EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr Lee **London Ambulance Service NHS Trust**

Heard at: **London South Employment Tribunal**

(Hybrid hearing with parties appearing by CVP and Tribunal sitting in London South ET)

On: **5-8 October 2020**
11 November 2020 (in Chambers)

Before: **EJ Webster**
Mr D Clay
Mr M O'Connor

Appearances
For the Claimant: **Mr B Toner (Counsel)**
For the Respondent: **Ms E Gordon Walker (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is upheld.
2. The Claimant's claim for direct perceived disability discrimination is upheld.
3. The Claimant's claim for direct age discrimination fails.
4. The Claimant's claim for victimisation fails.

REASONS

The Hearing

5. The hearing was a hybrid hearing with the parties and witnesses appearing via CVP and the Tribunal being in person at London South Employment Tribunal.

The respondent had made an application prior to the hearing for the matter to be in entirely in person. This was offered to the parties on the first day of the hearing but it was agreed by both parties that they would prefer to continue via CVP.

6. The Tribunal were provided with hard copy bundles and the parties confirmed that all relevant witnesses had access to their witness statements and the bundles for the purposes of giving evidence.

7. The claimant made an application to amend the claim to include an argument that the respondent was under an increased obligation to make attempts to retain the claimant in employment because the injury that caused the claimant's ill health was the respondent's fault. That application was allowed with oral reasons given at the hearing that are not repeated here.

8. The evidence and submissions were completed on 8 October 2020. Although the hearing was listed for 5 days, due to administrative resources, the tribunal were unable to convene on 9 October and so an in chambers day was listed for 11 November 2020.

9. Both Counsel provided helpful written submissions at the close of the hearing.

<u>The Issues</u>

The Issues had been agreed by the parties in advance of the hearing.

10. Unfair Dismissal

(i) What was the reason for dismissal?

a) The Respondent relies upon capability (ill health) and/or some other substantial reason.

b)The Claimant argues it was for a prohibited reason (victimisation / age).

(ii) Was the dismissal fair in all the circumstances in accordance with section 98(4) of the ERA?

a Was there adequate consultation with the Claimant?

b. Was there an adequate medical investigation?

c. Did the Respondent consider other options, such as alternative employment?

d. If so, could the Respondent reasonably be expected to keep the Claimant's job open any longer?

(iii) The Claimant says the dismissal was unfair because:

a. There was insufficient consultation.

b. The medical investigation was inadequate.

c. The Respondent did not adequately consider alternatives to dismissal such as alternative duties.

d. The Respondent refused to permit the Claimant to continue with 3rd manning, even though it was recommended by the Claimant's GP and OH.

e. OH stated it could advise more accurately when the Claimant began treatment– the Claimant was dismissed 10 days before his treatment commenced.

f. When the Claimant attended his appeal, despite his treatment proving successful and the Claimant reporting fit for his substantive role, his appeal was dismissed.

g. The appeal officer concluded it was likely the Claimant's symptoms would return – there was no evidence (let alone medical evidence) to support this conclusion.

h. The dismissal was an act of direct age discrimination and/or victimisation.

(iv) Did the decision to dismiss the Claimant fall within the range of reasonable response (taking into account the nature of the illness, the prospect of returning to work, the likelihood of recurrence, the need for someone to do the work, the effect of the absences on the workforce, the extent to which the Claimant was aware of the position and his length of service)?

11. **Victimisation**

(i) It is agreed the Claimant did a protected act

a) Protected Act 1 – raising a grievance alleging disability discrimination (10 February 2017)
b) Protected Act 2 – presenting ET claims, alleging disability discrimination (27 June 2017).

(ii) Was the Claimant subjected to the following detriment because he did a protected act?

a) Dismissal (06 February 2018).
b) Rejecting the appeal to dismissal (21 May 2018)

12. **Direct Age Discrimination**

The Claimant (aged 53 at the relevant time) alleges he was treated less favourably due to his age.

The actual comparator relied on is M - (aged 38 at the relevant time).

(i) Was comparator M an appropriate comparator? Save for age, were they in materially the same situation as the Claimant?

(ii) As a matter of fact, did the following treatment occur as alleged by the Claimant?

a) Was he subjected to a capability hearing (23 January 2018)?
b) Dismissed (06 February 2018).
c) Did he request an OH referral?
d) Was the OH referral / appointment with OH delayed?
e) Was he dismissed before his treatment commenced?
f) Was he offered no / fewer alternative duties? (as compared to MS)
g) Was his request for restricted duties declined?

h) Was the Claimant told to report sick due to not being fit for full Paramedic duties?
i) Was his sickness absence / injury managed and / or mostly managed by Carmel Prior (Sector Delivery Manager) and not his Station Manager?
(iii) If so, was the Claimant treated less favourably than comparator M?
(iv) If so, has the Claimant proven primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his age?
(v) If so, what is the Respondent's explanation? Has it proved a non-discriminatory reason for any proven treatment?
(vi) If so, can the Respondent objectively justify this treatment e.g. was it a proportionate means of achieving a legitimate aim?

13. **Direct Disability Discrimination by Perception**
(i) Did the Respondent perceive the Claimant to be disabled, in other words, did the Respondent perceive the Claimant as having the characteristics that make up the definition of disability?
(ii) The allegation relates to the Claimant's appeal outcome (upholding the decision to dismiss the Claimant and rejecting his appeal).
(iii) The comparator is hypothetical and would be a person who was not perceived to be disabled, that is, a person who was not perceived to have an underlying issue / condition with a susceptibility to further injury. The comparator would be in materially the same situation as the Claimant in all other respects.
(iv) Was the Claimant treated less favourably than the hypothetical comparator?
(v) If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because it was perceived the Claimant had a disability?
(vi) If so, what is the Respondent's explanation? Has it proved a non-discriminatory reason for any proven treatment?

The Law

14. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:
(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) The reason (or if more than one, the principal reason) for the dismissal, and
(b) That it is either a reason falling within subsection (20 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it –
(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or
(d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)
(a) 'capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
(b) 'qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss is fair or unfair (having regard to the reason shown by the employer) –
(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee and
(b) Shall be determined in accordance with equity and the substantial merits of the case.

