THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **Employment Judge Truscott QC**
Ms L Grayson
Dr N Westwood

BETWEEN:

Mr D Sappleton
Claimant

AND

The London Fire Commissioner
Respondent

ON: **20, 21, 22, 25, 26, 27, 28, 29 January, in chambers 8 March 2021**

Appearances:

For the Claimant: **Ms G Churchhouse of Counsel**

For the Respondent: **Mr S Keen of Counsel**

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable to do so.

JUDGMENT

The unanimous judgment of the Tribunal is:

(1) that the Claimant's claim of disability discrimination contrary to section 13 of the Equality Act is not well founded and is dismissed,
(2) that the Claimant's claim of disability discrimination contrary to section 15 of the Equality Act is not well founded and is dismissed,
(3) that the Claimant's claim of failure to make reasonable adjustments contrary to section 20 of the Equality Act is not well founded and is dismissed,

(4) that the Claimant's claim of harassment contrary to section 26 of the Equality Act is not well founded and is dismissed,
(5) that the Claimant's claim of victimisation contrary to section 27 of the Equality Act is not well founded and is dismissed, and
(6) hat the Claimant's claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

PRELIMINARY

1. The Claimant gave evidence on his own behalf and was represented by Ms G Churchhouse, barrister. His witness statement was revised at paragraph 5 at the commencement of the hearing and it is this evidence the Tribunal proceeded upon subject to what is said in paragraph 7 hereof. She led the evidence of Mr O Modupe, a co-worker. The Respondent was represented by Mr S Keen, barrister, who led the evidence of Mr K McKenzie, Borough Commander, Mr G Thompson, Station Commander, Ms S Banning, Area Admin Manager, Mr P Jennings, Assistant Commissioner, Fire Safety, Mr D Amis, Head of Wellbeing responsible for Health and Absence and Mr D Ellis, Assistant Commissioner.

2. The parties agreed that the correct name of the respondent is The London Fire Commissioner.

3. There were four volumes of documents to which reference will be made where necessary. There was an agreed chronology and cast list.

4. It was agreed that, due to shortage of time, the hearing would address liability only.

5. The Claimant had two previous sets of proceedings against the respondent. The first set, case number 2301851/2015, was heard in May 2016 before Employment Judge Spencer, Dr S Chacko and Mr G Henderson and judgment was sent to the parties on 2 August 2016. The Tribunal dealing with that claim is referred to as the 2016 Tribunal. The Claimant succeeded in part on a claim for harassment, his claims of direct discrimination, victimisation and trade union detriment were dismissed. The second set of proceedings, case numbers 2301013/2016 and 2301481/2017, was heard in December 2017 before Employment Judge Elliott, Ms J Forecast and Mr J Gautrey and judgment was dated 6 December 2017. The Tribunal dealing with that claim is referred to as the 2017 Tribunal. The claims for sex and race discrimination, including victimisation, breach of contract, disability discrimination and unlawful deductions from wages were dismissed.

6. In this, the third set of proceedings, the Claimant, by his witness statement, seeks to re-litigate a number of issues that have already been the subject of a determination between the parties, in particular, by the 2017 Tribunal. The following passages of the Claimant's statement provide examples of issues that have already been the subject of findings by the previous tribunals:

a) Paras. 5: alleges that harassing hand gestures were made by an officer. This was rejected by the 2017 Tribunal (at para.135) [1176],
b) Paras.6 to 27: give an account of the Claimant's return to work in 2016 and up to May 2017 that is replete with criticisms of the Respondent. This conflicts with the findings made by the 2017 Tribunal which held that the Respondent had dealt with the Claimant's attempts to return to work, lawfully, reasonably and fairly.
c) Paras. 75 to 78: the Claimant asserts that the Respondent should have realised that his absences were improving and relies (in para.77) on assertions that were rejected by the 2017 Tribunal. The 2017 Tribunal concluded, based upon the medical evidence (including that of Dr Bashir), that the Claimant was unlikely to be able to return to an operational role (see for example para. 358 to 360) [1210];
d) Paras. 122 to 133(b) and 134 deal with the Claimant's consultation with Dr Bell on 21 October 2016 [1679] and the previously dismissed cases of harassment against SM Hilary and SM Morton. The Claimant now seeks to rely on the transcript of Dr Bell to overturn the findings of the 2017 Tribunal. He also makes assertions about harassment allegations that have been dealt with (paras.81 to 88 [1168-9] and paras. 349 to 353 [1209] of the 2017 Tribunal's decision).

7. On the first day of its hearing, the 2016 Tribunal was faced with a problem arising from the fact that the Claimant's statement included new material that was not referred to in the list of issues [1135, para.6]. The Tribunal decided that the process of excising passages from the Claimant's statement was very likely to be so laborious as to be impractical. Instead of embarking upon that exercise, it said that it would not consider matters that had not been identified in the list of issues. This Tribunal when faced with similar circumstances requested that the Claimant consider revising his witness statement. Apart from the minor change noted in paragraph 1 hereof, no such revision was forthcoming although it would not have been a laborious exercise to do so. This Tribunal decided to address only the issues which were agreed for this hearing and not address material/issues that the Claimant should have raised previously or issues and causes of action that the Tribunal has already determined. This replicated the approach of the 2016 Tribunal and is supported in law is set out in the legal section of this judgment.

8. In the course of the hearing, there was an application on behalf of the Claimant to exclude corrected transcripts of recordings of a number of meetings which had been lodged by the Respondent from the bundle. The Tribunal rejected the application in the interests of justice. The Tribunal could not see how, if it was to consider the recordings of what took place at those meetings, it could fairly do so solely on the basis of selections from the recording made by the Claimant. The Claimant had been in possession of the recordings and was in a position to check the corrected transcripts. The Claimant complained, in particular, about the late introduction of the transcript of Dr Bell, but as he had the original audio recording and had a number of days before the commencement of the hearing, he was in a position to confirm its accuracy. It may also be that the recorded meetings would be covered in any argument for the Respondent set out at paragraph 6 hereof or objectionable on other grounds. This Tribunal does not repeat but does endorse the comments by the 2017 Tribunal

in relation to the use of recordings in respect of which permission has not been obtained.

9. There were three case management preliminary hearings in this set, respectively before EJ Cheetham QC on 3 April 2018, EJ Truscott QC on 6 March 2019 and EJ Balogun on 9 September 2020. The issues identified at the hearing before EJ Truscott QC were modified and agreed issues were provided to EJ Balogun and were further modified before the commencement of this liability hearing. The final agreed position on the issues is as follows:

ISSUES

10.

Harassment

1. Did the Respondent engage in unwanted conduct:
    a. By SM Gary Thompson on 13 September following the Claimant "to every corner of the building"?
    b. By SM Thompson on 13 September 2017 escorting the Claimant to his car, despite the Claimant's request that he was not to be followed?
    c. By SM Thompson on 13 September 2017 preventing the Claimant from visiting the toilet?
    d. By SM Thompson on 13 September 2017 blocking the doorway so that the Claimant could not "pass to anywhere else in the building?
    e. By SM Thompson on 13 September 2017 putting his face close to the Claimant's face in an aggressive manner?

2. If so, was this treatment such which falls within section 26 of the Equality Act 2010?

3. If so was such treatment related to his disability?

4. If so, did this have the purpose or effect of violating his dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

Victimisation

5. Was there a protected act or (acts)?
   The Claimant relies on his previous employment tribunal claims and grievances
   Employment Tribunal claims 2301851/2015, 2301013/2016, 2301481/2017 2302571/2017 and 2303650/2018 (in respect of the Claimant's dismissal.
   Grievances about Simon Hillary (2016), Andrew Cross (2016), Phil Morton (March 2017), Ian Frame (Nov / Dec 2017), Barry Wakefield (Mar / April 2018), Sue Banning (April 2018), and Paul Jennings (Sept 2018).

6. Was the Claimant subjected to the following treatment:
   - Respondent declining to assign an alternative Station Manager for the Claimant's return to work interview on 7 September 2017.
   - Respondent dismissing the Claimant on 21 June 2018; and

- Respondent's rejection of the Claimant's appeal on 3 October 2018.

7. If so, was he subjected to this treatment because he had undertaken protected acts?

Direct Discrimination – Disability

Note It is accepted (by the Respondent) that the Claimant was suffering from PTSD at the material time and that this condition amounts to a disability.

8. Did the Respondent treat the Claimant less favourably than an actual or a hypothetical comparator, by:
   - deciding to progress to stage 3 of the sickness absence procedure;
   - dismissing the Claimant on 21 June 2018; and
   - rejecting of the Claimant's appeal on 3 October 2018.

9. If the Respondent did treat the Claimant less favourably than an actual or hypothetical comparator, has the Claimant proved facts from which the Tribunal could conclude that such treatment was because of the Claimant's disability?

Failure to make reasonable adjustments

10. Did the Respondent apply a provision criterion or practice (PCP) which caused the Claimant to be put at a substantial disadvantage in relation to a relevant matter compared with non-disabled people in
    a) requiring employees to have their return to work meetings with their designated line managers?

11. Did that PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled because the Claimant says meeting with SM McKenzie would have exacerbated the effects of his disability?

12. Did the Respondent take such steps as were reasonable to avoid that disadvantage?
    In respect of the PCP at 10 a), the Claimant says he should have been provided with a different manager for the return to work hearing.

Discrimination because of something arising from disability

13. Were the following unfavourable treatment because of the Claimant's sickness absence which arose in consequence of his disability, contrary to Section 15 of the Equality Act 2010:
    - Respondent dismissing the Claimant on 21 June 2018; and
    - Respondent rejecting the Claimant's appeal on 3 October 2018.

14. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Unfair Dismissal

15. What was the reason for the Claimant's dismissal? Was it a potentially fair reason? The Respondent says the reason was capability in the form of ill health.

16. Did the Respondent act reasonably in all the circumstances in dismissing the Claimant for capability?

17. Did the Respondent follow a fair procedure - alleged procedural failings:-
– failure by the Respondent to follow its attendance policy
- failure to conclude a reasonable investigation into the Claimant's health and prognosis.

Chronology of ill-health absence

1. On 11 Feb 2015, the Claimant started his ill-health absence which continued for approximately 10 months until Dec 2015.

2. On 14 May 2015, he presented his first ET Claim (2301851/2015).

3. On 1 July 2015, a sickness capability process was published [809]

4. On 16 Dec 2015, the Claimant returned to work on light duties.

5. The Claimant attended the light duties pool at Lewisham and then Greenwich on the following occasions –
    1. 16 December 2015 to 2 February 2016
    2. 6 June 2016 to 2 August 2016

6. On 2 Feb 2016, the Claimant started a sickness absence for approximately 4 months until 5 June 2016.

7. On 7 April 2016, a new Managing Attendance Handbook was introduced [784], of particular relevance is Clause 1.14 (Non-Compliance with Policy) [796] and in the Managing Attendance Policy [765] Clause 4.7 and 4.10 [770].

8. On 21 May 2016, the Claimant presented his Second ET Claim (2301013/2016) [1102].

9. On 2 August 2016, the ET gave judgment in the First Claim [1132]. Light duties were terminated and the Claimant was placed on sickness absence for approximately 3 months until 23 Oct 2016.

10. On 17 October 2016, the Claimant returned to work on light duties.

11. On 19 December 2016, the Claimant started sickness absence for approximately 4 months until 7 March 2017.

12. On 16 December 2016, there was a Psychiatric Assessment by Dr Winbow, who reported his findings on 19 December 2016 [1467].

13. On 3 March 2017, there was an OH Assessment by Dr Bell [1520].

14. On 9 March 2017, there was an ASM Meeting with Mr P Morton [1320].

15. On 10 March 2017to 12 April 2017, the Claimant returned to work on light duties.

16. On 12 April 2017, there was a First Stage Capability Meeting with Mr P Morton.

17. On 13 April 2017, light duties were terminated and the Claimant is placed on sickness absence until 26 Oct 2017.

18. On 28 April 2017, there was an OH Assessment by Dr El-Nagieb [570].

19. On 28 May 2017, the Claimant presented his Third ET claim (2301481/2017). The Second & Third Claims were consolidated [1120].

20. On 6 December 2017, the ET gave Judgment in the Third and Fourth Claims [1156]. In relation to time limits the Tribunal finds at paragraph 330:

> We have also considered whether it is just and equitable to extend time. The claimant is familiar with tribunal proceedings as he brought his first claim in 2015 and has had the benefit of some advice along the way. We saw reference to union representative Mr Dale from Employees United who was representing the claimant in February 2016 when he was emailing on the claimant's behalf to the Head of Employee Relations. The claimant also copied Laura at Premier Advocates. He was represented by an employment consultant on 25 January 2017 before Judge Baron prior to issuing of a claim on 28 May 2017. The claimant has also previously presented claims and lodged grievances when off sick.

At paragraph 263, the Tribunal say:

> In relation to the claimant's health we also had a copy of the report of the jointly instructed psychiatric expert Dr Amir Bashir who is a consultant psychiatrist. This was introduced to the bundle commencing at page M84. At page 96 Dr Bashir said of the claimant (quoted as it appears in his report): "*His hypervigilance made him to supersensitive to any behaviour of his colleagues towards him. This made him to make further complaints and his lost trust in the authorities".* At page M99 Dr Bashir said: *"His mistrust in people and hypervigilance prevented him to go out or meet people".* At page M100 he said "*This means at work[s] his anxiety level would shoot up resulting in physical and mental symptoms of anxiety. Being hypervigilance resulted in a state of paranoia so he would misinterpret even neutral or innocent gestures or communications as a threat or bullying. He would take any person in authority communicating in a firm way as aggression".* At page M101 he reports on the claimant's "*perception of hostility"* on his various returns to work.

