have alleviated the substantial disadvantage he faced and it was recommended in a medical report;*
>
> *The Respondent should have adjusted the policy that says that middle managers are not moved during development. The Claimant was off sick and could not begin his development plan and the Respondent refused to transfer him until he had completed it.*
>
> *Working at Chingford station made his health conditions worsen and severely affected that of his wife and daughter. The Respondent should have followed section 19.4 of the managing attendance policy which does allow a disabled person to be transferred.*

214. By the time DAC Perez considered whether to facilitate a transfer, we have found that the Respondent had constructive knowledge of the disability.

215. We have rejected DAC Perez's evidence (and the Respondent's submission) that there were no vacancies in the south west. We have found that a vacancy arose at Feltham sometime between 20 May and 27 June.

216. We have found that, at that time, DAC Perez did not facilitate a transfer for the Claimant because he applied the development policy and practice.

217. If DAC Perez had adjusted the PCP and facilitated the transfer then the Claimant would have had a real prospect of being transferred: we cannot say for certain because we have seen evidence that there may have been competition for the post. But we have taken into account these factors:

    217.1. the immediate line manager, BM Kempton expressed a preference for the Claimant;

    217.2. OH had advised a move closer to home as beneficial for the Claimant's mental health; and

    217.3. OH had suggested a resolution of the issues would assist in the prognosis – transfer was plainly the most important issue for the Claimant as he had expressed in much of his correspondence; and

    217.4. the MAP identified transfer as an adjustment to support disabled employees, which might well have given him preference over others in the competition.

218. If there was a real chance of a transfer in the adjustment of the Provision, Criterion or Practice there was also, in our view, a real chance of the Claimant being able to get back to work. Probably not immediately but within a relatively short time. We have reached this view because:

    218.1. the OH advice of a move closer to home and that the prognosis depended in part on a resolution of the issues; and

    218.2. the prospect of extra time on management days to spend with his family, is likely to have reduced the Claimant's anxiety, improved his confidence, which in turn would have readied him for work;

    218.3. the adjustment would have also shown the Claimant that the Respondent was listening to him, had understood his mental health needs and was seeking to support him: this would have greatly assisted him to regain his confidence and the boost in his morale would undoubtedly have helped in his recovery.

Issue 15: Was it reasonable for the Respondent to have to take those steps and when?

219. The next question is then whether it was reasonable for the Respondent to take this step.

220. One of the factors we must consider, as per Griffiths, is the uncertainty of its effectiveness. We have not found the Claimant would definitely have been transferred because we have not heard evidence about the competition for the vacancy. But plainly GM Kempton's letters to the Claimant implied his preference was for the Claimant. And the OH advice and MAP guidance, that transfer was an adjustment to be considered, are likely to have assisted the Claimant in securing the post. He also had extensive service in the fire service in general, if not with the Respondent, a matter which, for example, Mr Powell had not wanted to see wasted. On the other hand he was a new employee, untested yet at his position and that will not have been to his advantage in any competition. But then, DAC Perez was happy to transfer the Claimant in December 2018 before he was known at all. Overall, the factors in favour of a likely transfer are strong enough for us not to weigh too heavily this uncertainty in the assessment of whether facilitating it was reasonable.

221. Then there is the question whether the transfer would have enabled the Claimant back to work. We have found him unlikely to have made an immediate recovery, given the severity of his illness. But the OH advice (both specific and more general) suggest that resolution of this issue is likely to have had an impact on recovery. Would a further likely short period of absence have made it unreasonable to take this step? We have carefully considered BC Prasad's evidence about the problems created by transferring an employee who is off sick: two gaps in confirmed postings instead of one, because promotions at this level were done by rounds rather than by individual appointments. This would have left an employee acting-up to station manager in both locations: with some loss of continuity. This must be considered against the logic of our decision: that there was a real prospect of an early return to work. This would

mean that the 'gap' in a confirmed station manager at Feltham would be likely to have been short-lived and the service overall would have gained the benefit of a return to work of someone on long-term sickness absence and the cost benefit of this. Thus BC Prasad's concerns, we consider are likely to have only existed in the short term and are outweighed by the advantages the facilitation of a transfer had in getting a member of staff back to work.