15. The respondent's case was that this was dismissal for capability due to ill health. That is a potentially fair reason under s 98(2)(b) ERA. In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) is required. This involves an analysis of whether the respondent's decision makers had a reasonable and honest belief in the claimant's inability to carry out his role due to ill health. Further a tribunal must determine whether there were reasonable grounds for such a belief. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses in all the circumstances.

16. We have considered the case of International Sports Co Ltd v Thomson [1980] IRLR 340. It states that an employer should:
(i) Carry out a fair review of the attendance record and the reasons for absence
(ii) Give the employee an opportunity to make representations and
(iii) Give appropriate warnings of dismissal if things do not improve.

Direct Discrimination – s13 Equality Act 2010

17. S13(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

Victimisation – s27 Equality Act 2010

18. (1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

19. The burden of proof provisions in the EqA 2010 are set out in *section 136(2) and (3)* and state:

(2) If there are facts from which the court [or tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Facts

Summary

20. The claimant was employed as London Ambulance driver from 2 September 1991. He was a health and safety union representative and was very active in those duties. In the past the claimant had suffered from 2 episodes of cancer in

2006-2008 and then again in 2010. On both occasions he considered that he had been treated well and supported back to work.

21. The claimant was injured at work on 24 January 2017 when he was carrying a patient. He tore his meniscus. He subsequently suffered another injury on 13 February 2017 when changing a battery in the ambulance. From this point on the claimant had two separate conditions – a neck problem and a shoulder problem.

22. As a result of both of these injuries the claimant requested physio treatment which commenced on 21 February 2017. He returned to work in accordance with his shift pattern on 17 February and requested light duties but was told to sign himself off sick instead which he did. He was signed off from 17 Feb until 4 April. Between 5 April and 21 April he took annual leave. He returned to work on 22 April 2017.

23. He carried out some work called 'third manning' (explained in detail below) for a short period of time between 22 April and 17 May. However, from 17 May he did not return to work in any capacity. He was dismissed with notice on 6 February 2018 (following a meeting on 23 January 2018). His employment terminated on 16 April 2018. He appealed that decision but the decision to dismiss him was upheld on 16 May 2018. The respondent states that his dismissal was for capability reasons.

The Injuries

24. The claimant's claim includes an allegation that the respondent caused his injury and that they therefore have an additional burden of responsibility to him. We reach our conclusions on this point below. However unusually we are put in the position where we are being asked to conclude whether the respondent caused the claimant's injury. An employment tribunal does not have jurisdiction to determine a personal injury claim save in discrimination claims.

25. We believe however that the claimant is asking us to make findings of fact that are relevant to the fairness of his dismissal which we do have jurisdiction to do. However we were provided with no medical evidence or witness evidence beyond the claimant's assertions, that would enable us to conclude that the incidents the claimant refers were caused by the respondent. We therefore make no findings of fact on this point beyond accepting that the injuries happened as described by the claimant (this was not challenged by the respondent) whilst he was at work.

Sickness absence management process

26. The respondent's sickness absence process is set out primarily in their policy pg 65 of the bundle. In summary there is an absence management process where sickness absence review meetings are held and which, if unsuccessful results in the employee being referred by the manager to a Capability Hearing.

It is open to the employer, under the process, to dismiss the employee at the capability hearing. There are no set time scales in the absence policy and the time for referring to a capability hearing is mainly at the discretion of the manager who is managing the process.

27. It was recorded in various places by the respondent that the claimant was off work from February 2017 and there are various references to the fact that by the time of his dismissal he had been off sick for almost a year. Whilst not always relevant, particularly given that the respondent's absence management process does not include time specific trigger points, the narrative that accompanied the claimant's absence and dismissal was that he had been off for almost a year. We find that this was incorrect. He was off between 17 February and April 21. He then returned to work on 22 April for almost a month. We also find (and address below) that he only signed himself off sick at the request of his manager and that he was willing to perform alternative duties throughout his absence. The letter at page 148, dated 14 June 2017, confirms that the period of absence that the respondent was managing was from 11 May 2017.

28. On the claimant's return to work on 22 April 2017 he was put on third manning duties by the Clinical Team Leader. Third manning is the practice of putting a third person in an ambulance service who could assist the two Technicians (a lower grade than paramedics) but would not be required to, for example, lift patients etc. The claimant was happy doing this work but was told on 11 May 2017, by Sonia Barwick, that he could not continue because he needed Occupational Health ('OH') approval. At this point the claimant requested that he be referred to OH which Ms Barwick did and the claimant saw an OH specialist on 17 May 2017.

29. It was explained by the respondent that third manning is only a short-term possibility and that they need paramedics such as the claimant to be able to fulfil their full responsibilities. We accept that explanation in principle though we address other possible alternative work in more detail below.

30. The claimant asserts that he ought to have been referred to OH before 17 May as the absence policy states that such a referral is meant to take place within **5 weeks of the absence** and that the delay contributed to his dismissal. His first appointment was on 17 May 2017. We accept that there was a delay of 2 months in referring the claimant to OH between him first being off sick in February and the referral in May. However we accept that this was, as was accepted by the respondent during the process and in evidence, due to an oversight by Ms Barwick. One of several by her in the management of the claimant's sickness absence.

31. We also find that the delay is of little significance to the overall picture. The claimant underwent some initial physiotherapy at an early stage during his

absence in February which he thought was helping and could lead to recovery. When that did not solve the problem it was right that he ought to be referred to OH. However the delay to the OH referral did not have to delay his treatment under the NHS system as appears to have been asserted by the claimant (though this was not entirely clear). It was for the claimant's GP to refer him for an MRI if that was appropriate and ultimately this is what happened. It was never explained why the claimant was waiting for the OH appointment before obtaining appropriate treatment under the NHS system given that the OH system did not arrange treatment per se.

32. The OH doctor makes an observation that they will be able to give a better prognosis once the results of the MRI scan were received. We accept that the OH doctor also stated that the claimant would be able to undertake other duties and was able to do them. We accept the respondent's explanation as to why they did not put him back on third manning at this stage but we do believe that the claimant's ability to do other work was clear to the respondent from the time that they had this report.