In relation to reasonable adjustments – claims 1 and 2, the Tribunal said at paragraph 354:

> We have considered whether the respondent applied the PCP of requiring employees on light duties to work a nine-day fortnight and to work for seven

hours a day. We have found above that a normal day's work in the light duty team was from 9am to 4:30-5pm. This is a seven hour day taking account of a lunch break.

At paragraph 359:

We find based on the medical opinion, any adjustment to a firefighting role was unlikely to be effective because of the claimant's perceptions of the respondent (caused by his disability) and the improbability that there would be a resolution to the claimant's satisfaction of his workplace issues. This was a blockage to a successful return to work. The pattern for the claimant was for him to attend a meeting or to return to work and unless things went 100% his way, he would immediately lodge a grievance which would involve a large amount of time and resource and would further wear down the working relationship. His covert recordings of his managers, without consent and against instructions, did not help and further undermined the position. We find on a balance of probabilities that there was no reasonable adjustment which the respondent could have made that was likely to be effective in securing the claimant's successful return to a firefighting role. Substantial efforts had been made over a long period and had all failed to secure this result.

At paragraph 365:

Temporary arrangements had already been in place in the light duty team and this had not proved successful. We rely on our findings above that the respondent had made, to the date of claim 2, all adjustments that were reasonable and that the question of redeployment on a permanent basis to the Fire Safety Regulation Team is a matter that may need consideration by the respondent for the future.

At paragraph 374:

The claim for failure to make reasonable adjustments therefore fails.

Chronology of the present claims

30 Aug 2017	ACAS notified of dispute in Fourth Claim	
12 Sep 2017	ACAS issued certificate in respect of Fourth Claim	
13 Sep 2017	Claimant attends Greenwich light duties office. Gary Thompson is in attendance. Accounts are provided: - by the Claimant [369] - Catherine Gibbs record of conversation with C [371] - Gary Thompson [380] - Sue Banning [384]	369
17 Sep 2017	Fourth ET Claim presented (2302517/2017)	

21 Jun 2018	Third Stage Outcome - Claimant is dismissed with notice given for 30 Aug 2018. Claimant is not required to attend work	872
10 Aug 2018	ACAS notified of Dispute in Fifth Claim	
07 Sep 2018	Appeal Hearing	1041
10 Sep 2018	ACAS issues certificate in respect of Fifth Claim	
03 Oct 2018	Claimant's appeal against dismissal is rejected	1033
07 Oct 2018	Fifth ET Claim presented (2303650/2018)	

Findings of fact

1. The Claimant is a firefighter who has worked for the respondent since 10 March 2008. His employment was terminated on 30 August 2018. The history of the Claimant's employment is not repeated here.

2. Mr K McKenzie was Station Manager (SM) within the South East Area, based at Lewisham fire station. On or about July 2017, he became the Claimant's new line manager. He needed to carry out an attendance support meeting (ASM) with him as provided for in the Respondent's Managing Attendance Policy (Policy Number 889) [89-108]. The purpose of the ASMs is to provide a structured approach for managing long term absence issues, through regular contact and return to work interviews. The ASMs are in place to ensure line managers explore all possible support to resolve attendance issues. The purpose of this ASM was to review the Claimant's current period of absence, the recent medical advice and the attendance target that was set at his stage 1 capability meeting which took place on 12 April 2017. It was also be an opportunity to explore and identify any appropriate support mechanisms that would facilitate the Claimant's return to work

3. Mr McKenzie introduced himself to the Claimant by way of an email dated 22 July 2017 [224]. Attached to his email was a letter addressed to the Claimant inviting him to attend an ASM on 2 August 2017 [226]. He sent a second email to the Claimant on 24 July 2017 [227]. Attached to the email was a revised invitation to the ASM which the Claimant was informed would take place at Purley Fire Station (as opposed to Addington fire station) [227-231]. The change of venue was made at the request of the Claimant in his email dated 22 July 2017 [228-229]. The Claimant responded on 25 July 2017 [234-236]. In his email, he stated that, based on his previous experience of attending ASMs, he believed that the ASM was a legal process to initiate the capability process, rather than a meeting to support the individual and he asked a number of questions about the ASM. The Claimant also asked forcefully if a representative from HR could attend the ASM, although he stated that the HR representative should not be Andrew Cross, (HR adviser for the South East area). In his email, the Claimant stated that he would be attending the ASM with a note taker as he was concerned about accurate notes of the ASM being taken. At the end of his email, the Claimant stated that his absence from work was not due to sickness, but because he had been removed from light duties and he

asserted that he was fit for light duties. He also alleged that the Respondent's management team had failed to support him and instead sought to get rid of him. He asked whether Mr McKenzie was trained in conducting an ASM meeting and stated that he had been "hoodwinked" before.

4. Mr McKenzie responded to the Claimant on the same day reiterating the purpose of the ASM was to discuss his absence, the target set at the stage 1 capability meeting, recent medical advice and to identify any support mechanisms [235]. In his reply dated 26 July 2017 [233], the Claimant reiterated that he was absent from work because he had been removed from his workplace not because he was sick. The Claimant also reiterated that the HR representative should not be Andrew Cross. Following receipt of this email, Mr McKenzie contacted Andrew Cross to request that he arrange for a HR advisor to attend the ASM [232].

5. On 31 July 2017 Mr McKenzie wrote [244]:

> I'm sorry to hear of your decision for this meeting not to go ahead. I had hoped that we could use this an opportunity to discuss and plan your return to work.

The Claimant replied [243]:

> My intention has always been the same since I was removed from the workplace against my will … Despite LFB's doctor and my GP advising of the importance of me being at work to help in building up this resilience on more than one occasion…
>
> ….I want to be at work….
>
> ….I do not feel at this time that an ASM meeting is appropriate as I have not booked sick and me not being in the workplace is through no fault of mine…

Mr McKenzie replied [242]:

> As I explained previously an Attendance Support Meeting (ASM) is to discuss your return to work on light duties, so that we can consider what the light duty arrangements will be….
>
> My view is that important to hold an ASM, particularly as some clarity is required about the hours you are able to work…. HML previously advised that you are fit to undertake Light Duties on full hours… your GP states you are … fit for amended duties on 3 days a week

The Claimant replied [241-242]

> For the avoidance of doubt, I am happy to attend a meeting to address my return to work only. If you are telling me that Wednesday's meeting is a return to work meeting only then I am happy to attend.

6. On 1 August 2017, the Claimant confirmed that he would attend the ASM on condition that the ASM was to discuss his return to work as opposed to his attendance which he stated was now "a legal matter" [240-241].

7. The Claimant attended the ASM at Purley Fire Station on 2 August 2017 unaccompanied [246]; also in attendance were SM Robert Scrivener who was the note taker, Mr Emmanuel Obeh of HR and Mr McKenzie who confirmed to the Claimant that the meeting was not of a disciplinary nature, but it was part of the attendance management process. The Claimant replied that he was only attending the meeting to discuss his return to work and that everything else was a legal matter. The Claimant asked why Mr McKenzie was his line manager and he claimed that there was a conflict of interest. The Claimant alleged that he had met him on three occasions in the past and

that he had ignored him. He also alleged that he had been at the Wimbledon tennis championship requesting information about him. Mr McKenzie denied that he had ignored the Claimant in the past or that he had requested information about him as he had alleged. The Claimant then alleged that in August 2016, he had been removed from light duties against his will and he repeated that he was ready to return to light duties. Mr McKenzie asked him if he was happy for him to continue as his line manager and he replied that he did not care who conducted the ASM as he just wanted to get back to work. Mr McKenzie reminded him that the target set at the first stage capability meeting in April 2017 was that he was required to return to light duties on a nine day fortnight with a view to return to full operational duties. The Claimant replied that he could only work three days per week and he referred to his GP's note dated 3 July 2017. However, this was not supported by the Medical Outcome report dated 6 June 2017 [579-580] which was received from Health Management Limited (HML), the company that provides occupational health services to the Respondent. Mr McKenzie explained to the Claimant that his current working pattern was not acceptable and referred again to the attendance target that had been sent by previous management. Mr McKenzie also pointed out to the Claimant that a phased return to work whereby he worked 2 or 3 days a week had been tried in the past but it had not led to him either increasing his hours to work a 9 day fortnight or him coming back to work in his substantive role. The Claimant repeated that he could only return to work three days a week as he needed time to build up his resilience. The Claimant stated that he would be willing to base his decision on the advice received from HML and he suggested that he be allowed to return to light duties working three days per week on the basis that this would be reviewed following his appointment with HML. Mr McKenzie explained to the Claimant that if he was not able to work a nine day fortnight, there was a strong possibility that he would be progressed to the second stage of the sickness capability process. The Claimant responded that he would not be taking part in the capability process as he considered this to be a legal matter that had yet to be decided.

8. Following the meeting, the notes that had been taken by SM Scrivener were typed up and a copy sent to the Claimant [245-250]. Mr McKenzie sent the outcome letter dated 4 August 2017 to the Claimant [252-254]. He confirmed that it was not acceptable for the Claimant to return to light duties working a 3 day week and he reiterated that the attendance target set at his first stage capability hearing in April 2017 was that he would return to work on light duties working a 9 day fortnight. He reiterated to the Claimant that if he was unable to return to light duties working a nine day fortnight, it was likely that he would be progressed to the second stage of the capability process on the basis that he had not met the attendance target set at the first stage capability meeting. At the end of the outcome letter, he also informed the Claimant that in accordance with the previous discussions he had with HR about his pay, his contractual entitlement to full sick pay had expired and he would be paid half pay effective from 1 August 2017.

9. On 8 August 2017 [255-257], the Claimant reiterated that he was able to return to light duties, as stated on his fit note, with a view to gradually increasing his hours to a 9 day fortnight. Mr McKenzie replied on 22 August 2017 noting the contents of his email [258]. He sent the Claimant a further two emails on the same date, one email reminding him that he had an HML appointment booked on 25 August 2017 and the second email requesting his consent to him liaising with him via email every two weeks to maintain contact [261]. The Claimant did not respond to these emails nor did he respond to Mr McKenzie's email dated 25 August 2017 which was sent because the Claimant failed to

attend his appointment with HML on 25 August 2017 [271]. The Claimant was informed that his appointment with HML had been rearranged and would take place on 12 September 2017 [271].

10. On 3 September 2017, the Claimant emailed Mr Obeh (cc Mr Jennings) stating that he is fit to return to light duties working a nine day fortnight, asked not to be line managed by Mr McKenzie. Mr McKenzie was forwarded the email by Mr Jennings [272 – 273].

11. The Claimant returned to work in the light duties team on 4 September 2017, he gave a copy of his Fitness for Work certificate [276] to Ms Banning. However, in line with the Respondent's Managing Attendance Policy (MAP) [89-108], the Claimant was required to attend a return to work interview with his line manager, Mr McKenzie. Mr Andrew Cross raised concerns about the Claimant's fit note [276] which stated that he is fit for work with amended hours and noting that this hadn't been raised by the Claimant [274]. Tania Legore, HRM Transitions Manager, wrote to say that the Claimant knew the terms upon which the Respondent would accept his RTW [277]. Also, on 4 September, Mr McKenzie asked Ms Banning if she could arrange for the Claimant to be released from light duties in the morning of 7 September 2017 so that he could attend a return to work interview. Mr McKenzie emailed the Claimant on 4 September 2017 and informed him that as he has returned to work, he was now required to attend a return to work meeting on 7 September 2017 at Greenwich Fire Station, in accordance with the Respondent's managing attendance handbook [112]. The purpose of the meeting was to explore the reasons for the employee's absence and any support mechanisms the employee may require, to determine whether the employee is fit/able to return to meaningful duties, to review the employee's overall attendance record to ascertain whether they meet an absence trigger, and what steps need to be taken. As the Claimant had not responded to any of the previous emails, Mr McKenzie forwarded this email to the Claimant's personal email address [280-281].

12. Mr Jennings wrote to Mr McKenzie with a copy of the email to the Claimant [300] asking him to give it to the Claimant [299]. Mr McKenzie was copied into an email from the Claimant to Mr Jennings in which he stated that *"based on negative and distressing interactions with Kevin McKenzie, I do not feel comfortable with Kevin as my line manager, I do not want to have this meeting with him on Thursday. I am happy to have the return to work meeting with another line manager once one has been appointed."* [290]. Mr McKenzie had not behaved in any way inappropriately towards the Claimant.

13. Mr Jennings liaised with the Claimant via email on 5 and 6 September 2017, [300–303] and concluded that he could not see anything to suggest that Mr McKenzie had acted inappropriately towards the Claimant and there was therefore nothing to suggest that a change in the Claimant's management was warranted. Mr Jennings confirmed to the Claimant that Mr McKenzie would remain his manager and that the Claimant must attend the return to work meeting on 7 September 2017. In his email to Ms Banning, Mr Jennings asked her to print off a copy of his response to the Claimant and give him the hard copy of the email when he arrived for duty the next day. This was in the event that the Claimant didn't see Mr Jennings' response in relation to Mr McKenzie conducting the return to work interview before he reported for light duties on 7 September 2017.