222. The other factors in favour of the reasonableness of an adjustment we have already referred to: the fact that prior to the sick leave it was not a problem to facilitate the transfer, as exemplified by DAC Perez's early aim to move the Claimant as soon as an opening arose; and that the Respondent's own policies suggest a transfer can be an adjustment to consider.

223. Overall, we find the factors in favour of the adjustment being reasonable outweigh the factors against. Facilitating the transfer would have given the Claimant a real prospect of returning to work; and the Respondent a real chance of regaining an experienced firefighter from a long absence. There was only a limited short-term gap in continuity of station manager at the new posting. The uncertainty of whether it might actually work, does not outweigh the prospect of large advantages if it did.

224. We therefore find it would have been reasonable for DAC Perez to put the Claimant forward for a transfer of the Claimant to a station in the south west, in particular for the vacancy which arose at Feltham sometime after 20 May and before 27 June.

225. What we are not saying is that putting forward the Claimant for this vacancy would have definitely worked. That is for the remedy hearing. But, on the evidence we have heard, there was a real prospect he would have secured the vacancy and a real prospect that this would have enabled him soon to return to work.

Section 15 Claim

Issue 16: Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date?

226. We have made our decision on this above. We have found that the Respondent knew or ought to have known the Claimant was disabled by 19 May and, if we are wrong about this, by 12 June, i.e. before 19 June when Ms Gibbs advised that the disciplinary process should be used and before 6 August which is the date when the Claimant was subject to the disciplinary process by the Respondent inviting him to a stage 3 hearing.

Issue 17: Did the Respondent treat the Claimant unfavourably and to his detriment by:

226.1. *subjecting him to a disciplinary process; and*

226.2. *dismissing him?*

227. It is section 39 of the EQA that gives the Tribunal jurisdiction to hear an employment complaint under section 15. The unfavourable treatment has to subject the Claimant to a detriment or be dismissal.

228. We find that subjecting a person to a disciplinary procedure is unfavourable and subjects them to a detriment. Any reasonable employee would consider that he had been placed at a disadvantage by such a step, particularly so one who has been absence by reason of sickness. It is a stressful process to have to go through and the employee knows he is at risk of dismissal by it. In the Respondent's disciplinary process allegations are made of an '*offence'*. The suggestion was that by his absence the Claimant had committed an offence. The Claimant had to '*admit'* this offence at the outset of the disciplinary hearing. The language is plainly inappropriate for a sickness absence which the Claimant has had to take through no fault of his own. Ms Gibbs accepted that the reason absence had been removed from the disciplinary procedure was because they were punitive. Neverthless, we were left with the impression that the Respondent appeared to consider this matter a technicality. The language used in any procedure shows an employee what attitude an employer takes to his circumstances. It has real consequences to accuse a sick of employee of an offence by their absence. We are clear that this was undoubtedly subjecting him to a detriment.

Issue 18: Did the following things arise in consequence of the Claimant's disability: the Claimant's sickness absence, his inability to work or attend at work, or his attendance record?

229. It is plain from our findings of fact that the absence was the consequence of the Claimant's depression, which was his disability.

Issue 19: Was the unfavourable treatment because of any of those things?

230. In our judgment, it is plain that the Respondent used the disciplinary procedure in order to deal with the Claimant's absence. Thus, this part of section 15 is satisfied.

231. What is most surprising is that the Respondent used the disciplinary procedure even though attendance had been removed from it after 1 August and Ms Gibbs was well aware of this.

232. Our findings of fact allow us to draw the inference that Ms Gibbs continued to advise its use it because it best served the expectations of senior management who wanted the Claimant out of the Respondent. We have found that this expectation was evident from the emails AC Roe sent. And we have concluded that he had this intention partly because of the Claimant's absence, a reason set out in his emails.