33. The claimant met with Ms Barwick on 11 June 2017. This was followed by a letter dated 14 June 2017. The claimant states that this letter was inaccurate as it contained reference to him being offered alternative work. We accept that the claimant tried, from an early stage to raise his objections to the inaccuracies in the letter and the respondent's letter dated 25 July 2017 (from Neil Kendrick, pg 155) confirms this. At the next meeting he had with Mr Cornett, the claimant clearly corrects this statement and says that he was and remained willing to undertake work at the CHUB.

34. We accept that at the meeting with Ms Barwick the following topics were discussed. We base our conclusions on the notes of that meeting at p146-147 and the subsequent comments made by the claimant at his meeting with Mr Cornett on 13 October 2017 and noted at page**s** 188-197.

    (i) The claimant told Ms Barwick that he was awaiting an MRI scan.
    (ii) That Ms Barwick had seen his GP and OH reports stating that the was fit for light duties; and
    (iii) Ms Barwick was aware that the claimant's injuries had improved significantly with the first set of physiotherapy; and
    (iv) They discussed the possibility of the claimant working in CHUB and we accept the claimant's version of events that he was not offered a CHUB role because Ms Barwick was going to see if there were any roles available for him and report back.

35. We address now the narrative surrounding how many absence meetings were held with the claimant and how many he attended or failed to attend. According to the respondent's submissions, the claimant was invited to 14 meetings and

attended six. Ms Gordon Walker then details the following meetings in her footnote:

5 April 2017 [126-127];

22 April 2017 [136];

11 May 2017 [149];
7 June 2017 [146-148];
31 October 2017 [188-197];
12 December 2017 [216-221];
23 January 2018 [291-300];
16 May 2018 [341-344].

Given that the last two meetings in that list are the dismissal meeting and the appeal meeting we assume that she relies on the first 6 as being those that occurred during the capability hearing.

36. Of the 8 that the claimant did not attend, we do not intend to address each and every situation. However we were satisfied by the evidence provided to us through cross examination of the respondent's witnesses and the documents we were taken to that the claimant did not attend the 8 meetings for various justifiable reasons including; availability of his union representative, annual leave, the fact that Ms Prior was arranging the meetings (addressed below). There was only one meeting we were made aware of that was missed because the claimant made a diary mistake. Of all the remaining meetings suggested by the respondent, the claimant corresponded with them in good time to discuss availability. There was no delay in the claimant responding to written communications and he engaged fully in the process when asked to do so.

37. The claimant did not correspond with or attend meetings with Ms Prior on the basis that he had submitted a grievance against Ms Prior alleging disability discrimination, victimisation and harassment in relation to her management of his agreed shift patterns that had been put in place following his cancer treatment. Although the basis of the grievance is not particularly relevant to these proceedings, that grievance does have relevance for two reasons:
    (i) The claimant relies upon it as a protected disclosure
    (ii) The claimant states that in the outcome of the grievance he was found to have been reasonable for not attending the meetings with Ms Prior.

38. As a result of the grievance, management of the claimant's sickness absence was transferred to Mr Cornett. The claimant agreed to attend the meetings with Mr Cornett and did so on 13 October 2017 and 12 December 2017. However how many meetings the claimant attended during the sickness absence process was a significant issue.

39. Mr Cornett accepted in cross examination that the meetings had all been missed for the reasons that the claimant has given throughout. There was only one where the claimant did not attend without notice and it was accepted at the time that he had made a mistake on the dates. All other 'failures' to attend meetings were notified and accepted by the respondent during these proceedings as being genuine and acceptable reasons. Yet, the tribunal notes that in the report prepared by Mr Cornett, no information is given as to the reason why the meetings were not kept to thus giving the distinct impression that the claimant was failing to comply with the absence review process.

40. At the absence review meeting with Mr Cornett on 13 October 2017 it became clear that Ms Barwick had not found out if there were any roles within CHUB and Mr Cornett accepted in cross examination that he was told by the claimant that the claimant was waiting for suggestions and that the claimant told him was happy to work in the CHUB.

41. We also accept that it is likely that the claimant focussed on his health and safety union duties during this meeting and expressed his disbelief that he couldn't just carry on 3rd manning. However we do not accept the respondent's version or 'slant' that they subsequently put forward about the claimant's position regarding alternative work. In Mr Cornett's management report which was then considered at the Capability Hearing and the Appeal, it was stated as a matter of fact that the claimant refused all other alternative duties and was not willing to consider them. This was clearly wrong. The evidence, which was available to the respondent throughout, and in particular to Mr Cornett when he prepared the management report, clearly confirmed that the claimant did not refuse CHUB work at any point and expressly confirmed that he would be willing to do it. This was further confirmed to us by Mr Cornett in evidence.

42. In addition Mr Cornett accepted that it was the respondent's responsibility as set out in their sickness absence policy (page 79 – paragraph 14.1.1) and in the pregnant and long term sick employees policy (pgs 89 and 90) that the line managers were responsible for informing the CHUB about the paramedics availability for alternative duties. It was not the claimant's responsibility as suggested to us. Ms Barwick appears not to have done this and so it is not until October 2017 that this is actioned by Mr Cornett.

43. At the meeting on 13 October 2017, Mr Cornett accepted responsibility for this and said that he would ask Ms Barwick to find out what positions were available in the CHUB. Subsequently nothing happened (again) and at the meeting on 12 December 2017, Mr Cornett accepted that Ms Barwick had not found out that information. We accept his evidence to us that he then phoned the CHUB himself and established that there were vacancies.. We accept that it was ultimately for Ms Pigeon to determine if there were suitable roles available for the claimant, but it is not until December 2017 that the claimant's availability is raised with Ms Pigeon. On the basis of this information the claimant arranged

a meeting with the manager of CHUB, Ms Pigeon, which he attended but she did not. This was meant to take place on 14 December 2017. It is not clear why this meeting did not occur.

44. Mr Cornett's witness statement at paragraph 18 states,

"Ian clearly did not wish to do anything other than third manning of full time Union duties but these were not appropriate alternatives".

Mr Cornett accepted in evidence that this was wholly incorrect. We note that this narrative of the claimant only wanting to third man or do his union duties permeates the entire decision making process up to and including the appeal and yet is without factual foundation. It started with Mr Cornett's management report and is sustained throughout. It is not clear how this narrative originated. We accept that it is more likely than not that the claimant focussed on these issues during his meetings but not that it was at the exclusion of all other possibilities as has been put forward by the respondent.