14. Mr McKenzie attended Greenwich Fire Station on 7 September 2017 to conduct the return to work meeting with the Claimant which was scheduled to start at 8:00am which was the Claimant's normal start time. The Claimant did not arrive until approximately 8:26am when he spoke to Ms Banning but ignored Mr McKenzie. After about five minutes, Mr McKenzie told him that the meeting will commence at 9:00am given that he had arrived late. According to Mr McKenzie, the Claimant replied in a "raised and angry tone" that he would not attend the meeting with him. Mr McKenzie reiterated that the meeting would be at 9:00am and they could go from there. At around 8:50am, the Claimant asked Ms Banning whether he could go outside and get some fresh air. He went to the station yard. Mr McKenzie went outside and asked him if he was going to attend the meeting, but the Claimant ignored him. The Claimant went to Ms Banning's office. Ms Banning told Mr McKenzie not to enter the office as the Claimant was in there and he was 'wound up'. Later that day, Mr McKenzie sent an email to the Claimant informing him that in view of his refusal to comply with a reasonable request to carry out a return to work meeting with him, the matter had been referred to Mr Jennings for his consideration [330]. Shortly after Mr McKenzie left Ms Banning's office, the Claimant entered her office. He appeared to be angry and distressed and he said that he wanted Mr McKenzie to leave him alone. He also stated that Mr McKenzie was following him around the station and harassing him. She explained to him that she tried to call him but the call went to voicemail and that was why Mr McKenzie went to find him. The Claimant told Ms Banning that he did not want Mr McKenzie to do his return to work interview. The Claimant sat for a while and Ms Banning asked the Claimant if he was fit enough to go out in one of the light duty cars. The Claimant said that he was and he left the office. Shortly after this, Nicola Jacques, who was also in the light duty team, told Ms Banning that Mr McKenzie was leaving. Subsequently, Ms Jacques came into the office and asked Ms Banning if it was ok for her to travel in the same light duty car as the Claimant as he was stressed and was worried that he was going to have a panic attack. Ms Banning agreed to this request and Ms Jacques left the office. A short while later, Ms Banning received a telephone call from Ms Jacques, who explained that the light duty car was bringing the Claimant back to Greenwich fire station as he was feeling stressed and he had stated that he was having heart palpitations. Later, the Claimant called Ms Banning to confirm that he was going to book off sick. She booked him as "incomplete duty" on StARs, (the Respondent's computerised attendance management system).

15. Mr McKenzie sent the Claimant an email on 11 September 2017 telling him that he had rescheduled another return to work meeting to take place on 13 September 2017 [350]. Among other things, he explained to the Claimant that his attendance at the return to work meeting was compulsory and that should he fail to attend this meeting, he will be considered as unfit to be at work and placed on sick leave as he was unable to determine whether he is fit to return to work.

16. Mr Cross decided that the Respondent should proceed to a Stage 2 Capability Meeting on the material it had and Mr Amis agreed [354]. Ms Legore wrote to say that the Claimant should be placed on sick leave because of the lack of information from OH [356]. About 12 September 2017, Catherine Gibbs, Senior HR Adviser forwarded an email that she had received from the Claimant [358]. In his email, the Claimant stated that he did not want to have a return to work meeting with Mr McKenzie. In addition, Mr McKenzie was told by Mr A Cross that the Claimant attended an OH appointment with HML that morning but he refused to provide his consent to release the Medical

Outcome report [352]. Whilst the Claimant is entitled to decline to give his consent to the release of the report, the report from OH would provide the OH physician's opinion as to whether the Claimant was fit to return to work at that point in time. In addition to this, OH had advised that the Claimant had refused to be seen by a psychiatrist as recommended in the OH report dated 6 June 2017 [580]. Mr McKenzie sent an email to the Claimant on 12 September 2017, informing him that as he had refused to release the OH outcome report and that he had also refused to be seen by a psychiatrist, he was not able to assess his fitness, and he had no alternative but to place him on sick leave with immediate effect [362]. He also asked Ms Banning to hand the Claimant a hard copy of the email dated 12 September 2017 which had been sent to his work email account. The Claimant refused to take the email from Ms Banning and he told her that he did not want Mr McKenzie to ever contact him again [361].

17. By email dated 12 September 2017, Mr McKenzie informed Mr Jennings and HR that he had booked the Claimant as sick effective from 13 September 2017 [364]. Later on 12 September 2017, Mr Jennings telephoned Mr Thompson and requested that he attend Greenwich Fire Station on 13 September 2017 to support Ms Banning in the event that the Claimant attended for work that day. If the Claimant did attempt to report for duty. Ms Banning intended to inform him that he had been placed on sick leave and that he would have to leave the premises. Mr Thompson was asked to be present to ensure that the Claimant complied with her request to leave the premises.

18. On 13 September 2017, the Claimant attended Greenwich Fire station at approximately 8.30am and entered Ms Banning's office. Mr Thompson was outside the office but listened to the conversation in order that he might intervene if necessary. Ms Banning asked the Claimant if he had read the email that had been sent to him on 12 September 2017 by Mr McKenzie. The Claimant replied that he was not going to read the email. He also stated that he had told Mr Jennings that he did not want to have any further dealings with Mr McKenzie and that he did not want Mr McKenzie to carry out a return to work interview with him. Ms Banning explained to the Claimant that Mr McKenzie was his line manager and that if he, was refusing to attend the RTWI with Mr McKenzie then he would be booked sick. The Claimant replied that he would not book sick as he was fit for work. Ms Banning then introduced Mr Thompson to the Claimant. He explained to him that he was there to support Ms Banning and to ensure that he complied with the instructions that were given to him. The Claimant started to explain his unwillingness to deal with his line manager, Mr McKenzie, but Mr Thompson interrupted him and reiterated that he was there to support Ms Banning. He then explained to the Claimant that a decision had been made that he was to be booked sick and he was therefore required to leave the premises. The Claimant replied that he was not going to book sick and that he would not leave the premises until he had spoken to the Officer on duty ("OOD"). The responsibilities of the OOD include ensuring all stations have the staff and appliances to maintain the required level of fire cover. The OOD is also a point of contact for all staff for HR/welfare issues. Mr Thompson explained to the Claimant that there was no need for him to speak to the OOD as he would not have any influence or impact on the decision to book him sick, however he insisted on speaking to the OOD, stating that he wanted to discuss the decision to place him on sickness absence with the OOD. Mr Thompson contacted the OOD and informed him of the situation. During the telephone conversation with the OOD, the Claimant informed Ms Banning and Mr Thompson that he was now recording their conversation. Mr Thompson told him that he did not have his permission to record his conversation and he asked him to stop

recording. The Claimant refused to stop the recording and requested that a colleague be present. Mr Thompson again asked the Claimant to comply with the instruction to leave the premises. The Claimant then left the office and went into the corridor, making comments about how he had been poorly treated by managers and that he was going to the press. Mr Thompson followed the Claimant into the corridor and once again instructed him to leave the premises. The Claimant replied that he would not leave until he had spoken to someone in Human Resources (HR). The Claimant went into the main light duties office and made a call using the office phone. He handed the phone to Mr Thompson and stated that Catherine Gibbs from HR wanted to talk to him. Mr Thompson asked all the other members of the light duties team to leave the main office area and go into the mess (kitchen) area. Mr Thompson also informed Ms Gibbs that the Claimant was recording all conversations, including, the conversation that he was having with her. Mr Thompson told Ms Gibbs that he would remain outside of the room until her conversation with the Claimant had ended and he placed the phone handset on the table so that he could continue his conversation with Ms Gibbs. Following his conversation with Ms Gibbs, the Claimant left the main office and returned to Ms Banning's office while Mr Thompson remained in the corridor between the two offices. The Claimant informed Ms Banning that he was leaving the building, as he had been instructed to do, but he stated that he was doing so against his will. The Claimant also stated that he was not booking sick and that he would not produce a medical certificate until his current certificate had expired. Mr Thompson followed the Claimant down the stairs. The Claimant said he did not need to follow him. He also shouted that all the "white shirts" (meaning managers) were bullies who thought that they could push others around. Mr Thompson did not respond to the Claimant during this time. Upon reaching the yard of the fire station, which is at the rear end of the fire station, the Claimant took photographs of Mr Thompson on his mobile phone. He then drove away. Mr Thompson's prepared an account of the event [381-383].

19. On 25 October 2017, the Claimant attended another appointment with Dr Kurzer of OH. The Claimant said that he has not been given anything to fill in or any box to tick at reception [416]. He stated that he felt that his points were not being listened to and written down. "I told the doctor that I would like to be written to by LFB with a date and time to return to Greenwich Light duties and that could be tomorrow. He told me that he would not write that as it is up to LFB to decide…. For the avoidance of doubt I am fit for light duties now as I was when removed from the workplace against my will on approximately 13th September" [417]. According to the Medical Outcome report, the Claimant was assessed as fit to carry out "community fire safety" [600 – 601].

20. On 27 October [423], Mr McKenzie took on a new role necessitating a change in the Claimant's line manager

21. On 31 October, a Psychiatric Assessment by Dr Bashir was prepared for the 2017 Tribunal.

22. Following confirmation by OH Services that the Claimant was fit for light duties, he returned to work in the light duties team on 30 October 2017.Management case summary [598].

23. On 8 November 2017, a Second Stage Capability Meeting took place in the Claimant's absence. The outcome was that the Claimant's attendance was to be

monitored over 6 months with the aim of returning to full duties by 15 May 2018. On 15 November 2017 [602] the outcome was sent to the Claimant. Mr Wakefield became the Claimant's line manager on 20 November 2017 [424]. On 4 December 2017 [427b], the Claimant recorded that he had returned to work doing a 9 day fortnight and asked to be considered for the Fire Safety Team and to be provided with a mentor. On 12 December, the Claimant did not attend a medical appointment as he was unwell [606]. On 15 December 2017 [609], the Claimant replied to the second stage outcome. On 3 January 2018, Dr Kurzer stated the Claimant was not fit for operational duties [612].

24. On 24 January the Claimant attended a meeting with Mr Wakefield regarding reasonable adjustments [617]. On 31 January, the Claimant attended late and said that Mr Wakefield agreed a later start time. Mr Wakefield said that he had not agreed [615]. The Claimant wrote to ask for reasonable adjustment to start time [616].

25. On 7 March 2018, the Claimant attended an OH appointment with Dr Kurzer and discussed EMDR [627]. On 11 March 2018, the Claimant raised a grievance about his start and finish time [432d]. On 12 March 2018, the Claimant's GP wrote a letter stating that he is suffering from "great fatigue" and that 4.30pm was the latest time he could work without endangering his health [1529]. On 19 March 2018, the Claimant was sent a list of vacancies [690]. On 21 March, there was an Informal Grievance meeting, but the Claimant did not attend [434].

25. On 26 March 2018, Mr Wakefield invited the Claimant to an ASM meeting on 28 March 2018 with a view to returning him to full operational duties [437]. The Claimant replied [435] and Mr Wakefield corresponded further [434]. The Claimant did not attend the ASM on 28 March. He was invited to a further ASM to consider progress on 16 May 2018.

26. The Claimant was invited to a redeployment/adjustments meeting on 12 April 2018 [668]. He sent a complaint about this letter to Mr Dominic Johnson [677]. He complained about the Respondent's consultation with OH and said he did not consent. He requested Mr Wakefield relinquish his role as welfare officer. Mr Johnson provided his responses [674]. On 12 April, the Re-deployment/adjustments meeting was adjourned by Mr Wakefield due to a disagreement about the Claimant's wish to audio record it. The Respondent wrote to the Claimant with the outcome on 18 Apr 2018 [685] explaining the redeployment process and enclosing a list of job vacancies. In the outcome letter, it was stated that "as this was the 4th unsuccessful attempt at a phased return to work, it is unlikely that the Authority is going to agree a 5th attempt at a phased return, so may only permit a return to light duties when you are assessed as fit to work a 9 day fortnight." [572-547]. It was confirmed that a monitoring period of 3 months (until August 2017) would be set, at the expiry of which, it was expected that the Claimant would return to work on light duties working a 9 day fortnight. He was also encouraged to visit the vacancies pages and was offered pay protection for three years [685].

27. On 16 April 2018, the Claimant came to see Ms Banning. He stated that a colleague had told him that she had said to the colleague that the working hours in the light duty team had been changed to 8.00am – 5.20pm because the Claimant had raised a query about subsistence claims. Ms Banning explained to the Claimant that she had told the light duties team that the change to the working hours was due to a management

decision and that she had not suggested to anyone that the change was due to him. Subsequent to this, she was Cc'd into an email from the Claimant dated 16 April 2018 [441] in which he alleged that a colleague had told him that Ms Banning had said to the colleague that a lot of things had changed in the light duties team including the change of working times because of the Claimant and that because of one person's actions, all must pay the price. The Claimant also alleged in his email that Ms Banning had created a tense and hostile working environment for him.

28. On 17 April 2018l [683], the Claimant asked for light duties team to be addressed about his fatigue. On 18 and 19 April 2018, Emmanuel Obeh sent further job vacancies to the Claimant and encouraged him to check the website for vacancies [688-690]. On 19 April 2018, the Claimant wrote to the Respondent: "I have not agreed with you or management of the organisation about redeployment. I have every intention of going back to Woodside Fire station to continue operational firefighting" [691]. On 20 April 2018, the Respondent wrote to the Claimant about his expressed intention not to take part in the redeployment process and stated that he will be referred to IQMP to see whether he meets the requirements for ill health retirement [692]. The Claimant wrote to the Respondent [694] referring back to his letter of 19 April 2018, restating his intention to return to his substantive role [691]. On 23 April 2018, he wrote to Mr Obeh as follows [695]:

> "Please do not send me anymore correspondence regarding redeployment/medical retirement until you or LFC has a proper consultation with me regarding this matter in order for me to make an informed decision."