233. DAC Perez's reasons for dismissal were in the main because of the Claimant's absence.

Issues 20 and 21: The Respondent relies on the following legitimate aims:

> *Providing a safe and reliable service to the public, ensuring that employees sickness absence causes minimal disruption to a statutory service delivery (in accordance with the Fire and Rescue Services Act 2004);*
>
> *To ensure that additional pressure is not put on colleagues who have to cover workload which has the potential to cause low morale and reduce the efficiency of the service;*
>
> *To ensure that employees are able to perform their duties without endangering their health or that of other workers or public service users*
>
> *To ensure that the employees can maximise their attendance at work and perform their substantive roles and;*
>
> *To ensure that additional financial pressure is not put on the organisation from employee absence, where there is scrutiny of reducing budgets and how public funds are spent.*

234. We accept that the Respondent held these aims. They are set out in the Managing Attendance Policy and there was no real dispute that they existed or that they are legitimate.

Issues 20 and 21: Was the treatment (disciplinary procedure and dismissal) a proportionate means of achieving a legitimate aim? The Tribunal will decide in particular:

> *was the treatment an appropriate and reasonably necessary way to achieve those aims;*
>
> *could something less [discriminatory] have been done instead;*
>
> *how should the needs of the Claimant and the Respondent be balanced?*

235. In relation to whether the acts were 'reasonably necessary' means to achieve the aim/s, we remind ourselves that there is no discrimination if the act is objectively justified. Despite the wording of the issues, to which neither party objected, we prefer to consider the issue of what is 'reasonably necessary' as requiring us to ask whether lesser measures could have met the aims.

Use of Disciplinary Procedure

236. In our judgment the Respondent cannot objectively justify the use of the disciplinary procedure in this case:

    236.1. First, and most importantly, the Respondent had removed the issue of attendance from its disciplinary procedure before it subjected the Claimant to it. It was therefore an inappropriate

means, by its own policies, to make decisions in relation to attendance.

236.2. Second, the construction of the contract did not require the disciplinary procedure to be used. We interpret clause 7 of the contract to refer to the disciplinary procedure in force at the time any action would be taken. This means that attendance could not be dealt with under it and a construction would allow for that: namely that performance and conduct was dealt with under it but not attendance. There were two other obvious policies which could be referred to in that case, both incorporated into the contract: the MAP and the probationary procedure. These were both lesser measures it would have been reasonable to use. It was not reasonably necessary, as a matter of the construction of the contract of employment to use the disciplinary procedure to meet any of its aims.

236.3. The probationary procedure could have required the Claimant to attend a single stage meeting but it would not have been in the context of an offence. Moreover the probationary procedure explicitly refers at clause 5.4 to disability and anticipates the possibility of adjustments. This would have meant the Respondent would have had to consider disability and adjustments rather than treating them as hypothetical matters in the way that DAC Perez did.

236.4. It strikes us as completely inappropriate to describe absence from work as an offence, unless the charge was of malingering. While AC Roe's emails both suggest he has taken the view the Claimant was being somehow dishonest, this is not the case before us, and such a case simply would not have succeeded. The Respondent has accepted that the Claimant was disabled from February not later. While the Claimant had always wanted a transfer, after the breakdown in his mental health his need for one grew. That is not manipulating the system but responding to the facts of what had happened to his mental health. While such a suggestion was never made clearly in the Respondent's case, if the suggestion lingers that the Claimant has been using his health to get what he wanted, we would reject that suggestion. The Respondent suggested the Claimant misled the Respondent on his application form, when a glance at his GP records would have confirmed that he did not. The suggestion that there has been a 'turning up of the dial' disregards the Respondent's own concession of disability and the clear medical evidence that the Claimant became unwell and struggled to cope. AC Roe's poorly-informed view, taken early on, that the Claimant had taken the wrong attitude to his posting and that his illness was the result has hampered the Respondent's ability to use its excellent procedures on disability and attendance to support him and find a workable solution.

Dismissal

237. By 19 October the Claimant's absence was lengthy. This was one of the main reasons for DAC Perez's to dismiss.

238. Plainly dismissal met three of the legitimate aims: minimal disruption; avoiding pressure on colleagues and financial pressure. But it did not serve the aims of maximising the Claimant's attendance nor ensuring he could perform his duties safely.

239. The factors in favour of dismissal being objectively justified in this case are:

    239.1. The Claimant's was an important managerial and firefighting role. He was the link between the station and higher management. His role played a part in protecting Londoners. In his absence, his work was being done in part by someone acting-up and in part by an additional burden on BC Prasad. A lengthy absence interferes with the continuity of service.