45. What then transpired was that despite knowing that:
    (i) The claimant was interested in CHUB work;
    (ii) That there were vacancies that were probably suitable;
    (iii) That the delay in referring to CHUB was due to Ms Barwick's inaction; and
    (iv) That it was clearly the respondent's obligation to source and refer the employee to the CHUB

    Mr Cornett firstly chose to refer the claimant to a capability hearing and, in his referral report, he states at page 284 that the claimant had not initially been interested in redeployment which is incorrect and which Mr Cornett accepted he knew was incorrect at the time he was writing the report. And secondly he implies that the claimant is not interested in redeployment because he had not filled in the redeployment form.

46. We address here the issues regarding the redeployment form. The claimant accepted that he had not submitted a redeployment form. His explanation for this was that he understood that the redeployment form would have resulted in his permanent redeployment and that he would have lost his role as a paramedic. The respondent's case was that this was not the purpose of the form but the witnesses accepted that it was a possible outcome. Mr Cornett also accepted that it had not been explained to the claimant that this was not the outcome they were seeking or that it would be necessary for working at the CHUB where Mr Cornett knew there were suitable roles available.

47. The respondent witnesses accepted that the words alternative employment and redeployment could be used interchangeably and that this could cause confusion. It was also admitted in cross examination that it was not necessary

to complete a redeployment form to obtain temporary alternative employment as opposed to a possible role transfer.

48. We find that the claimant's reasons for not filling in the redeployment form were genuine and did not reflect any intention on his part to refuse temporary alternative duties. In the dismissal letter at p302 it confirms that the claimant told the respondent at the Capability Meeting that he wanted to return to his role as a paramedic and that this was the reason he had not completed the form. This confirms his understanding that he could lose his job as a paramedic not the respondent's assertion that he was refusing temporary alternative duties.

49. At the second meeting with Mr Cornett on 12 December, the claimant updated Mr Cornett on his medical meetings. He confirmed that he was awaiting treatment for his shoulder which was likely to be steroid injections. He explained that if the injections did not work he might need surgery. We accept that the claimant did not say he was undecided, just that he would not receive the treatment until his consultant was back from leave which would be February the following year. In cross examination Mr Cornett accepted that the claimant was not undecided on treatment and that he knew it would take place in February.

50. We accept that the claimant did not know if the treatment would work and that if it did not his only other option would be surgery. We also accept that this treatment was only relevant (as far as both parties knew at the time) to the claimant's shoulder injury and that the prognosis for his neck remained unknown and awaiting the MRI results and further physio.

51. The respondent's case was that the claimant had failed to provide medical evidence. We accept that it was their policy that the OH doctor was responsible for contacting the claimant's health workers (pg 66 para 4.4) and that nobody at the respondent had asked for access to the claimant's medical records. This was confirmed by Mr Cornett in cross examination. We find that as soon as the claimant had medical documents he provided them. There were no documents in the bundle that the respondent claims they were not given at the appropriate time. At no point was the claimant specifically asked for a specialist report nor did OH feel that it was required in order to give prognosis as all the medical professionals, in all the information we have been provided with, appeared to accept that treatment available was that which the claimant was getting and/or about to get and that until those courses of treatment for either condition were completed, it was impossible to give a proper prognosis regarding recovery. We have not been provided with evidence to suggest that the claimant failed to obtain relevant medical evidence or that the respondent's policy required him to do so.

52. We were provided with no clear reason by Mr Cornett as to why he took the decision to refer the claimant to a capability hearing as opposed to scheduling

another sickness absence meeting. We do accept that there was no definitive prognosis and that the claimant had been off for a significant period of time (even discounting the erroneous days that have been included in their calculation). However there was a clear treatment plan in place and the claimant had indicated a willingness to work in the CHUB (and in fact attended a meeting there 2 days later). Mr Cornett was expressly aware that there were suitable alternative roles available at the CHUB and the HCP desk as he had spoken to Ms Pidgeon and the claimant.

53. At paragraph 12.4.5 the respondent's sickness absence policy (p77) states: *"However, when there is little likelihood of the member of staff being able to return to work in any capacity within the Trust and other options have been exhausted he or she should be referred for possible dismissal on the grounds of capability".*

    We accept that the alternatives had not been exhausted or, in fact, on the evidence before us, properly explored given the lack of exploration by the respondent of opportunities at CHUB until December 2017.

54. The report compiled by Mr Cornett is negative in its tone. It sets out the following which we have found were not supported by the evidence before us:
    (i) That the claimant did not want to consider alternative work
    (ii) That the claimant had failed to attend numerous sickness review meetings without explanation
    (iii) That the claimant had failed to provide relevant medical evidence
    (iv) That his sickness absence had lasted almost a year when in fact, it was only 8 months by that time and a significant portion of that was annual leave.

Capability hearing

55. At the capability hearing on 23 January 2018 the claimant was represented by his union representative. The decision maker was Mr Norton. Just as Mr Cornett's witness statement was full if inaccuracies that simply repeated the errors in the report, so was Mr Norton's. On cross examination both witnesses accepted these inaccuracies. It was not helpful for the tribunal to have witness statements so full of information that was clearly contrary to the documents in the bundle. We found that overall this significantly undermined our view of the respondent witnesses' credibility throughout.

56. We find that Mr Norton relied upon Mr Cornett's case pack and the inaccuracies that we have outlined above. The dismissal letter clearly outlines that the following reasons underpinned his decision to dismiss:
    (i) That the claimant had been absent since 17 February when in fact he had only been signed off sick since 22 April 2017.
    (ii) That he had not been willing to engage with alternative employment

(iii) That no treatment plan had been agreed when it had and the claimant was due to have the first set of steroid injections shortly after this meeting (On 2 Feb 2020)

57. There was no convincing explanation provided to us as to why the respondent could not wait to make their decision until after the claimant's treatment. We have accepted that the outcome of that treatment was not guaranteed and that the claimant was frank in saying that if it did not succeed he would need surgery. However the time frame involved was not significant and the OH advice received by the respondent clearly stated that a prognosis would not be clear until after the treatment had commenced.