29. The appointment with Dr Kurzer had been arranged in line with the Respondent's Managing Attendance Policy (MAP) [89-108], and took place on 2 May 2018. Dr Kurzer had been asked to provide advice on the Claimant's fitness to carry out the duties of his substantive role of fire fighter [696]. The Claimant complained about Dr Kurzer [751], he alleged that Dr Kurzer had been unprofessional, that he had sworn at him and that he had terminated the appointment against his wishes. On 9 May 2018, he refused to share the outcome of his meeting with Dr Kurzer [702-3]. On 10 May 2018, Mr Amis wrote to the Claimant to strongly urge him to share the outcome of his OH meeting on 2 May or to consent to a further report for ASM on 16 May 2018 [704]. On the same date, the Claimant was invited to ASM meeting on 16 May 2018 [710]. The Claimant objected to having a meeting with Mr Wakefield [707]. On 11 May 2018 [715], the Claimant wrote – "please note that current medical information states that I am fit for operational duty" and refuses to give his consent to sharing his medical report with LFB [709]. The Claimant continued to work in the light duties team until 16 May 2018 when, following an ASM, the decision was taken to terminate his light duties. After this decision was made, Ms Banning said that the Claimant attempted to book on for duty on two occasions – on 16 and 21 May 2018, but on both occasions, he was asked to leave the premises.

30. One of Mr Amis' responsibilities as Head of Wellbeing was to manage the contract between the Respondent and the company which provided Occupational Health services to the Respondent, Health Management Limited (HML). The Claimant had made a complaint about Dr Kurzer, one of the occupational health physicians at HML [696]. Prior to receiving the Claimant's email, he had received an email from Dr Kurzer in which he stated that the Claimant attended an appointment with him, during which he was "demanding", and "confrontational". Dr Kurzer also stated that during the appointment, the Claimant had stated that HML doctors were "corrupt" and shortly after this, Dr Kurzer

terminated the appointment. At the end of his email, Dr Kurzer explained that the Claimant had not given his consent to the release of his medical report and therefore he was unable to comment on the Claimant's fitness for his substantive role, or indeed any role [460]. Mr Amis responded to the Claimant by email of the same date in which he confirmed that he would be pursuing the matter directly with HML so that his complaint could be investigated [460a-460b].

31. As it was still necessary to obtain advice with regard to the Claimant's current medical condition and his fitness for work, Mr Amis contacted Dr El Nagieb at HML and agreed that a different occupational health physician, Dr McKinnon, who had not seen the Claimant before would be asked to review the Claimant's Psychiatric reports and his OH records and advise on his fitness for work. Mr Amis wrote to the Claimant to ask if he would consent to either the release of Dr Kurzer's medical outcome report or to a medical adviser reviewing his medical records and providing a report that could be referred to at the ASM [704]. In his email dated 10 May 2018, the Claimant confirmed that he would not consent to the release of Dr Kurzer's report, but he did not respond in relation to the second option to provide his consent a report being prepared based on a review of his psychiatric reports and OH records [709].

32. The Claimant did not attend the ASM on 16 May 2018 because he objected to Mr Wakefield conducting the ASM. The ASM proceeded in his absence [717 721]. The Claimant's light duties were terminated and he was progressed to Stage Three of the Capability process. Mr Wakefield wrote [723]: *"*… I have decided to end the light duty arrangements with effect from tomorrow, 17th May 2018, and you will be placed absent sick from this date. It is not sustainable for you to continue to remain on light duties for any longer…."

33. The Claimant wrote to object to being placed on sick leave and stated that he will attend work [726-9]. On 17 May 2018, the Claimant was placed on sickness absence for approximately 1 month. On 21 May 2018, the Claimant wrote to say that he is at Lewisham light duty between 8am and 5.20pm. On 21 May 2018, Mr Wakefield directed him to leave the building [736].

34. On 22 May, the Claimant was invited to consult OH but refused [984-5]. On the same date, Mr Amis received a letter from Dr Nadia Sheikh, Consultant Occupational Health Physician at HML [491- 493]. In her letter, Dr Sheikh explained that she had completed her investigation into two complaints that the Claimant had made in relation to Dr Kurzer. The first complaint made by the Claimant was that on 12 March 2018, Dr Kurzer had provided a "clarification" email to HR subsequent to his medical outcome report dated 7 March 2018 [626-627 and 643]. The Claimant complained that the "clarification" email should not have been provided without his consent. The second complaint related to the appointment on 2 May 2018. In her letter, Dr Sheikh concluded that there had not been any breach of confidentiality in relation to the clarification. With regard to the Claimant's second complaint, Dr Sheikh found that Dr Kurzer had not behaved in the way described by the Claimant on 2 May 2018. HML's investigation outcome letter was not sent to the Claimant and when he discovered the omission, Mr Amis sent a copy of the letter to him by email dated 22 June 2018 [917].

35. By email dated 22 May 2018, Mr Amis wrote to the Claimant acknowledging that he had contacted Catherine Gibbs, HR and confirmed that he was happy to provide his

consent to HML preparing a report based a review of his OH record and psychiatric reports [1653]. He also informed the Claimant that the review would be carried out by Dr McKinnon. He explained that if he did not consent to the release of Dr McKinnon's report to his manager, a decision would be made with regard to his fitness for his substantive role, based on the available information. The Claimant replied by email of the same date in which he stated that he did not think that it was appropriate for Dr McKinnon to carry out the review without having had an appointment with him [1652-1653]. As the Claimant had expressed a preference for having a meeting with Dr McKinnon, an appointment was arranged for 31 May 2018. Mr Amis informed the Claimant of the date for his appointment with Dr McKinnon by email dated 24 May 2018 [1652] and explained that he is not permitted to record the appointment and that a chaperone would be present during the appointment. By email dated 25 May 2018, Mr Amis wrote to Dr McKinnon enclosing a management brief in relation to his forthcoming appointment with the Claimant [488-490]. The purpose of the management brief is to provide the OH Physician with a summary of the employee's absence history, together with any other relevant information such as the employee's progress on light duties and the outcome of any recent attendance support meetings with the employee. At the end of the management brief, there were a series of questions for Dr McKinnon to consider and provide answers to in his report.

36. The Claimant's period of light duties continued until May 2018. Mr Wakefield and Mr Jennings discussed whether the Claimant's period of light duties should be extended. Mr Jennings was of the view that if the Claimant was not fit to carry out the duties of his substantive role as Fire fighter, his light duties period should not be extended. In coming to this decision, he took into account the fact that the Claimant had been unable to perform the duties of his substantive role for over three years and there was no evidence from OH to suggest that the extending the light duty period would assist the Claimant's return to his substantive role. The outcome of the Claimant's ASM was that his period of light duties was not extended and he was marked as absent due to sickness with effect from 17 May 2018 [475-479]. Mr Jennings decided that there should be a third stage capability meeting. The reasons why the Claimant was referred to the third stage of the sickness capability process are set out his letter, dated 22 May 2018 [508-509]. In summary, a second stage capability meeting had been held on 8 November 2017, followed by ASMs on 28 March and 16 May 2018, however the attendance improvements that had been discussed during those meetings had not been achieved. He also considered the information in the management checklist which was completed by the HR adviser, Andrew Cross that was enclosed with his letter [510-513] which summarised the full history of the Claimant's sickness absence and the period that he has been unfit for his substantive role, as well as the support that he received during this period to facilitate his return to work, such as light duties and amended hours. It was also noted that the Claimant had been offered the option of redeployment which would have given him the opportunity to search for a suitable alternative role, but he declined this option. The Claimant also declined the offer to refer him to the Independent Qualified Medical Practitioner (IQMP) who would consider whether the Claimant met the criteria for medical retirement.

37. On 22 May 2018, Mr Jennings sent a letter to the Claimant inviting him to attend a third stage capability meeting with him on 14 June 2018 [508-509]. He explained that the purpose of the third stage capability meeting was to;

review his attendance records against the targets set at the second stage capability meeting;
discuss the prospects of him returning to his operational role within a reasonable timescale, and
consider whether the Claimant would be able to sustain an acceptable level of attendance.

38. At the end of the letter, Mr Jennings informed the Claimant that the third stage meeting could lead to his employment being terminated on capability grounds. Also enclosed with the letter was a copy of the documents that would be considered during the third stage meeting [510-745]. A supplementary bundle of documents was prepared by Ms Josie Durand, HR Adviser, which was sent to the Claimant prior to his third stage hearing [748-813]. In addition to this, the Claimant provided copies of further documents [814-870].

39. By email dated 28 May 2018, the Claimant confirmed to Ms Durand, HR Adviser that he would be attending the third stage hearing. In his email, he also expressed surprise that Mr Jennings would be conducting the third stage hearing [814]. In her response to the Claimant dated 1 June, Ms Durand explained that in accordance the Respondent's normal practice, Mr Jennings would be conducting the third stage hearing, as he was the DAC for the South East Area [814].

40. On 31 May 2018, the Claimant attended his OH Assessment with Dr McKinnon. The Claimant did record the appointment. Dr McKinnon produced a report dated 31 May 2018 [754-757] which said that:

> "…I found no particular cause for confidence that he would thrive any better in an operational environment than when on light duty, and the requirement for him to [be] mentally fit at all times is a long term concern…. .Given his health at work as recently observed during the Light Duty, I did not find it likely that that [sic] a re-training process would be successful at present, but could be revisited after treatment with NICE recommended modalities have been implemented, such as EMDR, with perhaps 6 months allowed for referral and time for evidence for us to back up effective progress…. He may be a candidate for ill health retirement." [756]

42. On 5 June 2018, Dr Daw wrote to the Respondent "RTW notes are not a legal requirement from General Practice therefore if a patient feels ready to return to work then a meeting regarding return should be held" [1546]. On 13 June 2018, the Claimant arranged a meeting with Talk Together Bromley [753].

43. At the start of the meeting on 14 June 2018 [880-893], Mr Jennings introduced the attendees and explained to the Claimant that the purpose of the meeting was to review his attendance levels. He also made clear that electronic recording devices should not be used and that mobile phones should be switched off (the Claimant recorded the meeting). Mr Jennings checked with the Claimant that he had received the bundle of documents that had been sent with his letter dated 22 May 2018 and the claimant confirmed that he had, including the management case summary which is at bundle page 740-745. Even though the Claimant had attended the meeting with a workplace colleague, he made clear that he (the Claimant) would be doing the talking and that Mr Elcock was there to take notes. Ms Durand then provided a brief summary of the Claimant's attendance history. At the end of her summary, Ms Durand stated

that there was no recent medical evidence from OH that the Claimant was fit for his operational role nor was there any indication as to when he would be fit for that role. She stated further that there was no medical evidence from OH that the Claimant would be able to sustain an acceptable level of attendance. Ms Durand also stated that the Claimant had continued to maintain that he was fit for operational duties. Having heard from Ms Durand, Mr Jennings explained to the Claimant that he now had the opportunity to ask questions about Ms Durand's presentation. The Claimant did not ask any questions but he stated there were some inaccuracies in Ms Durand's summary. None of his comments were in relation to his capability to return to work in his operational role and Mr Jennings reminded the Claimant that this was what he needed to focus on.

44. Mr Jennings invited the Claimant to put forward his submissions. The Claimant alleged that throughout his career with the LFB, he had been subjected to physical, emotional and sexual abuse by his colleagues. He stated that subsequent to this, his light duties had been terminated on several occasions, which the Claimant stated did not help his case. He stated his treatment from 2010 had led to his diagnosis of post-traumatic stress disorder (PTSD), but he claimed that his symptoms had now subsided and that he was absolutely fine and ready to return to operational duties. The Claimant also set out his suggestions as to how the LFB could support his return to work. His suggestions were as follows;

To accept his GP's fit note;

To provide him with a safe working environment (free from harassment and discrimination;

To arrange a temporary redeployment if additional time is required to facilitate his return to operational duties;

To permit him to return to light duties.

45. The Claimant explained that ever since he was ordered by Mr Wakefield and another SM to go home or face disciplinary action after his period of light duties was terminated on 16 May 2018, he had confirmed to HR every morning that he was fully fit and available for duty. The Claimant explained that over the past few months, he had been building up his resilience, confidence and stamina and that as a result, his GP decided that he was fit for operational duties. The Claimant further stated that he did not have panic attacks and anxiety symptoms any more, and as a result he had stopped taking one of his medications, Propranolol. He also stated that he no longer suffered from fatigue and that he had developed coping mechanisms for whenever he felt stressed. The Claimant reiterated once again that he was fit and ready to return to operational duty. After a short break, the Claimant continued with his submissions. The Claimant stated that he had received some information in relation to his request made under the Freedom of Information Act which suggested that other employees had spent more time than he had in the light duty team. He also stated that he was aware of other people who had been allowed to be in the light duty team for more than three years. The Claimant stated that he did not know why he was being discriminated against and why his GP's fit note was not being acted upon. He also claimed that from his experience of the light duty team, when a fire fighter states that they are fit for duty, they are sent to their station within a week. At the end of his submissions, the Claimant stated that ineffective management had been the reason why he was subjected to the treatment that he received from other staff at Dockhead and Woodside fire stations. He also reiterated that he was ready to resume work.