    239.2. The Claimant had a new role in new organisation. He was as yet untried as a station manager. The early assessment of a probationer is appropriate in order to avoid continuing to employ those who fall below standards.

    239.3. It was uncertain when the Claimant might be able to return to work. Without resolution of issues, a further OH review was at least 12 weeks away.

    239.4. There was a (smaller) cost in the continuing absence, given the Claimant was receiving half pay and the person acting-up would be receiving an additional amount.

240. The factors against the dismissal being objectively justified:

    240.1. The Claimant's 21 years' experience and service as a firefighter and junior manager, much of it at another brigade, was valuable and recognised by the Respondent. It is for this reason he was referred to as a transferee and the Respondent contended that the Probationary Procedure did not apply to him. And Mr Powell's oral evidence was very clear that it did not suit anybody's purpose to see this significant service go to waste.

    240.2. In our view there was a rush to judgment of the Claimant from early on and AC Roe's expectation that he be dealt with 'robustly', an expectation that meant dismissal. This was inappropriate because it was formed without reference to the Claimant's particular circumstances and to assumptions about him that were unwarranted (that he had misled on his application form; and that his sick leave was the result of wanting a transfer). We consider the managers' minds had been influenced by expectations of AC Roe: for this reason DAC Perez did not give any real consideration to action short of dismissal.

240.3. Importantly the Respondent's MAP reflected the legitimate aims and is said to apply to all employees. Under it dismissal is identified as a last resort. It anticipates 3 stages, the last of which is 12 months from start of absence. The Claimant's absence had not reached this stage.

240.4. The OH reports all advised there was a likelihood of the Claimant being fit and that prognosis depended on resolution of issues. A review in 3 months' time was not beyond the foreseeable future and it fit with, roughly speaking the guideline for the final stage of the MAP procedure. A further review would maximise the Claimant's chance of returning to work.

240.5. The first OH report was good evidence of the likelihood of improvement if the Claimant had been moved to the south west. We consider that the later OH reports reference to 'resolution of the issues' really refers to this but does not state it in terms because of the 'mutually acceptable' outcome that the Respondent probably negotiated.

241. We have considered these factors against the test of whether dismissal was an appropriate and reasonably necessary means of achieving the 3 aims.

242. We have concentrated on whether dismissal was the means reasonably necessary to meet the aims. We acknowledge the impact of the absence and the importance of the Claimant's role. We do not underestimate the pressures on the Respondent to provide an efficient service. These are factors that, without more, are likely to have led us to find that after such a long absence dismissal was appropriate. But was it reasonably necessary at this stage? Here we consider there is more: the Claimant's long service and experience as a firefighter that would go to waste; the inappropriate rush to judgment of the Claimant that influenced minds; and ultimately that the Respondent's own Managing Attendance Policy had been designed to respond to those legitimate aims and balance a sick employee's needs. The MAP applied to this safety critical service; it applied to employees whose work was essential. But it established guideline stages for absence review meetings that anticipated a further review at the 12 months' stage. It also established the principle that dismissal was a last resort. For all of those reasons, therefore we find that dismissal at this stage was not reasonably necessary to meet the aims and the lesser measure of a further period of review would better have balanced the Respondent's and Claimant's needs.

Direct disability discrimination

Issue 22: Did the Respondent know, or could it have been reasonably expected to know, about the Claimant's disability? From what date?

243. The Respondent could have been reasonably expected to know about the Claimant's disability from 19 May, see above.

244. In our judgment, AC Roe could not have known nor reasonably ought to have known that the Claimant was disabled when he reached his

negative view of the Claimant and subsequently wrote his emails setting out his (incorrect) view of the Claimant's likely dishonesty on 28 March, and his opinion that the absence was unacceptable on 24 April, and his expectations that he be managed robustly, on 9 May. In our judgment the evidence shows that AC Roe likely made up his mind at an early stage when it was too soon to tell whether the Claimant's depression might well last 12 months.

Issue 23: Did the Respondent do the following things:

Refuse to transfer the Claimant to a vacant post at Feltham which was 1 hour, 15 minutes from his home as opposed to Chingford which was a 3-hour trip.