Appeal Hearing

58. The claimant was served his notice and remained employed during his notice period. He appealed against the decision to dismiss by letter dated 23 February 2018 **(**p304-306). The meeting was held on 16 May 2018. Between the capability hearing and the appeal, the claimant received the steroid injections (2 February 2018) and reported on 10 May that he had made a full recovery. This was confirmed by his consultants by letters dated 7 February 2018 (p396) and 27 April 2018 (pg 407). Further his neck condition was deemed to be highly likely to improve by his consultant on this matter (letter dated 8 March 2018, pg 401) and the claimant reported at the appeal hearing that he was completely better.

59. All 3 of these letters were available to the appeal panel. We were told that the appeal panel consisted of Mr Buchanan (who gave evidence to us) Dr McFarland (a doctor) and Mr Swabe who wrote the outcome letter.

60. The appeal outcome has two conclusions. First that the original dismissal decision by Mr Norton was correct at the time and secondly, despite the evidence that the claimant was now better, that they did not want to reinstate him because,

"Whilst Mr Lee's symptoms would appear to have been resolved following an injection, the considerable length of Mr Lee's absence after two relatively minor incidents, together with Mr Lee's own evidence, indicates an underlying issue and a clear susceptibility to further injury. During normal duties it is likely that substantially greater demands would be made on a paramedic's physical fitness. The panel concluded that allowing Mr Lee to return to full paramedic duties was both likely to lead to further long-term sickness absence, and would be too great a risk to him, his colleagues and to patients."

61. We find that their decision to rely on the original decision is flawed by the same issues that flawed the original decision. In addition, the time between the decision and the appeal hearing crystallised some matters. Firstly it was clear

to the appeal panel that there clearly had been a treatment plan in place and the claimant received treatment very soon after the original decision thus demonstrating that this part of the conclusion at the very least had been significantly flawed. Secondly it was made clear to the appeal panel that the claimant's concerns about redeployment focussed on not wanting to permanently move away from a paramedic role as opposed to not wanting to carry out alternative duties. Despite this clarification, the panel continued to unquestioningly follow the narrative that was set in train by Mr Cornett's report, namely that the claimant was not engaging in the sickness absence process and did not want to undertake alternative duties. Both were objectively untrue even on the basis of the evidence they had before them.

62. We turn now to their decision not to reinstate the claimant. Here we have the following concerns:
    (i) They had medical evidence to demonstrate that the claimant was able to return to work in his contractual role.
    (ii) Even if they had misgivings about the nature or longevity of the recovery, they failed to refer the claimant to OH before making their decision.
    (iii) They relied upon the fact that they believed, without any evidence that was put to the claimant or put to the tribunal, that the claimant had an underlying chronic condition that would affect his future ability to work.
63. This latter assumption is set out in paragraph 47 (as above) but was also confirmed to us by Mr Buchanan in evidence and his witness statement (paragraph 15).

64. It is worth quoting this paragraph as it appears to suggest that the panel chose to disregard the medical evidence before them for a variety of reasons:

    "One letter confirmed that Ian was 'going to start physiotherapy exercises and it was *' high likely he will get better by physiotherapy exercises in most cases… if the right shoulder and arm pain persists he may be a candidate for CT-guided injection option*2. This did not confirm that Ian had fully recovered and suggested that he only started physiotherapy exercises in March 2018, over a year after the injury occurred. In contrast, the other letter dated a month later, showed that the consultant was amazed that Ian's shoulder was fully recovered after one steroid injection. This and Ian's view that the injury was easily reversible was at odds with what he presented throughout his absence. Ian had previously maintained that his injury was chronic, had built up and was caused by lifting patients over a significant time and he could not be sure that treatment would rectify it….. Dr McFarland felt that given the severity and duration of the injury, a steroid injection would address the pain but was unlikely to resolve the injury and it could easily recur or worsen."

65. In answer to a question from the tribunal Mr Buchanan told us that Dr McFarland had never examined the claimant or seen his full medical history and that his opinion regarding the claimant's health was never put to the claimant to respond

to. According to Mr Buchanan, Dr McFarland's opinion was based on his knowledge of the effects of steroid injections and how they normally affect similar conditions. These issues were discussed by the appeal panel after they had heard from the claimant and 'behind closed doors' (our phrase not the claimant's). As has already been noted, the claimant was not referred to OH at this stage despite the panel's clear concerns about the claimant's medical evidence.

Other matters

Grievances

66. In February 2017 the claimant submitted a grievance against his line manager Carmel Prior alleging disability discrimination, victimisation, bullying and harassment. An ET1 was submitted on 27 June 2017 alleging similar matters. The claimant relies upon these both as protected acts and the respondent agrees that it satisfies the requirements in the Equality Act 2010.

67. We conclude that the grievances and the capability process were carried out by different people. The only crossover in personnel that was evidenced to us was Ms Prior but we find that once Mr Cornett was appointed to manage the claimant's sickness absence, Ms Prior's involvement all but ceased. We were provided with no evidence to suggest that either grievance was linked to the claimant's absence or informed any decisions made by the respondent witnesses. We accept the witness evidence that both Mr Norton and Mr Buchanan knew nothing about the grievance and ET1 and that in any event Mr Cornett knew only that the grievance existed but not the detail. We were given no evidence whatsoever to challenge that position.

Comparator - M

68. We were provided with a separate bundle of documents relating to M who the claimant relied upon as a comparator. M was 15 years younger than the claimant. She also suffered a rotator cuff injury and was off sick for a considerable period of time. None of the respondent witnesses managed M nor had any knowledge or input into any of the decisions that were made regarding how her absence was managed or whether she ought to be dismissed. We were taken to various documents in the bundle to evidence different treatment.

69. The evidence we were taken to enabled us to conclude the following difference in treatment that is relied upon by the claimant:
    (i) M was referred to a capability hearing though she was not dismissed as a result.
    We accept that M was off for longer than the claimant before she was referred to a capability hearing and that the capability hearing had a different outcome.
    (ii) M was referred to OH without having to ask for a referral

We accept that the claimant had to ask to be referred but as discussed above the failure to refer was an oversight and once the claimant requested the referral it occurred very quickly. The delay was also relatively insignificant and did not delay his treatment as that was always going to occur under the NHS system.

(iii) M was offered alternative duties and undertook them
M did get offered alternative duties and carried them for a significant period of time before being allowed to return to her contractual role of paramedic.