46. Mr Jennings asked the Claimant when he had started to feel better and he said that this was about eight to ten weeks ago. It was however established that the Claimant was working from 9-4pm in the light duties team at this time, when the normal working hours are 9 to 5.20pm. The Claimant also confirmed that on one occasion, he had to sit down during one light duty shift due to fatigue, however he stated that he was just having an off day that day. Mr Jennings was aware from the documents that the Claimant had not had EMDR (eye movement desensitisation and reprocessing) or CBT (cognitive behavioural therapy) in 2018. The Claimant stated that he had had CBT, and he felt that this had worked for him. He also confirmed that he had not had EMDR. Towards the end of the meeting, the Claimant stated once again that he was ready and fit to return to operational duties, and that he could report for work tomorrow if he was asked to do so. At the end of the meeting, Mr Jennings explained to the Claimant that he would not be in a position to make a decision that day as he needed time to consider all of the available evidence in this case.

47. On 21 June 2018, Mr Jennings sent his third stage outcome letter to the Claimant [872 – 876]. In coming to his decision, he reviewed the Claimant's attendance history. He also considered the Claimant's submissions that he had developed his resilience and confidence with the result that his GP determined that he was now fit for operational duties, that his medication had been reduced and that he did not now suffer with panic attacks or anxiety. However, he also had to consider the medical evidence that was contained in the bundle of documents that was prepared for the third stage meeting. In particular, he noted that HML had advised on 7 March 2018 that to have any chance of resolving the Claimant's PTSD so that he would be fit for operational duties, the Claimant would have to undergo a course of specific EMDR [626-627]. Despite being advised of this treatment option, the Claimant had not taken any steps to undergo EMDR, even though he had been advised that he could access this treatment via the Respondent's Counselling and Well-being team. The Claimant had alleged that he had received CBT, however he had not provided any evidence of this treatment. There was no evidence that the Claimant had received any treatment since November 2017. Although in his report dated 31 May 2018 [754-757], Dr McKinnon had noted that the Claimant had presented with "near zero" mental health symptoms over the last week, he had expressed concern about the likelihood of the Claimant suffering a relapse following his return to the work environment. In particular, Dr McKinnon stated that he had no confidence that the Claimant would thrive any better in an operational environment than when he was working in the light duty team. Having considered all of the documentation in the bundle that related to the Claimant's time in the light duty team, he noted that the Claimant was unable to undertake the full range of duties within the light duties team in that he had to work reduced hours. He noted that as recently as March 2018, his own GP had said when his GP was asked if the Claimant could increase his hours so his finishing time was 5.20pm instead of 4.30pm, that the Claimant could not increase his working hours without endangering his health and well-being. Taking into account the role and responsibilities of a fire fighter and the conditions that they have to work in, which can be very stressful, he agreed with the advice of Dr McKinnon that the Claimant was not fit for operational duties. He also accepted Dr McKinnon's assessment that the Claimant was prone to suffering a relapse and based on this assessment, he concluded that it was unlikely that the Claimant would be able to make a sustained return to work. Mr Jennings also noted that attempts had been made by the Claimant's

managers to explore the options of reasonable adjustment, redeployment and ill health retirement, however the Claimant did not engage with the process, in particular, the Claimant asked HR Advisor Emmanuel Obeh not to send him a list of vacancies [827-829]. In addition, when E Obeh contacted the Claimant to discuss the option of ill health retirement, the Claimant informed him that he was not interested in this option as he had every intention of returning to work. The option of Ill health retirement was also raised at the third stage meeting, but once again the Claimant made it clear that he did not wish to explore this option. The Claimant did not wish to consider anything other than returning to his substantive role.

48. Following the third stage meeting, the Claimant submitted a report from Mr Robin Wall, Locum Psychological Well-being Practitioner [906-907]. Although the report was not part of the bundle that was prepared for the third stage meeting, Mr Jennings did consider it. In his report, Mr Wall stated that he did not recommend any further treatment for the Claimant. The Claimant had explained that he had been referred to Mr Wall by his primary healthcare provider. However, from his job title, it did not appear that Mr Wall was a Psychiatrist and the report did not contain his medical qualifications. There was no reference in Mr Wall's report to him having considered the previous reports with regard the Claimant's medical condition (i.e., previous medical records, GP records, HML reports and psychiatric report). Taking all of this into account, Mr Jennings preferred the report of Dr McKinnon who is an occupational health doctor who is familiar with the fire service. Dr McKinnon has also considered the Claimant's medical file which included two psychiatric reports before he provided his assessment with regard to the Claimant's fitness for work.

49. Mr Jennings concluded that it was no longer possible to continue the Claimant's employment and he decided to terminate his employment on capability grounds with effect from 30 August 2018 [872-875]. Subsequent to his letter of 21 June 2018, the Claimant was sent the minutes of the third stage capability meeting [880-893].

50. The Claimant sent an email dated 8 July 2018 in which he stated that he had grave concerns about the report he received from Dr McKinnon [921-922]. The Claimant was advised by HML that his email would be considered by the clinical governance lead [932]. The Claimant submitted a grievance about Mr Amis email of 22 May 2018 [985] by email dated 3 August 2018 [1661]. The grievance was considered by Mr Dominic Johnson, then the Head of HR Advice and Employee Relations who confirmed by email dated 6 September 2018, that he was satisfied that the way in which Dr McKinnon's report had been prepared was appropriate and in order [1655-1660]. On 16 July, the Claimant arranged a meeting with Talk Together Bromley [1552].

51. The Claimant appealed against the outcome of his third stage capability meeting [899-904]. The Claimant stated that his appeal was on the following grounds:

New medical evidence/due consideration of existing medical evidence;
The reliability of the existing HML Evidence;
Failure to follow the principles of the Managing Attendance Policy (PN889) and sickness Capability Process (PN873); and
Decision to dismiss was too severe.

52. The Claimant was informed by Human Resources (HR) in an email dated 19 July 2018, that the manager hearing the appeal would be Mr Ellis, and that if he sought to rely

on any additional documents at the appeal meeting, he would need to forward them to him, via email, at least five days prior to the date of the appeal hearing [948]. The Claimant responded to this email on the same date, in which he expressed concerns about Mr Ellis hearing his appeal [963] because his 29 plus years of service meant that he might be very close to retirement which might mean that he would be unavailable for questioning in his future legal proceedings. Ms Catherine Gibbs, then a senior HR Advisor (Discipline/Grievance), responded to his email on 20 July 2018 and confirmed that the appeal would proceed with Mr Ellis as the presiding manager [962].

53. The Claimant was advised by letter dated 23 July 2018, that his stage 3 appeal would be heard on 7 September 2018 [951-952]. The Claimant sent a number of documents in support of his appeal before the date of the hearing [973-1010]. His appeal was heard by Assistant Commissioner Dominic Ellis; David Amis was the HR adviser.

54. On 30 July, the Claimant wrote to say that he did not consent to Mr Amis being present [957].

55. On 23 August, the Claimant complained about Dr McKinnon reviewing his medical records [975-6]. On 30 August 2018, the Claimant told Mr Ellis by email that he had sent him five recordings contained on a USB stick, which he had sent via the post [973]. According to his email, the recordings were of the following;

His consultation with Dr McKinnon on 31 May 2018;
The third stage capability hearing on 14 June 2018;
His discussion with SM Wakefield and HR Emmanuel Obeh on 4 April 2018 when his redeployment/reasonable adjustment meeting was cancelled
His removal from the workplace on 21 May 2018;
Julie Doyle “forcing me [the Claimant] to leave the workplace” on 21 May 2018.

56. The Claimant also forwarded a number of emails to Mr Ellis [992-1010] which Mr Amis replied to by email dated 6 September 2018 [1017]. Mr Ellis was also provided with the following documents by HR;

The documents that had been prepared for the stage 3 capability hearing – [bundle pages 507-745]
The Supplementary documents [bundle pages 746 to 813]
The miscellaneous emails and notes – [bundle pages 814 – 870]
The stage 3 hearing outcome letter, the notes of the stage 3 hearing and the Claimant’s comments on the notes of the hearing – [bundle pages 871-897]
The documents at pages 905-913 of the hearing bundle.

57. The Claimant attended the appeal hearing on 7 September 2018 without a representative. The matters discussed during the appeal hearing are set out in detail in the minutes [1041-1054]. At the start of the hearing, AC Ellis asked all attendees to turn off their mobile phones/pagers and he informed the Claimant that the was not permitted to record the hearing. The Claimant did record the hearing. Mr Ellis confirmed that the meeting was being held under the Respondent’s Sickness Capability Process PN873 [809-813]. With regard to the recordings/transcripts that the Claimant provided prior to the stage 3 appeal hearing, he explained him that the recordings/transcripts would not be considered and returned his memory stick to him. This was because it appeared that the individuals who had been recorded were either unaware that they were being

recorded or had specifically said that the individual did not consent to being recorded. Mr Jennings attended the appeal hearing as the management representative.

58. At the appeal hearing, Mr Jennings asked the Claimant about the recording that he had made of the third stage capability meeting; however, the Claimant would not say how the recording had been made. He then also summarised the evidence that he took into account into when he made the decision to terminate the Claimant's employment on capability grounds [1046 -1047]. Mr Ellis requested that the Claimant start the meeting by presenting his grounds of appeal. The Claimant asked if he could refer to his 'Appeal hearing – support document' notes [1054a-1054n] as he stated that he felt that the stage 3 capability hearing notes that were taken by the Respondent were not accurate and Mr Ellis agreed to him doing this.

59. With regard to the existing HML documentation, the Claimant stated that the references to EMDR (Eye Movement Desensitisation and Reprocessing) therapy and CBT (Cognitive Behavioural Therapy) in the case management summary [740-745] was incorrect. He also stated that he had never been afforded the opportunity to discuss redeployment, although Mr Ellis understood that the Claimant had made it clear that he did not want redeployment [691-695]. The Claimant also asked if it could be noted that it is stated twice in the documentation that was provided to the stage 3 hearing that his prognosis was "unknown". He stated that this was incorrect. He also explained that he had not realised that the side effect of the medication that he was taking (propranolol) was fatigue, and he stated that he was no longer suffering from fatigue.

60. Following a brief adjournment, the appeal hearing resumed with the Claimant presenting the rest of his appeal submissions. The Claimant stated that his GP had not been contacted throughout the whole process. He also explained that he was carrying out light duties due to his fatigue. He stated that he had been removed from the workplace against his will on four separate occasions, and he asserted that he was suffering from a disability at the relevant time. He then alleged that there had been 21 individuals who had spent 2 to 3 years in the light duties team and one individual who had spent three years in the light duties team.

61. When the Claimant came to the end of his notes, Mr Ellis asked him if there was anything else that he wished to add on top of his submissions. The Claimant asked Mr Ellis if he had received a number of documents that he said he had sent to him – namely a letter from his GP [994b], an email from his EMDR specialist [993] and a letter from Talk Together Bromley [906-907] and Mr Ellis confirmed that he had received the documents. The Claimant then explained that it was stated in his GP's letter that he felt well and that he was fit for operational duties. The Claimant also explained that he had 2 sessions with and an assessment by an EMDR specialist and he had been told that there were no signs of trauma and therefore he did not have to pursue any further trauma sessions. The Claimant also provided a copy of his contract with the EMDR specialist [1547-1551] as proof that he had attended EMDR sessions. The Claimant further explained that he was not taking propranolol, due to its side effects, and that his other medication, fluoxetine had been halved, which he said showed how well he had progressed in terms of his recovery.

62. The Claimant also stated that he had been asked to provide his psychiatric reports to HML which he had done, but there was no reference to the reports in the medical outcome report received from HML. He reiterated that he had given consent for HML to contact his GP but this had not been done. The Claimant also stated that HML had not referred to the fact that he had undergone Cognitive Behavioural Therapy (CBT). He then referred again to the management case summary [740-745], and he claimed that there was a lot of information about him in that document that was not correct.

63. The Claimant agreed to provide consent for HML to obtain his full GP records. This was so that HML could investigate further his assertion made during the hearing that he had been unfit for work due to fatigue, which was caused by the medication that he was taking – (Propranalol), and that he had now recovered from the fatigue because he had ceased taking this medication. At the end of the meeting, Mr Ellis advised the Claimant that given the complexity of his case and the need to carefully consider all of the extensive information it would be not be possible to advise him of any decision within seven days of the date of the meeting – seven days was the normal timescale for providing the appeal outcome.

64. As the Claimant had agreed to provide to consent to HML contacting his GP to obtain clarification with regard to his medication, Mr Amis wrote to the Claimant following the meeting to request that he sign the consent form that was enclosed with a letter which confirmed that he was dismissed, but that if his appeal was upheld, he would be reinstated with effect from his last day of service – i.e. 30 August 2018 [1020-1024].

65. The Claimant responded to the letter by email dated 10 September 2018 [1025]. In his email he denied that he had consented to HML obtaining access to his GP records as his doctor had already provided a letter about his medication. In his email, the Claimant also stated that he wished to make a grievance against Mr Jennings. The Claimant alleged that Mr Jennings had not shaken his hand or said hello to him when he entered the room where the appeal was being held. The Claimant also alleged that during the appeal hearing, Mr Jennings had stared at him which made him feel uncomfortable.

