EMPLOYMENT TRIBUNALS

Claimant:	**Mr O Modupe**
Respondent:	**London Fire Commissioner**
Heard at:	**London South Employment Tribunal**
On:	**22.06.2021 – 25.06.21, 28.06.2021 – 30.06.21, in chambers 08.07.21 – 09.07.21**
Before:	Employment Judge Dyal sitting with Niamh Murphy and Penelope Barratt

Representation:

Claimant:	Ms Von Vachter, Counsel
Respondent:	Mr Spencer Keen, Counsel

RESERVED JUDGMENT

1. The complaints of race discrimination are dismissed.
2. The complaints of harassment related to race are dismissed.
3. The complaints of victimisation are dismissed.
4. The complaints of harassment related to disability:
   a. succeed in respect of SM Scrivener's message on the Claimant's answerphone on 3 August 2017;
   b. succeed in respect of SM Scrivener's comment to Mr Elcock that the Claimant was bringing the brigade to its knees;
   c. otherwise are dismissed.
5. The complaints of failure to make reasonable adjustments:
   a. succeed in respect of the adjustment of allowing the Claimant to remain on light duties;
   b. otherwise are dismissed.

REASONS

Introduction

The issues

1. A draft list of issues was agreed by the parties in advance of the hearing. On the first day of the hearing the tribunal asked a number of questions about the list of issues (e.g. the dates or date ranges of the matters complained of). It also noted that when setting out the complaints of failure to make reasonable adjustments the list did not pose the correct questions given the applicable statutory tests (as identified in ***Environment Agency v Rowan*** [2008] IRLR 20). The tribunal indicated that when determining the complaints it would apply the applicable statutory tests and that it would be helpful for the list of issues to reflect them. The tribunal invited the parties to refine the list of issues during the course of the reading day. A revised list was sent overnight.

2. The revised list was a big improvement on the first draft. However:

   2.1. The complaint of failure to make reasonable adjustments still did not identify the correct questions (it did not, for example, pose the question, '*did the PCP put the Claimant a substantial disadvantage compared to others who are not disabled?*' but referred instead to whether the Claimant suffered a detriment). However, it was sufficiently clear how what was written should be transposed to fit the correct questions.

   2.2. The list contained a number of errors in respect of dates. Most of the errors in the list of issues were identified over the course of the hearing by the tribunal and were corrected by consent. There was one exception to this where the Respondent did object to the Claimant's proposed correction of a particular date. On that matter we heard submissions and decided to allow the correction for reasons given at the time.

Parties' Agreed List of Issues

1. Disability; s6 Equality Act 2010 (EqA)

a. Did/does the Claimant have two physical impairments, namely a right shoulder condition and a jaw condition?

b. If so, did/does either or both of the impairments have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

c. If so, is that effect long term? In particular, when did it start and:

   i. has the impairment lasted for at least 12 months?
   ii. is or was the impairment likely to last at least 12 months or the rest of the Claimant's life, if less than 12 months?
   iii. *N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.*

d. Are any measures being taken to treat or correct the impairments? But for those measures would the impairments be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

The relevant time for assessing whether the Claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is from 24 October 2014 to 19 October 2017.

2. Harassment related to disability and/or race; s6 EqA

a. Did the Respondent engage in unwanted conduct as follows:

i. In June 2017 seeking information from a maxillofacial surgeon who had examined the Claimant, which information was beyond the scope of her remit.
ii. In May and July 2017, Station Manager Hunter asking the Claimant either to book sick or return to full operational duties.
iii. In August 2017, Station Manager Scrivener making derogatory comments about the Claimant during a telephone call with SM Button which was inadvertently heard by the Claimant [*to clarify: SM Scrivener telephoned the Claimant who did not answer. SM Scrivener then began talking to SM Button and that conversation was accidently recorded on the Claimant's answerphone*]. Later making a derogatory comment to Tyrone Elcock about the Claimant [*it was clarified in closing submissions that the impugned comments was saying that the Claimant was bringing the brigade to its knees*].
iv. In ~~December~~ May 2017 [*date corrected in course of hearing*] not allowing the Claimant to return to work when his GP confirmed that he was fit for light duties.

b. Was the conduct related to the Claimant's disability and/or race?

c. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

d. If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3. Direct discrimination because of race and/or disability; s 13 EqA

a. The Claimant describes his racial group as Black African. The disabilities relied upon are stated above in paragraph 1a.

b. Has the Respondent subjected the Claimant to the following treatment pursuant to s39 EqA, namely:

i. On or around 19 July 2015 asking the Claimant to carry out the task of installing smoke alarms, lifting heavy items and working in extreme and difficult conditions.
ii. Not being offered the option of redeployment between 16 June 2016 and the date of claim.
iii. Not being offered a phased return to work between July 2015 and May 2017 (excluding the period of sickness absence 3/16 – 10/16).
iv. In ~~December~~ May 2017 [*date corrected in course of hearing*] until the date of claim, not being allowed to return to work despite evidence from his GP that he was fit for light duties.

c. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on the following comparators: Crew Manager Michael Kelf, Station Manager ~~Mick Burrell~~ Mick Burges [the tribunal understands the reference to Mr Burrell to be an error and Mr Burges to be intended for reasons explained below], Firefighter Jakeman and Firefighter Nicola Jacques and/or hypothetical comparators.

d. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of any proven disability and/or his race?

e. If so, what is the Respondent 's explanation? Does it prove a non-discriminatory reason for any proven treatment?