(iv) M was allowed to commence treatment before a decision was taken regarding whether she would be dismissed
M's manager did agree to allow M to have surgery before making a decision regarding her prognosis. Mr Norton did not wait 9 days for the claimant to commence his steroid injections.

(v) The claimant was asked to report sick as he was not fit to carry out his contractual role. M was clearly off sick for considerable periods of time as well though we accept that she was allowed to do alternative duties. We are not aware of how or why her managers dealt with the situation differently in this regard.

70. We do not find that the claimant has made out as a question of fact the following detriments relied upon.

(i) His request for restricted duties was not declined. We accept that the claimant's requests for third manning and trade union duties were not agreed to. However we also conclude that they did not have to be agreed to by the respondent. Third manning was, we have accepted, a temporary position that the respondent only offered for short periods of time. There is no suggestion that M was allowed to continue TU duties. We understand that the claimant was upset that he was not allowed to continue with his health and safety role but he has provided us with no evidence to suggest that this occurred because of his age or that M was treated differently in the same regard. We cannot see that this was different treatment to M given that she did not make those requests. The

(ii) We do not accept that the claimant's his sickness absence was mostly managed by Carmel Prior. We accept that it was initially but do not find anything untoward with the claimant's line manager dealing with this matter. Further, as soon as the claimant's grievance was submitted it was managed by others, mainly Ms Barwick and Mr Cornett.

Conclusions

Unfair dismissal

(iii) We conclude that the reason for dismissal was the claimant's capability. We have not been given details as to what the 'Some Other Substantial Reason' relied upon by the respondent is. We have not been given

sufficient evidence to suggest that there was a different underlying motive or reason behind the claimant's dismissal.

(iv) Capability is a potentially fair reason for dismissal where it relates to the capability or qualifications of the employee for performing work of the kind for which he was employed to do (*section 98(2)(a)*). Capability here means an employee's capability assessed by reference to skill, aptitude, health or any other physical or mental quality (*section 98(3)(a)*).

(v) In cases of long-term absence, case law has established that fairness will involve the following key elements:

- Ascertaining the up-to-date medical position.
- Consulting with the employee.
- Considering the availability of alternative employment.

(vi) If we are satisfied that an employer has followed a fair procedure, we must consider whether the employer can be expected to keep the employee's job open any longer (*Hart v A R Marshall & Sons (Bulwell) Ltd [1977] IRLR 61*).

(vii) *BS v Dundee City Council [2013] CSIH 91* (as applied in *Monmouthshire County Council v Harris [2015] UKEAT/0010/15*) stated that the following factors may be relevant to how long an employer may be expected to wait:

- The availability of temporary cover (including its cost).
- The fact that the employee has exhausted his sick pay.
- The administrative costs that might be incurred by keeping the employee on the books.
- The size of the organisation.

(viii) In *O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145* the Court of Appeal decided not to interfere with a tribunal's "borderline" decision of unfair dismissal which relied on a finding that it had been unreasonable of the employer to disregard medical evidence at an internal appeal hearing that the employee was fit to return to work. It held that it is open to a tribunal to find that it was unreasonable of the employer not to wait a few months longer so that it could obtain its own medical evidence. Underhill LJ said as follows:

"The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis." (paragraph 36).

(ix) We have reminded ourselves not to substitute our opinion of the process with that of the respondent and that we must simply consider what would fall within the range of a reasonable consultation/process.

(x) We conclude that the consultation leading up to the decision to dismiss and the basis for the decision to dismiss was significantly flawed and not within the range of reasonable consultations. This was particularly in regard to the availability of alternative employment.

(xi) We have concluded that the claimant did engage in the sickness absence process. We accept that there was some non-attendance at meetings and that the conclusion that most of these were reasonable due to the complaint against Ms Prior. However we reject the argument by Ms Gordon Walker that when taken as an overall picture, the claimant's non-attendance at so many meetings provided a reasonable conclusion that the claimant was not engaging. Mr Cornett during cross examination accepted that almost every single 'missed' meeting was adequately explained. This was something known to him at the time that he wrote the report.

(xii) We appreciate that the medical evidence up to the meeting of 12 December 2017 with Mr Cornett was sparse and did not provide a plan of treatment that could render a specific return to work date. However we consider that Mr Cornett was aware, from 12 December 2017 that the treatment available to the claimant would take place in early February and that the delays in this were not of the claimant's making but were as a result of the NHS process. He also knew that it was possible the treatment would not work but that this was only a 30% chance and that the treatment was due to occur soon after his last meeting in December 2017.

(xiii) Whilst it was not a significant delay in the scheme of things, we do find it relevant (though not determinative) that Mr Cornett was also aware that the respondent had delayed in referring the claimant to an OH specialist. At the date Mr Cornett took the decision to refer to a capability he was aware of that.

(xiv) Most importantly, we find that the failure to adequately consider alternative employment meant that the investigation prior to referring the claimant to a capability hearing was not within the range of reasonable responses. Mr Cornett was aware throughout the process both at the time he referred and at the time of the Capability Hearing when he presented the case that the claimant was interested in alternative work, had expressed that interest from an early stage, that Ms Barwick had filed to follow up on this and that the claimant was happy to undertake work in the CHUB or the HCP desk. Furthermore he knew from his

conversation with Ms Pigeon that there were jobs that were likely to be suitable for the claimant. Given that Mr Cornett knew that this process had been delayed by Ms Barwick's inaction not the claimant's we conclude it was not within the range of reasonable responses for him not to wait to see if that situation could bear fruit. This is particularly so given that there were no specific time triggers for referrals to be made to a capability hearing, the responsibility for liaising with the CHUB lay with the respondent, and the first meaningful contact with CHUB about the claimant had only occurred in December.

(xv) Mr Norton did not go behind Mr Cornett's report or interrogate any aspect of it before making his decision to dismiss. The claimant clearly told him that there were inaccuracies in the report. Further, at the time of dismissal Mr Norton knew that the claimant was due to receive treatment only 9 days later. Whilst we note the LJ Underhill's observations in O'Brien, given that there was such a short time frame between the meeting and the treatment we find it was outside the reasonable responses of an employer of the size and resources of the respondent, to consider waiting 9 days to see what the up to date medical position was before deciding whether to dismiss. We find that this failure to wait 9 days is rendered even more unreasonable by the fact that had the respondent followed up on the alternative work possibilities (as was their contractual obligation), the claimant could have been working throughout this period on alternative duties. Whilst we accept that a decision was being made regarding his ability to do his contractual role of paramedic, it is implausible to suggest that had the claimant been found and carried out alternative work in the CHUB, that he would either have been referred to a capability hearing or, that at the capability hearing he would have been dismissed with treatment due to happen very shortly thereafter.