Decide to progress straight to Stage 3 of the disciplinary procedure and dismiss him.

245. It follows from our findings of fact, that DAC Perez decided not to facilitate a transfer to Feltham or any other fire station in the south west. We have found that the difference in journey time between Chingford and Feltham is between 1 and 1.5 hours.

Issue 24: Was that less favourable treatment because of disability?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was. He relies on a hypothetical comparator.

Transfer

246. We consider that, at the time he refused to facilitate a transfer, DAC Perez did not know that the Claimant was disabled but he reasonably ought to have known. We have found the Respondent had constructive knowledge.

247. The development policy and practice of not transferring employees who were off sick were two of the factors applied by DAC Perez in refusing to facilitate a transfer. This policy and practice were of general application. We consider the same policy and practice would have applied to a non-disabled employee in development who was off sick. It would thus not be possible to find, on those factors alone, that the reason for the refusal to facilitate a transfer was because of disability.

248. The third main factor in DAC Perez's mind was the expectation of AC Roe. We have decided that AC Roe could not have known that the Claimant was disabled. AC Roe reached his incorrect view of the Claimant on inadequate evidence but we are not persuaded, on the evidence we have heard, that it was a view he reached through a stereotypical view of those with mental health problems. We consider he would likely have adopted the same or similar so-called robust approach

to any probationer who had sought a transfer and then gone off sick: looked for a way to dismiss him.

249. Thus, the Claimant's direct disability discrimination claim on the refusal of transfer does not succeed.

Stage 3 of the Disciplinary Procedure and Dismissal

250. The decision to select stage 3 and use the disciplinary process was made at a time Ms Gibbs likely knew the Claimant was disabled or certainly ought to have known.

251. Certainly, this was a surprising decision: to use an out-of-date disciplinary procedure. We consider it unlikely that Ms Gibbs would have taken that approach with other probationers off sick but not disabled: more likely she would have followed the view proffered by Mr Amis and used the probationary procedure (as read with the MAP where relevant).

252. Without more, that establishes a difference of treatment and a difference in protected characteristic. The surprising feature of a senior HR professional having selected the wrong disciplinary procedure, might have been the 'something more' that would have shifted the burden of proof and required the Respondent to show that the reason for the use of the disciplinary procedure was not because of disability. But we have found Ms Gibbs was influenced in her decision by AC Roe's view of what should happen. And we have found, for all the unfairness in AC Roe's view, it was not because of disability. We cannot therefore find that the use of the disciplinary procedure at stage 3 was direct disability discrimination.

253. As for dismissal, we have found that the main reason for dismissal was the lengthy absence. In our judgment, DAC Perez is likely to have made the same decision in relation to someone with a similar level of absence who was not disabled. He felt the need to act robustly and did not consider lesser alternatives because of the influence of AC Roe. AC Roe's view was not because of disability. We do not therefore find that the dismissal was direct discrimination.

Remarks of the 'Industrial Jury'

254. This has been a difficult decision. Our decision in favour of the Claimant does not amount to a decision that he would definitely have been transferred or would definitely have avoided dismissal after a further review: those are questions for the Remedy Hearing.

255. We are all glad to see that attendance is now not part of the Respondent's disciplinary procedure. This should be the case for all, including probationers. Any reference to a genuine sickness absence as an offence is inappropriate.

256. Some disabilities are invisible or difficult to understand. Here the Respondent took the view that the Claimant was asking for what he had always wanted. Of course, in a sense that is true, but it does not answer the questions we have had to grapple with. Whereas, at first, a transfer

was an understandable preference to avoid long commute; once his mental health broke down, it became more pressing.

257. Clear management hierarchies have their strengths, but the influence of senior managers in individual employment decisions can be problematic. Those seeing the big picture lack the benefit of the detail that is required in considering, for example, whether a duty to make reasonable adjustments arises.

258. Finally, we are very concerned to see an employer here seeking acceptable OH advice. To avoid any suggestion of this in the future the Respondent may wish to appoint an independent person to receive and determine any concern that its OH providers have about this. It may be also be appropriate that any information provided by the Respondent to OH be copied to the employee.

Employment Judge **Moor**
Date: 20 November 2020