66. The Claimant sent a further email in which he included a list of the medications that he had been prescribed [1028a-1028c]. By email dated 12 September 2018, Mr Amis confirmed receipt of both of the Claimant's emails [1028d]. Attached to the email was a letter dated 12 September [1028] which noted that the Claimant did not deem it necessary for HML to be provided with his consent to review his GP records as he was of the view that he had provided sufficient information/documents with regard to his appeal. Mr Amis confirmed that he would inform AC Ellis that he should proceed with making his decision based on the information that had been made available to him. The Claimant replied by email dated 12 September 2018, in which he stated that he did not deem it necessary for HML to review his GP records in order to provide a report [1028d]. He however said he would provide his consent for an independent report to be produced by a third party practitioner/specialist. In his email, the Claimant stated that during the appeal hearing, Mr Amis had explained in the event of dispute between HML and his GP, that an independent doctor should be instructed. This is consistent with the guidance in the grey book [1607-1612]. In a subsequent email sent later on the same day, the Claimant reiterated that he would be happy to provide his consent for the

purpose of an independent practitioner producing a report and he asked for confirmation as to whether the further assessment was required [1029]

67. By letter dated 14 September 2018, Mr Amis confirmed to the Claimant that no further assessment by a third party was necessary [1031]. This was because there was a report from Dr McKinnon dated 31 May 2018 and the Claimant had provided further information in relation to his medication. The Claimant responded to the email on 15 September 2018 in which he stated that he was happy for contact to be made with his GP to confirm information with regard to his medication [1031a-1031b]. Mr Amis acknowledged receipt of his email on 17 September 2018 [1031a].

68. The Claimant's appeal was not upheld and he was advised of the outcome by letter dated 3 October 2018 [1033-1040]. Mr Ellis concluded that there was no basis for overturning the decision to dismiss the Claimant. Having reviewed all of the available information, which included the stage 3 bundle, his documents provided in readiness for the appeal, and his grounds of appeal, Mr Ellis considered that the prospects of the Claimant returning to work within a reasonable timescale, and/or sustaining good attendance in his contractual role was not likely. He addressed all of the grounds of appeal in the outcome letter.

69. The Claimant has stated in his witness statement that he was treated less favourably than four firefighters, who were performing light duties at the same time as him. These were: Radcliffe White, Dave Shove, Victoria Madden, and Tosh Modupe. The Tribunal considered that the Claimant's circumstances were highly individual and could not be compared with those of his comparators. In addition, on 7 April 2016, a new Attendance Management Handbook was introduced [784], of particular relevance is Clause 1.14 (Non-Compliance with Managing Attendance Policy) [796] and in the Managing Attendance Policy [765] Clause 4.7 and 4.10 [770]. The comparators referred to by the Claimant in paragraph 112 of his witness statement pre-date the implementation of this capability process. Likewise, with regard to information contained in the Freedom of Information Act request (paragraphs 115-120 of the Claimant's witness statement), the Tribunal concluded that comparison could not be made.

SUBMISSIONS

70. The Tribunal received detailed submissions of high quality from both barristers both in writing and orally. Without intending any disrespect, these submissions are not repeated here.

RELEVANT LEGAL PRINCIPLES

Res judicata

71. A *res judicata* is a decision, pronounced by a judicial tribunal having jurisdiction over the cause and the parties, that disposes once and for all the matter, so that except on appeal it cannot be re-litigated between the parties.

72. The rule in **Henderson v. Henderson** (1843) 3 Hare 100 is an expression of the important public policy that there should be finality in litigation. In that case Sir James Wigram stated at pp. 114-115:

> In trying this question I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the litigation.

73. The modern approach to **Henderson v. Henderson** was dealt with authoritatively in **Johnson v Gore-Wood** [2002] 2 AC 1, especially at pp. 22-23F, 30-31 (Lord Bingham) and pp. 59-6 (Lord Millett). Whether or not there is an abuse of process must be judged in the light of the particular facts of the case, and without rigidity, as was explained in (p31B-D):

> I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty but where those elements are present the later proceedings will be much more obviously abusive and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits- based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

74. The principles have been helpfully summarised in **Dexter v. Vlieland-Boddy** [2003] EWCA Civ 14 by Clarke LJ at para. 49:

i. Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process;
ii. A later action against B is much more likely to be held to be an abuse of process than a later action against C;
iii. The burden of establishing abuse of process is on B or C or as the case may be;
iv. It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive;
v. The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process;
vi. The court will rarely find that the later action is an abuse of process unless it involves unjust harassment or oppression of B or C.

75. The question of whether or not strike out a claim for abuse of process on the grounds that the claim should have been brought in previous litigation is not an

exercise of discretion. It is a decision involving the assessment of a large number of factors to which there can only be one correct answer (see **Aldi Stores Ltd v. WSP London Ltd & Ors** [2007] EWCA Civ 1260 at paras 16,32,37 and 38).

76. In **Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)** [2014] AC 160 SC, the Supreme Court gave some guidance:

i. where the claimant succeeded in the first action and did not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages;
ii. a cause of action is treated as extinguished once judgment has been given upon it, and the claimant's sole right is then a right upon the judgment: the doctrine of merger (cause of action estoppel);
iii. even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both and which had been decided on the earlier occasion may be binding on the parties. So, a party may not bring subsequent proceedings on an issue that has already been determined (issue estoppel).

77. Lord Sumption did not accept that there was an either/or situation, namely that if **Henderson v. Henderson** was not a form of abuse of process, it could not be a form of issue estoppel. This is because he regarded res judicata and abuse of process as overlapping principles, even though they were each distinct: *"Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers*".

Just and equitable extension

78. Section 123(1)(b) of the Equality Act 2010 permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable beyond the 3 month period for making a claim. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

79. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westward Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

80. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not normally constitute sufficient ground for delaying the presentation of a claim: and

observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

81. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

82. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

the length and reasons for the delay;
the extent to which the cogency of the evidence is likely to be affected by the delay;
the extent to which the party sued had co-operated with any requests for information;
the promptness with which the claimant acted once she knew of the possibility of taking action; and
the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

83. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220. Indeed, rigid adherence to the factors would not be in accordance with the discretion under the Equality Act; **Adedeji v. University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23.

84. Further guidance cited to the Tribunal was that the Tribunal must not make assumptions in the claimant's favour on any contentious factual matters that are relevant to the exercise of the discretion: **British Transport Police v Norman** UKEAT/0348/14 at para 39. The lack of specific prejudice to the respondent does not mean that an extension should be granted: **Miller v Ministry of Justice** UKEAT/0003/15 at para 13. Where a claimant asserts ignorance of the right to make a claim, the same principles that are relevant to the 'not reasonably practicable' clause apply when considering a just and equitable extension (see **Bowden v. Ministry of Justice** UKEAT/0018/17 *(25 August 2017, unreported* para 38); **Averns v. Stagecoach in Warwickshire** UKEAT/0065/08 *(16 July 2008, unreported)*. Accordingly, the assertion must be genuine and the ignorance – whether of the right to make a claim at all, or the procedure for making it, or the time within which it must be made – must be reasonable. It is not enough, in a case where ignorance is relied

upon, for a tribunal to conclude that a claimant has not acted reasonably and promptly without specifically addressing the alleged lack of knowledge (see **Averns** at para 23). Nor is it correct to say that the only knowledge that is relevant when considering an extension of time is knowledge of the facts that could potentially give rise to a claim, not knowledge of the existence of a legal right to pursue compensation in respect of those facts; as a matter of law both kinds of knowledge are relevant and should be taken into account. Incorrect legal advice may be a valid reason for delay in bringing a claim but will depend on the facts of the case: **Hawkins v Ball & Barclays** [1996] IRLR 258 and **Chohan v Derby Law Centre** [2004] IRLR 685. In answering the question as to whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan [**2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** (2016) IRLR 278.

85. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "the just and equitable power" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

86. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case. That obligation is not just a matter of the burden of proof. It also raises the question of what is the standard of proof to be established in order to persuade the Tribunal that a period other than the normal three months should be applicable. It is therefore a matter which requires evidence – which may be oral and subjected to cross examination or documentary.

87. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in **Hendricks v. Metropolitan Police Commissioner** [2003] IRLR 96. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

Direct Discrimination

88. Section 13 of the Equality Act 2010 ("EqA") deals with direct discrimination. It states as follows:

(a) "(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."

89. Section 23 EqA deals with comparators. It states as follows:

> "(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

90. It is only if the Tribunal is satisfied that there is less favourable treatment when comparing the treatment of the claimant to what would have been received by the actual or hypothetical comparator, that the test of whether an alleged act was direct race discrimination arises and this requires a consideration of the reason for the treatment.

91. The Equality and Human Rights Commission: Code of Practice on Employment 2011 ('the Code of Practice') sets out helpful guidance for carrying out the comparator exercise. As to the identity of the comparator, paragraph 3.23 of the Code of Practice confirms:

> The Act says that, in comparing people for the purposes of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

92. As to the comparison exercise for a hypothetical comparator, paragraph 3.27 of the Code of Practice confirms:

> Who could be a hypothetical comparator may also depend on the reason why the employer treated the Claimant as they did. In many cases, it may be more straightforward for the Employment Tribunal to establish the reason for the Claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the Claimant to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can be found.

93. In **Amnesty International v. Ahmed** [2009] IRLR 884 Mr Justice Underhill (as he then was) (at para 34) confirmed that where the act complained of is not inherently discriminatory, it can be rendered discriminatory by motivation. This involves an investigation by the tribunal into the perpetrator's mindset at the time of the act. This is consistent with the line of authorities from **O'Neill v. Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor** [1996] IRLR 372, the Tribunal should ask what is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained about. In **Nagarajan v. London Regional Transport** [1999] IRLR 572, HL, it was stated that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out.

94. The crucial question is why the claimant received the particular treatment of which he complains.

95. Paragraph 3.11 of the Code of Practice confirms:

> The characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

96. Paragraph 3.13 of the Code of Practice confirms:
> In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

97. The burden of proof provisions in relation to discrimination claims are found in section 136.

98. The Court of Appeal, in **Igen Ltd v. Wong** [2005] ICR 931 CA, has authoritatively set out the position with regard to the drawing of inferences in discrimination cases in the light of the amendments implementing the EU Burden of Proof Directive.

99. In **Laing v. Manchester City Council** [2006] ICR 1519 EAT, the Employment Appeal Tribunal held that the drawing of the inference of *prima facie* discrimination should be drawn by consideration of all the evidence, i.e., looking at the primary facts without regard to whether they emanate from the claimant's or respondent's evidence page 1531 para 65. The question is a fundamentally simple one of asking why the employer acted as he did: **Laing** para 63. That interpretation was approved by the Court of Appeal in **Madarassy v. Nomura International plc** [2007] ICR 867 CA at paragraph 69. The Court also found at paragraphs 56-58 that 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. That means that the claimant has to 'set up a *prima facie* case'. That done, the burden of proof shifts to the respondent (employer) who has to show that he did not commit (or is not to be treated as having committed) the unlawful act, at page 878.

100. Tribunals should be careful not to approach the **Igen** guidelines in too mechanistic a fashion (**Hewage v. Grampian Health Board** [2012] ICR 1054 SC para 32, **London Borough of Ealing v. Rihal** [2004] EWCA Civ 623 para 26).

101. The Court of Appeal has confirmed the foregoing approach under the EqA in **Ayodele v. Citylink** [2018] IRLR 114 CA.

Discrimination arising from a Disability

102. Section 15 EqA 2010 provides, relevantly, as follows:
> '(1) A person (A) discriminates against a disabled person (B) if—
> A treats B unfavourably because of something arising in consequence of B's disability, and
> A cannot show that the treatment is a proportionate means of achieving a legitimate aim."
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.'

103. There are two questions of causation, as the Employment Appeal Tribunal held in **Basildon & Thurrock NHS Foundation Trust v. Weerasinghe** [2016] ICR 305 EAT explained:

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

104. **Sheikholeslami v. University of Edinburgh** [2018] IRLR 1090 EAT confirmed that there are two distinct causative issues:

> "In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence. (See *City of York Council v Grosset* [2018] EWCA Civ 1105 [2018] IRLR 746)."

105. **Pnaiser v. NHS England** [2016] IRLR 170 EAT set out the following guidance as to the correct approach to a claim under section 15 EqA 2010 (at [31]), including, relevantly, the following (emphasis added):

> '(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something

> that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
> (e) … However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
> (f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
> …
> (h) Moreover, the statutory language of s.15(2) makes clear… that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so…

106. Whilst the test is objective and could arise from a series of links, there still has to be some causal connection between the "something" and the Claimant's disability: per HHJ Eady QC (as she then was) in **iForce v. Wood** UKEAT/0167/18 (2 January 2019, unreported).