(xvi) The fact that Mr Norton did not give any weight to the claimant's length of service also contributes to bringing the decision outside the range of reasonable responses.

(xvii) Turning to the appeal, we find that it was outside the range of reasonable responses that the new medical evidence was disregarded. The claimant, at this point had an almost clean bill of health and yet the respondent chose to disbelieve the medical evidence produced and return to the narrative that they had already created, along with the medical profile that they decided was more appropriate, and say that the claimant was likely to be unwell again soon and not be able to undertake his job. They did this without obtaining any independent medical evidence corroborating their conclusion.

(xviii) Even if we are wrong and the original decision to dismiss was within the range of reasonable responses, we cannot accept that this claim can be significantly distinguished from the case of O'Brien. The respondent quotes that an employer is entitled to some finality, but it is clear from O'Brien that where evidence is provided that the claimant was well enough to return to work at an appeal that can render a dismissal unfair. The respondent asserts that it was clear that the claimant had two injuries. We disagree. At the appeal hearing the claimant clearly said he was completely better. The medical evidence he produced addressed both conditions which said that one was completely cured by the injections and the second was highly likely to improve with physio and the claimant himself confirmed that he was fully well and his neck was completely better.

(xix) The appeal panel conclusions at paragraph 47 show that they do not rely on the fact that they are unsure about one of his pre-existing conditions. Instead, they have seemingly created a 'chronic condition' for the claimant that has no name, with no evidence to support its existence and which is not based on any medical information. Nor was the possibility of the existence of such a condition put to the claimant at the appeal hearing. It is a principle of natural justice that the case against an employee ought to be put to them before such a conclusion is reached. This was not done. Nor was their 'diagnosis' checked by an OH doctor. The claimant offered to attend an OH appointment before the appeal hearing and whilst he was still employed but this was not explored by the respondent. Whilst re-referral to an OH specialist may often not be necessary or reasonable; in circumstances where the respondent has created its own diagnosis and prognosis and disagrees with the claimant's own doctors and self-reported lack of symptoms, we conclude that it was unreasonable that they would not check the medical situation further.

(xx) We therefore conclude that the original decision to dismiss the claimant was outside the range of reasonable responses based on an unreasonable consultation. The appeal decision was also outside the range of reasonable responses in light of the new evidence available to it and the fact that they diagnosed the claimant with a separate condition without medical evidence and without putting this to the claimant.

(xxi) The claimant's claim for unfair dismissal is upheld.

<u>Direct Age discrimination</u>

(xxii) The claimant relies upon the comparator M. We accept that M was an appropriate comparator in that she was a paramedic who suffered from

a similar injury and had a similar sickness absence record. The age difference between them was 15 years.

(xxiii) We accept that the claimant was treated differently to M in the following ways:

(i) He was dismissed (06 February 2018)
(ii) He did request an OH referral and was not referred as quickly as M was after his injury
(iii) He was dismissed before his treatment commenced
(iv) He was not offered alternative duties.
(v) The Claimant was told to report sick due to not being fit for full Paramedic duties

(xxiv) We do not find that the claimant's OH referral was refused nor that it was delayed in any significant way more than M's nor that his sickness absence was mostly managed by Ms Prior.

(xxv) However, although the claimant has identified what could amount to less favourable treatment that does not necessarily mean that the claimant has identified a set of facts from which we could

(xxvi) The two stage test regarding the burden of proof was established in the case of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332*, This was confirmed, by the Court of Appeal in *Igen Ltd and others v Wong and other cases [2005] IRLR 258* and by the Supreme Court in *Hewage v Grampian Health Board [2012] IRLR 870*.

The two-stage approach to the burden of proof applies:

- Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent.
- Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?

(xxvii) Whilst we have found various differences concerning how M's sickness absence was managed, we have been provided with no evidence whatsoever that these events occurred on grounds of the claimant's age. The managers making decisions regarding M and the claimant did not overlap. M was based at a different ambulance station. We accept the respondent witnesses' evidence that they were unaware of M's situation until these proceedings. All the claimant has done is present a difference in status and a difference in treatment. This does not, in accordance with Madarassy, establish a set of facts or a prima facie case that shifts the burden of proof. We have not been provided with the 'something more'.

(xxviii) However, if we are wrong and the claimant has established a prima facie case because there are a set of events that could allow the tribunal to

conclude that there may be less favourable treatment. We conclude that the respondent has proven that it did not treat the claimant less favourably on grounds of the claimant's age.

(xxix) The respondent's sickness absence policies allow for a significant amount of management discretion. No argument was put forward by the claimant that the policies were somehow inherently discriminatory on grounds of age. Therefore whilst we accept that there were various points when the claimant was treated differently and potentially less favourably to M by the respondent, the fact that those decisions were made by completely separate people within the discretion allowed by the relevant policies, means that we have no basis on which to conclude that any difference in treatment was because of age. No reference to the claimant's age or M's age were made in any of the decisions we were taken to and the claimant has not suggested that there was anything other than different treatment. In cross examination he was asked why he did not think that the different treatment occurred because of sex given that M was a woman and that was a difference between them. The claimant had no real answer to that question. Whilst we understand that discrimination is not always overt, we have simply not been given any evidence to suggest that the respondent made their decisions on grounds of the claimant's age, including any suggestion that the claimant felt that this was why he was being treated that way.

(xxx) We therefore do not uphold the claimant's claim for direct age discrimination.

Victimisation

(xxxi) We find that the grievance dated 10 February 2017 and the ET1 dated 27 June 2017 amounted to protected disclosures and this has been accepted by the respondent. Both documents made clear factual allegations that the claimant was being discriminated against contrary to the Equality Act 2010.

(xxxii) The only detriment complained of is the claimant's dismissal.

(xxxiii) Again, we were provided with no evidence to suggest that this situation played any part in the respondent's decision making and in particular, Mr Norton's decision making. Beyond stating that the claimant carried out those protected acts and was subsequently dismissed, the claimant has not provided any evidence that substantiates a conclusion that the decision to dismiss was a response to those protected acts.

(xxxiv) In particular it is not clear how the claimant says that this situation informed or influenced the respondent's decision making. Mr Norton was

not aware of the claimant's grievance or its outcome or the ET1 at the time that he made his decision. Mr Cornett was only aware of the grievance against Ms Prior insofar as it led to him being asked to manage the claimant's sickness absence. We accept his explanation that he did not know the content of that grievance. Therefore we cannot conclude that the disclosures influenced, even in a small way, the decision to dismiss the claimant or refuse to uphold his appeal.

(xxxv) The claimant has done little more than point to a set of facts and insisted that there must be a link between them. The main argument from Mr Toner was that the dismissal was so unfair that there must have been a more sinister ulterior motive underlying it. At various points Mr Toner's questions appeared to suggest that the HR function at the respondent would have known all aspects of the situation and told the managers what their decisions ought to be. Mr Toner's submissions suggest again that HR were 'no doubt' the same people but beyond this supposition we were given no evidence to suggest that the HR personnel dealing with the matters were the same let alone that they were using that information to influence Mr Norton's decision. For a tribunal to conclude that this is the case, more evidence than just a set of facts must be presented (Madarassy).

(xxxvi) The claimant's claim for victimisation is not upheld.

Direct disability discrimination by perception

(xxxvii) It is the claimant's case that at the appeal, the respondent, perceived that the claimant was disabled for the purposes of the Equality Act 2010 and that it was for this reason that they refused to overturn the original dismissal decision despite the medical evidence which certified the claimant as fit to return to work.

(xxxviii) We consider that this case is almost entirely on all fours with the reasoning in The Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061.

(xxxix) Analysing paragraph 47 at page 350 and Mr Buchanan's oral evidence it is clear that the panel believed that the claimant had a chronic, long term condition that was likely to cause him to have significant levels of sickness absence in the future and would prevent him from being able to do his contractual role of paramedic.

(xl) It is common ground that the claimant was not disabled at the relevant time. The claimant has to establish however that the panel considered that the claimant was suffering from an impairment that had or was likely

to have a long term substantial impact on his ability to carry out day to day activities.

(xli) Taking this definition to the case facts. Paragraph 47 almost addresses each of these issues head on as did Mr Buchanan's witness statement. Mr Buchanan told us that Dr McFarland advised the panel that the injection was masking the condition and that it was very likely that the shoulder or beck injury or a combination of the two would recur and would then prevent the claimant from working.

(xlii) The precise nature of the original condition, which the respondent was fully aware of and was worried about a recurrence of, was that the claimant struggled to lift or carry. (pg 274 of the executive summary for the capability hearing). Such a restriction was not limited to heavy objects necessarily and therefore we consider that, on its own, lifting and carrying are day to day activities (e.g. carrying the shopping). We find that their perception was that the impact on the claimant's day to day activities was more than minimal.

(xliii) The respondent stated in their dismissal letter that they thought that the condition would continue for a long time and they were treating it as a continuation of the condition that had kept him off work for almost a year (something which they held against him even though it was incorrect). Therefore it was clearly in their minds, that the condition had lasted or was likely to last a year. We conclude that the appeal outcome letter at paragraph 47 (p350) and Mr Buchanan's witness statement, demonstrate that the appeal panel believed at the relevant time that the claimant was disabled even if they did not carry out a conscious consideration of the disability definition in the Equality Act.

(xliv) The relevant comparator in this claim would be someone else who had been dismissed having been off sick for the same period of time, who presented medical evidence that they were fit to work and their condition was largely if not completely cured, but who was not perceived to have a disability at the time of the appeal hearing.

(xlv) Paragraph 47 of the letter from Mr Swabe (pg 350) states clearly that the fact that the condition was likely to continue and prevent him from carrying out his duties was the key reason that the appeal panel did not reinstate him. It was this belief that caused them not to reinstate him. They cannot, it seems to us, have it both ways and say that the decision not to re-employ him at the appeal stage had nothing to do with his health or prognosis when at the same time clearly relying upon it as the reason for the dismissal being fair under s 98(4) ERA 1996. We conclude that had they not believed that the claimant had a ongoing chronic condition that had a substantial impact on his ability to carry out day to day

activities they believed would continue, they would have reinstated him given that the original decision to dismiss had been based primarily on his apparent medical inability to do his contractual role and he now had clear medical evidence showing that he was fit to return to work.

(xlvi) We disagree with the respondent's submissions that this ought properly be pleaded as a s15 Equality Act 2010 claim. We assume, following the discussion in Coffey, that the suggestion the respondent is making is that the claimant was dismissed because of the perceived impact that the disability would have on the claimant's absence levels and his ability to do the job. The decision was not made because he had the condition but because of the something they feared would arise namely that the claimant would continue to be unable to do his job and/or have significant absence levels in the future.

(xlvii) In the case of Coffey it was found (paragraph 74) that the case;

"fell within s13(1) because of the particular facts of the case… [the decision maker] was influenced in her decision by a stereotypical assumption about the effects of what she perceived to be the claimant's (actual or future) hearing loss."

(xlviii) The respondent's reasons at paragraph 47 say that they have assumed that the claimant has an

'…underlying issue and a clear susceptibility to further injury. During normal duties it is likely that substantially greater demands would be made on a paramedic's physical fitness. The Panel concluded that allowing Mr Lee to return to full paramedic duties was both likely to lead to further long-term sickness absence, and would be too great a risk to him, his colleagues and to patients."

(xlix) This is a set of assumptions regarding the claimant's chronic condition (which they have not named) which they believe indicate that the claimant could not perform his duties in the future. They have decided that because of his condition he could not return to full duties, not just because of the levels of potential absence but also because it would create a (again unnamed) risk to his colleagues and patients and made a stereotypical assumption that he would be susceptible to further injury.

(l) We therefore uphold the claimant's claim that in refusing to reinstate him the respondent discriminated against him because they perceived that he had a disability as defined by the Equality Act 2010.

Employment Judge Webster

Date: 25 November 2020