107. It is also sufficient if the disability is an "effective cause" of the "something" that causes the unfavourable treatment: it does not have to be the sole (or even main) cause. In **Risby v. London Borough of Waltham Forest** (UKEAT/0318/15, 18 March 2016, unreported) the Employment Appeal Tribunal held that:

> "17. … In the passage cited from the Employment Tribunal's decision, it is plain that it believed that it was necessary for it to be shown that there was a "direct linkage" between the Claimant's disability and his conduct on 19 June 2013. There was no such requirement. All that had to be established was that the Claimant's conduct arose in consequence of his disability or, to put it in Laing J's words, that was an effective cause or more than one of his conduct. …
> 18. If he had not been disabled by paraplegia, he would not have been angered by the Respondent's decision to hold the first workshop in a venue to which he could not gain access. His misconduct was the product of indignation caused by that decision. His disability was an effective cause of that indignation and so of his conduct, as was, of course, his personality trait or characteristic of shortness of temper, which did not arise out of his disability. On the Employment Tribunal's own analysis of the facts, this was a case in which there were two causes of conduct that gave rise to his dismissal, one of which arose out of his disability."

108. The test of justification is an objective one to be applied by the Tribunal, against the backdrop of evidence before it. The Tribunal may, therefore, reach a different conclusion to that advanced by the employer: **York City Council v Grosset** [2018] ICR 1492 CA. held that:

> "54. … the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer

itself. By contrast, the test under section 15(1)(b) of the EqA is an objective one, according to which the employment tribunal must make its own assessment …"

109. The EHRC Code further states that:
"5.20. Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments …
5.21. 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."

110. Para 4.31 states that:
"EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

111. In other words, the justification defence will not be made out where the same aim could be achieved by less discriminatory means.

112. Albeit in the context of indirect discrimination, Lady Hale addressed the justification defence (which is the same in section 15) in **Essop v Home Office; Naeem v Secretary of State for Justice** [2017] ICR 640 SC and stated at [29]:
"A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

113. In **Homer v Chief Constable of West Yorkshire** [2012] ICR 704 SC the Supreme Court considered the justification defence (again in the context of indirect discrimination) and Lady Hale stated:
"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim…
…
20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

> ". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."
>
> He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:
>
> > "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"
> >
> > As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.
> >
> > …
> >
> > 22. The ET (perhaps in reliance on the IDS handbook on age discrimination) regarded the terms "appropriate", "necessary" and "proportionate" as "equally interchangeable" [29, 31]. It is clear from the European and domestic jurisprudence cited above that this is not correct. Although the regulation refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.
> >
> > …
> >
> > 23. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate. The EAT suggested that "what has to be justified is the discriminatory effect of the unacceptable criterion" [44]. Mr Lewis points out that this is incorrect: both the Directive and the Regulations require that the criterion itself be justified rather than that its discriminatory effect be justified (there may well be a difference here between justification under the anti-discrimination law derived from the European Union and the justification of discrimination in the enjoyment of convention rights under the European Convention of Human Rights)."

114. Proportionality was considered by the Supreme Court in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 where Lord Reed JSC stated at page 791:

> "74 The judgment of Dickson CJ in Oakes provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in Oakes can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measures effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord

> Clyde in de Freitas, and the fourth reflects the additional observation made in Huang. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no divergence of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

Reasonable adjustments

115. The duty to make reasonable adjustments is found in section 20 of the Equality Act 2010:

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

116. The EAT in **Royal Bank of Scotland v. Ashton** [2011] ICR 632 held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment. This case was considered by the Court of Appeal in **Griffiths v. Secretary of State for Work and Pensions** [2016] IRLR 216 on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

117. With reasonable adjustments, there must be a prospect that the adjustment(s) will work (**Leeds Teaching Hospital NHS Trust v Foster** EAT/0552/10). In **South Staffordshire and Shropshire Healthcare NHS Trust v Billingsley** EAT/0341/15 Mitting J said:

> [17] Thus, the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show that the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under s 15(1) of the *2010 Act*. [We understood this to be a reference to section 20].
>
> [18] It is in the end a question of judgment and evaluation for the Tribunal, taking in to account a range of factors, including but not limited to the chance. A simple example may suffice to illustrate the point. If a measure proposed by an employee as a reasonable adjustment stands a very small chance of avoiding the unfavourable treatment arising out of her disability to which she would otherwise be subjected, but it was beyond the financial capacity of her employers to provide it so a Tribunal would be entitled to conclude that it was not a reasonable adjustment. Indeed, on those facts it would be difficult to justify a conclusion that it was a reasonable adjustment. In the case of a large organisation by contrast, where a proposed adjustment would readily be

implemented without imposing an unreasonable administrative or financial burden on the employer then the obligation to take it may arise notwithstanding that the chance of avoiding unfavourable treatment was very far from a certainty.

Harassment

118. Under section 26(1), harassment occurs when a person engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of:

violating the worker's dignity; or

creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

119. Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

120. In **Betsi Cadwaladr University Health Board v Hughes** EAT/0179/13 (Langstaff P) the EAT considered the recent cases in relation to harassment under section 26 Equality Act and said as follows:

> [10] Next, it was pointed out by Elias LJ in the case of *Grant v HM Land Registry* [2011] IRLR 748, that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said "tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."
>
> [11] Exactly the same point was made by Underhill P in *Richmond Pharmacology* at para 22:
>
> ". . . not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."
>
> [12] We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

121. In relation to the word "environment" in section 26 the EAT in **Weeks v Newham College of Further Education** EAT/0630/11 (Langstaff P) said "…it must be remembered that the word is "environment". An environment is a state of affairs". Words spoken must be seen in context and that context includes other words spoken and the general run of affairs within the particular workplace.

Victimisation

122. Section 27 provides that:

"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."

123. In **Chalmers v. Airpoint & Ors.** UKEATS/0031/19/SS dated 16 December 2020, it was held that comments in a grievance that actions "may be discriminatory" may not amount to a protected act.

Unfair Dismissal

124. Dismissal must be for a potentially fair reason within the meaning of section 98 of the Employment Rights Act ("ERA") 1996. Conduct is a potentially fair reason: section 98(2)(b) ERA 1996. At the first stage of assessing fairness, the employer merely has to show that the reason given was the reason it in fact relied on and that it was capable of being fair. Once it has done this this the tribunal will go on to consider whether the dismissal was fair in all the circumstances within the meaning of section 98(4) ERA 1996.

125. The statutory reasonableness test which tribunals must apply when deciding unfair dismissal complaints requires that where the employer has fulfilled the requirements of section 98(1) of the Employment Rights Act 1996, then, subject to sections 99 to 106 of the Employment Rights Act, the determination of the question whether the dismissal was fair or unfair, is established in accordance with section 98(4) of the Employment Rights Act, which states:

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal 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 reasonably 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.

126. In the context of capability, the starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT

decision in **Spencer v. Paragon Wallpapers Ltd** [1977] ICR 301. In that case Phillips J emphasised the importance of scrutinising all the relevant factors:

> "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?"
> And he added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.

127. In **Lynock v. Cereal Packaging Ltd** , [1988] ICR 670, the EAT (Wood J presiding) described the appropriate response of an employer faced with a series of intermittent absences as follows:

> "The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding'.'

128. So, there is a conflict between the needs of the business and those of the employee, and the tribunal must be satisfied that the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted. In the course of doing this, he will have to show that he carried out an investigation which meant that he was sufficiently informed of the medical position.

129. The importance of consultation was stressed in the following passage from the judgment of the EAT in **East Lindsey District Council v. Daubney** [1977] ICR 566:

> "Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring

> to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done'.'

130. In relation to inconsistency, according to the Inner House of the Court of Session in **Conlin v. United Distillers** [1994] IRLR 169, the only relevant inconsistency relates to the dismissal itself and not previous disciplinary sanctions. Accordingly, the court held that the fact that the employee had been given a final warning after a first offence, whereas others had not, was not a basis for saying that the employer had acted inconsistently. The important feature was that the employer was consistent in dismissing employees who repeated the offence after a final warning.

131. However, four notes of caution need to be added. First, although the employer should consider how previous similar situations have been dealt with, the allegedly similar situations must truly be similar (**Hadjioannou v. Coral Casinos Ltd** [1981] IRLR 352 followed in **Procter v. British Gypsum Ltd** [1992] IRLR 7). In practice this is likely to set significant limitations on the circumstances in which alleged inequitable or disparate treatment can render an otherwise fair dismissal unfair. The point is emphasised by the decision of the Court of Appeal in **Paul *v.* East Surrey District Health Authority** [1995] IRLR 305.

132. Second, an employer cannot be considered to have treated other employees differently if he was unaware of their conduct (**Wilcox v. Humphreys and Glasgow Ltd** [1975] ICR 333*, QBD*).

133. Third, if an employer consciously distinguishes between two cases, the dismissal can be successfully challenged only if there is no rational basis for the distinction made; **Securicor Ltd v. Smith** [1989] IRLR 356 *CA*.

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

DISCUSSION and DECISION

135. These claims seem to have their origin in around 1 August 2017, when the Respondent decided to place the Claimant on ½ pay in accordance with the outcome letter dated 4 August 2017 which Mr McKenzie sent to the Claimant [252-254].

136. There were large areas in the chronology of events where the evidence of the Claimant conflicted with that of the Respondent's witnesses. In each case, the Tribunal preferred the evidence of the latter. Their evidence was clear, concise, reliable and supported by documents. This could not be said of the Claimant's evidence perhaps because of the residual effects of his mental health condition.

137. The Claimant's disability and prognosis had changed little between November 2017 and his dismissal although the Claimant sought to persuade the Tribunal otherwise. Dr Bashir's report resulted from a joint instruction by the parties in the 2017 proceedings. The Claimant refused to consent to a further psychiatric report for the Respondent to use for its HR processes since he felt that this would be a duplication of Dr Bashir's report.

138. The Respondent had good reasons to be concerned about the Claimant's future health. On 8 March 2017 the Respondent asked the Claimant to increase his hours (by 50 minutes per day) with a view to building his resilience for a future return to operational duties [628]. The Claimant immediately replied to say that he was only just about coping with the hours he was doing and questioned why the Respondent was not following OH advice [630]. The Claimant raised a grievance against Mr Wakefield [632] and refused to attend the ASM with him on 28 March 2017 (see also [639]). On 11 March 2017 the Claimant wrote to Rob Bond to explain the difficulties that he was having at work [635]. On 12 March 2017 the Respondent sought urgent advice from Dr Kurzer (which the Claimant refused to release) [641- 643]. A letter from the Claimant's GP dated 12 March 2018 [1529] stated that he was working at the 'maximum limit without endangering his health and welfare'. On 21 March, the Claimant's informal grievance meeting was cancelled because he wished to take an audio recording of it. After the ASM outcome [661] was sent to him on 26 March 2017, the Claimant complained to the Respondent that he was not fit to do the hours he was being required to do and asked Ms Banning to "notify my light duty colleagues of my limitations as I have already been called "lazy" by one person and do not want to feel any more uncomfortable at work than I already do" [663]. On 4 April 2018, the Claimant went home after having panic attacks because he didn't bring his medication to work with him [670]. Later that day, the Claimant wrote to complain of the difficulties that he was having with the Respondent's current arrangements for his work and asked for Mr Wakefield to be removed as his line manager. A redeployment and adjustments meeting, chaired by Mr Obeh, was scheduled for 12 April 2017 [668]. The Claimant did attend but it was not possible to discuss redeployment because the Claimant insisted on recording the meeting, so it was brought to an early conclusion. On 17 April 2017, the Claimant asked Ms Banning to inform the team of his occasional need to sit out a visit. This last request is only 10 days before his appointment with the new GP signing him fit for operational duties [683-684].

139. In the latter stages of his employment, the Claimant did not co-operate with the Respondent's attempts to gather information about his health. He would either not attend an appointment without giving adequate reasons, such as on the 25 August 2017 [261, 263-264] or he would attend and then refuse to consent to the release of a report if he did not agree with it (e.g., Dr El-Nagieb's report from the meeting on 12 September 2017 [352] and Dr Kurzer's report following the consultation on 2 May 2018 [702]). This failure to co-operate often occurred during crucial periods when the Respondent needed the information to manage a return to work or conduct an ASM.

140. Dr McKinnon's report was the latest and most reliable report. He saw the Claimant on 31 May 2018 and produced a report on the same day [754]. He was able to review the Claimant's absence record on his file and notes that, after an absence of over 3 years, a successful and sustained return to work would be unusual. He noted

[755] that he could find no evidence that the claimant "has had treatment strategies for…" EMDR is the standard treatment for PTSD which Dr Bashir had advised was what the Claimant required to make a recovery "within a couple of years" [1073 para.14.18 and 14.19]. Dr McKinnon concluded that on the date of his examination, while the Claimant had a near-zero level of mental symptoms, his main concern was the high likelihood of relapse on return to work. This is consistent with the view expressed by the Claimant's new GP [460c]. Dr McKinnon records that the Claimant posed a high risk of relapse and advised that he had no confidence that the Claimant would thrive any better in operational duties than he had on light duties. Dr McKinnon advised that the Claimant's retraining would not be successful [756] but could be revisited after the Claimant had had treatment with EDMR and that the picture would be clearer in 6 months. Dr McKinnon suggested that the Claimant might be a candidate for ill-health retirement. Accordingly, Dr McKinnon's report does not conflict with the GP fit note which provided a snapshot of the Claimant's health on that day. Dr McKinnon's report did however provide a prognosis that was consistent with the previous independent psychiatric reports. There was no need for a further independent report. The Respondent had procured two independent expert opinions on the Claimant's health. One of those expert reports was prepared by Dr Bashir and had been prepared less than six months earlier. He gave a prognosis that the Claimant's condition may last for many years if not the Claimant's whole life [1067].

141. The Claimant contended that there was a conflict of medical evidence in this case and that an independent report should have been commissioned under his contractual procedure. The Tribunal concluded that there was no need for a further independent report.The Claimant said that his mental health had improved significantly but does not acknowledge the problem created by him, for whatever reason, which caused him to behave in the manner he did towards every manager who dealt with him in the period. It is not correct to characterise the position as between the GP note and Dr McKinnon's report as a dispute. Even if the contractual provision relied upon by the Claimant applied, the limited information provided by the GP fitted with what Dr McKinnon narrated in his report which goes into considerably more detail. While the Claimant's new GP said that as at his appointment on 27 April 2018 that the Claimant was "fit for operational duties", he/she says nothing about the prognosis. Both Mr Jennings and Mr Ellis preferred the advice of their occupational health department for the reason that it had been dealing with the Claimant for the last three years and had a better understanding of his case, to that of a new GP who was unlikely to have any knowledge of the operational demands of a firefighter. They were able to draw upon three years' worth of medical reports and the Claimant's own GP's most recent opinion, which stated that the Claimant had reached the maximum limit of what he could do [1529].

142. The Tribunal concluded that, in the circumstances, the Respondent had all the necessary medical information and its interpretation of that evidence was correct. At the hearings with Mr Jennings and Mr Ellis, the Claimant exhibited deep distrust of the officers of the Respondent and if he returned to operational duties, it was likely that there would be either or both of disagreement with the officer and a relapse in the Claimant's anxiety. The Claimant ignores even the possibility of such a risk.

Direct Discrimination – Disability

143. The Tribunal did not accept the comparators chosen by the Claimant as they were in dissimilar situations to him. The chosen comparators did not test whether there was less favourable treatment in the following respects:

a) deciding to progress to stage 3 of the sickness absence procedure;
b) dismissing the Claimant on 21 June 2018; and
c) rejecting the Claimant's appeal on 3 October 2018.

152. The Claimant's comparators focus on examining whether others were allowed to remain on light duties for longer periods of time but this is not what his direct discrimination claim is. The comparators are irrelevant to the decision to start the stage 3 proceedings or the rejection of the Claimant's appeal.

153. In so far as the stage 3 capability and the dismissal are concerned, even if the cessation of light duties was less favourable treatment, a procedure started in response to the cessation of light duties (or a dismissal because of the cessation of light duties) would not mean that the treatment was afforded because of disability for the purposes of a section 13 claim, as this type of causation is more properly suited to a claim under section 15.

154. The comparison exercise suggested by the Claimant cannot compare like for like. The proper management of a sickness absence is likely to depend upon a consideration of the relevant job role, the type of disability, the medical evidence (including the prognosis) and the Respondent's business requirements. In order to make a meaningful comparison the Tribunal would have to consider the details of several different but related reasonable adjustments cases. The requirement to make reasonable adjustments complicates matters further. Circumstances put in place to satisfy the duty to make reasonable adjustments for one person cannot properly be said to place that person at an advantage.

155. Even if the Claimant could show that someone else, with a similar medical history, was on light duties for a longer period, this does not raise a *prima facie* case of less favourable treatment. The inevitable differences between disabilities, prognoses and circumstances would make any comparison invalid. This is why section 23 requires that the comparator in a direct disability discrimination case must share the abilities of the disabled person in question.

156. There are a number of features of the Claimant's case that distinguish him from his named comparators. For instance:

i. He failed to co-operate with the Respondent's attempts to seek medical advice;
ii. He failed to attend important meetings, convened to discuss the sickness absence, adjustments and return to work (e.g., Third stage capability, redeployment and adjustments meeting);
iii. Mr Amis' evidence, which was accepted by the Tribunal, was that the Respondent's sickness management policy changed in July 2015 and resulted in a number of cases being embargoed while the policy change took place.

157. The Tribunal decided to test the Claimant's case against a hypothetical comparator. The hypothetical comparator in this case would be a person whose circumstances and abilities and performance were the same as Claimant's, but who was not disabled. The Tribunal determined that the Claimant had not proved facts from

which it could conclude that the Respondent treated the Claimant less favourably than such a comparator. In this case the hypothetical comparator should be a person who was not disabled (or with a different disability) who had similar abilities, a similar medical prognosis in respect of their fitness for return to full operational duties and who had also failed to co-operate with the Respondent's ill health management processes. The Respondent would have treated such a person in precisely the same way as it treated the Claimant. There was no less favourable treatment.

158. The Tribunal also tested the Claimant's case by asking the question, what was the reason why there was a difference in treatment between him and other employees of the Respondent, the treatment was not afforded because of any direct discrimination but was because of the Claimant's inability to perform his duties.

Discrimination because of something arising from disability

159. The Tribunal considered the impugned treatment for the purposes of the Claimant's section 15 claim was:

the Claimant's dismissal on 21 June 2018; and
the rejection of the Claimant's appeal on 3 October 2018.

160. The Respondent conceded that, for the purposes of the Claimant's dismissal, the reason arose because the Claimant was unable to carry out his operational duties as a firefighter and that he was prevented from doing so by his disability. However, this is not the Claimant's case. The Claimant's case is that he was fit to carry out his operational duties. In these circumstances, the Claimant must establish what the "something" that arose in consequence of disability was. He has not done so.

161. The Tribunal did not consider that the Claimant's internal appeal was dismissed because of disability or because of something arising in consequence of disability. The appeal was dismissed because the Respondent was unable to identify any errors in the dismissal decision. This had nothing to do with disability.

162. In any event, the Tribunal found that the Respondent's dismissal of the Claimant was justified. It was a proportionate means of achieving a legitimate aim. The Respondent's reasons are effectively identical to those that were accepted by the 2017 Tribunal. Nothing had changed since 2017, aside from the fact that the Claimant had been given a fifth opportunity to demonstrate his fitness for operational firefighting and the Respondent had attempted, unsuccessfully to get the Claimant to engage with Mr Obeh to discuss reasonable adjustments and redeployment.

163. The Claimant's approach was that the Respondent should simply rely on the Claimant's own interpretation of the fit notes and should be allowed to return to his substantive role of being a firefighter, albeit with some retraining. The Respondent's legitimate aim was ensuring that its firefighters were fit to carry out their duties and perform their role. The Respondent is a significant public service body and firefighters must be fit to carry out an often dangerous and stressful role in order to reduce the health and safety risk both to the public and to the individual firefighter to the lowest level reasonably practicable and to his colleagues who would need to rely on a fully fit colleague in a fire fighting situation.

Reasonable adjustments

164. In relation to the claim of failure to make reasonable adjustments, the Tribunal finds that the Respondent did apply a provision criterion or practice by requiring employees to have their return to work meetings with their designated line managers. The disadvantage arose from the Claimant having to have a return to work interview with a person who had previously made a management decision with which he disagreed. Any manager (whether or not his designated line manager) who had previously made a decision adverse to the Claimant would have been unacceptable to the Claimant. There was nothing untoward with Mr McKenzie's conduct. The Claimant complained about his next line manager, Mr Wakefield, after Mr Wakefield made a decision he did not agree with [707].

165. The Tribunal concluded that it was not reasonable to make the adjustment of changing the Claimant's line manager for the following reasons:

a. The management of long term sick leave is a difficult process that requires the person managing the absence to have a good knowledge of the employee in question;

b. The Claimant had already had three different line managers;

c. A line manager will often have to deliver difficult news and the Respondent could not change the Claimant's manager every time that the Claimant was dissatisfied with a management decision. The Claimant saw criticisms and conspiracies in every decision that he did not completely agree with. The Claimant's relationship with the Respondent would simply be unworkable if his line manager had to be changed every time a decision was made that the Claimant did not agree with;

d. Mr McKenzie had done nothing that would warrant his replacement as line manager and any other line manager would likely have met with the same reaction from the Claimant.

Victimisation

166. The Tribunal concluded that there were a number of protected acts. These were the Claimant's previous employment tribunal claims 2301851/2015, 2301013/2016, 2301481/2017, 2302571/2017 and 2303650/2018 (in respect of the Claimant's dismissal).

167. The grievances the Claimant relied upon were those he made against Simon Hillary (2016), Andrew Cross (2016), Phil Morton (March 2017), Ian Frame (Nov / Dec 2017), Barry Wakefield (Mar / April 2018), Sue Banning (April 2018), and Paul Jennings (Sept 2018). The Tribunal heard little evidence about these grievances and in particular whether they referred to discrimination and consequently were protected acts.

168. The Tribunal accepted that the Claimant was subjected to the following treatment:

(a) Respondent declining to assign an alternative Station Manager for the Claimant's return to work interview on 7 September 2017.
(b) Respondent dismissing the Claimant on 21 June 2018; and
(c) Respondent's rejection of the Claimant's appeal on 3 October 2018.

169. This claim was not out of time. Whilst it would have been technically possible for the Respondent to change the Claimant's line manager, it had good reason not to, given the previous behaviour of the Claimant.

170. The Tribunal does not accept that the previous employment tribunal claims caused either Mr Jennings or Mr Ellis to come to the decisions they did. Mr Jennings provided his reasons for refusing to change the Claimant's line manager and his decision in the Stage Three Capability Meeting which the Tribunal accepted. Mr Ellis's evidence about his reasons for rejecting the appeal were also accepted. Neither of them took any action against the Claimant because of any protected act.

171. The Respondent had not misinterpreted or misunderstood the Claimant's position in relation to redeployment or medical retirement. The Claimant 's stance was that he was fit to return to operational duties. The Claimant's reliance on the words of his email dated 23 April 2018 [695] is disingenuous when read in the context of the previous emails [685-694]. He expressed himself clearly and emphatically to Mr Odeh that he was not interested in redeployment or medical retirement.

Harassment

172. The Tribunal did not accept the Claimant's account of the alleged harassment by Mr Thompson on 13 September 2017 and accordingly finds that there was no harassment of the Claimant.

149. In addition, the claims of harassment on 13 September 2017 are out of time and there is no reason to extend the time period. The 2017 Tribunal found that the Claimant was well aware of the time limits.

Unfair Dismissal

173. The Respondent established that the reason for the dismissal was capability in the form of ill health.

174. The Tribunal decided that the dismissal fell within the range of reasonable responses open to an employer. In particular, it followed its attendance policy and fully investigated the Claimant's health insofar as he allowed it to do so.

175. In relation to its attendance policy, the principal allegation is that the Respondent breached a contractual requirement to seek further medical evidence (see clause 29 of the Grey Book, [1611]). That part of the Grey Book is, as Mr Amis rightly pointed out, concerned with sick leave rather than capability for work. Even if it were a contractual requirement for the Respondent to seek further medical evidence, that requirement was not engaged in this case. There was no conflict between Dr McKinnon's opinion and the new, unnamed GP, who gave his/her view on 27 April 2018. The purpose of the Respondent's sickness capability policy [809] is to streamline its approach to sickness absences. There is no requirement for the Respondent to investigate how others have been treated. In the context of a lengthy sickness absence this is completely unworkable. The best way of ensuring

consistency was for the Respondent to pay careful attention to the guidance set down in its sickness capability process.

176. The investigation of the Claimant's health was thorough in the circumstances. The difficulties that the Respondent had procuring adequate medical evidence were caused by the Claimant's refusal to co-operate. In any event, by the time of his dismissal by Mr Jennings, the medical position was clear. Even if the Claimant was fit at that moment to return to work it was very unlikely that he would be able to provide reliable service as a firefighter in the future. Furthermore, to the extent that there were any deficiencies, these were caused by the Claimant's hostile approach to the Respondent. He sought to frustrate the Respondent's attempts to gather medical evidence at every turn and refused to participate in any discussion concerning reasonable adjustments or redeployment. His repeated insistence, for no good reason, on recording meetings hindered the free flow of information with the Respondent. The Claimant states that he did have a good reason for audio-record meetings: his disability made it hard for him to absorb and retain information from verbal exchanges. There was no medical evidence to support of his position. Even though the 2017 Tribunal expressed its "distaste" for the practice and indicated that it was undermining the employment relationship, the Claimant persisted in recording his meetings.

177. Dismissal was not too severe a sanction. The Claimant refused to discuss both redeployment and medical retirement. The Claimant argued that he wanted to discuss these options but could not take them up without a proper consultation on his terms because of his inability to absorb and understand procedures [695]. The Tribunal did not accept this evidence. Once the Respondent had determined that the Claimant's lengthy opportunity to demonstrate his fitness for his operational post should be terminated, it was inevitable that he would have to be redeployed, retired or dismissed. The Claimant can have been in no doubt what lay ahead.

178. The Claimant had not performed the duties of his operational role for nearly three and a half years. This was well below the standard required by the Respondent and it was not sustainable. As well as the medical evidence, the Respondent's sickness capability process states at paragraph 5.3 that dismissal may be appropriate where there is a consistent record of non-improvement in the employee's record of absence, or no foreseeable date identified for the employee's return to their substantive duties [135-136]. Dr McKinnon had suggested in his report that the Claimant might be fit within 6 months, however given that the Claimant had not undergone EMDR, (and it is was not known whether in any event the treatment would be successful), the conclusion that the Respondent could not be satisfied that the Claimant would be able to return to his operational duties within a reasonable timescale, or that he would be able to maintain an acceptable level of attendance, was well within the range of reasonable responses open to an employer.

179. All of the claims made by the Claimant against the respondent fall to be dismissed.

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Employment Judge Truscott QC

Date 19 March 2021

Sent to the parties on:
Date 20 May 2021

FOR THE TRIBUNAL