4. Victimisation; s 27 EqA

a. Has the Claimant done a protected act? The protected act relied upon is giving evidence in the Employment Tribunal claim of his colleague Firefighter Sappleton in May 2016.

b. If there was a protected act, has the Respondent carried out any of the treatment set out below because the Claimant had done a protected act?

i. The Claimant relies upon being ostracised and singled out by the Respondent and being subjected to the treatment detailed at paragraphs 2,3 & 5 of this list.

5. Failure to make reasonable adjustments; ***ss20&21 EqA***

a. Did the Respondent impose the PCP on this Claimant in ~~April 2016~~ October 2014 [*date amended at outset of the hearing – this was the disputed amendment]* that all sick notes must be submitted on the same or almost the same day as the date of certificated absence?

i. Was the Claimant was denied sick pay because his Fit Notes were backdated despite his explanation that GP appointments were difficult to obtain at the right time? There were no gaps in his period of sickness absence
ii. Did this act to his detriment by reducing his pay?
iii. Was it a reasonable adjustment to allow some leeway for a disable employee or at least make enquires about the reasons for late submission before docking pay.

b. In August and October 2015 did the Respondent impose the PCP of requiring the Claimant to report for work at 9 am every morning?

i. Did the Claimant suffer the disadvantage of an increased driving time (at rush hour) that caused him pain and suffering?
ii. Was it a reasonable adjustment to allow the Claimant a later start time?
iii. Did the Respondent fail to make any required adjustment?

c. Did the Respondent impose the PCP of a requirement to carry out physically demanding work at above head height from 19 July 2015 to 24 March 2016 and October 2016 to May 2017?

   i. Did this cause the Claimant a detriment by causing him pain and suffering throughout his time on light duties (as detailed above)?
   ii. Did the Respondent fail to remove the Claimant from work that involved raising his arms above shoulder height as recommended by his GP and as an adjustment in respect of his condition during the dates detailed above?
   iii. Was it a reasonable adjustment to reallocate work such that the Claimant did not have to do work that involved raising his arms above shoulder level, for instance allowing him to do the presenting side of the smoke detector installation work as had been afforded to FF Kelf & Eminson?

d. From July 2015 until the date of the claim did the Respondent apply a PCP insofar as it had a rule that officers on altered work regimes could not be temporarily assigned?

   i. Did the Respondent fail to offer the Claimant the chance of redeployment on a temporary basis throughout the period detailed above?
   ii. Did this act to the Claimant's detriment as he was compelled to take sick leave with the resultant potential loss of wages between March – October 2016 [sic]?
   iii. Was it a reasonable adjustment to allow this disabled employee to be assigned to altered work regimes on a temporary basis?

e. Between July 2015 and date of claim (excluding periods of sickness absence 3/16 – 10/16 and May 17 to date of claim) did the Respondent apply the PCP of a rule that officers on altered work regimes could not be placed on a phased return to work scheme?

   i. Did this disadvantage the Claimant by compelling him to take sick leave with the resultant potential loss of wages between Jul 2015 and May 2017 (excluding period of sickness absence 3/16 – 10/16)?
   ii. In the period March 2016 to October 2016 and May 2017 to date of claim did the Respondent fail to offer the Claimant a phased return to work?
   iii. Was it a reasonable adjustment to allow this disabled employee on an altered work regime, a phased return to work.

f. Did the Respondent apply a PCP which was the rule that officers on altered work regimes could not be assigned to light duties for more than 6 months.

   i. Was the Claimant was not permitted to remain in light duties as part of his rehabilitation from injury as a result of this PCP?
   ii. Did this act to his detriment insofar as he was compelled to take sick leave with the resultant potential loss of wages?
   iii. Was it a reasonable adjustment to allow this disabled employee to remain on light duties for more than 6 months?
   iv. Did the Respondent allow the Claimant to remain on light duties for more than 6 months?

g. Did the Respondent apply a PCP that only allowed firefighters who were fully fit for work to return to work at all.

    i. Was the Claimant refused permission to return to work on 18 May 2017 [*agreed in closing submissions that this should be May 2017*] despite a report from his GP and Occupational Health stating that he was fit for light/amended duties?
    ii. Did this disadvantage the Claimant by a compelling him to take sick leave with the resultant potential loss of wages?
    iii. Was it a reasonable adjustment to allow the Claimant to return to work / remain on light duties for a further period whilst not being fully fit for operational firefighting duties?

6. **Aggravating Factors** [omitted – issues deferred to remedy stage]

7. **Time/limitation issues**

The claim form was presented on 19 October 2017. Accordingly and bearing in mind the effects of ACAS early conciliation, acts or omissions relied upon, may potentially be out of time, so that the tribunal may not have jurisdiction.

a. Does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
b. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

The hearing

3. *Documentary evidence before the tribunal*:

    3.1. main hearing bundle, electronic file running to 879 pages;
    3.2. a bundle comprising primarily medical records and reports, electronic file running to 511 pages;
    3.3. Claimant's supplementary bundle, electronic file running to 50 pages;
    3.4. on the sixth day of the hearing two further documents were admitted ultimately by consent. These were the pay scales for uniformed operational staff and the pay scales for the fire and rescue staff;
    3.5. on the seventh day of the hearing the following were admitted by consent:
        3.5.1. the Employment Tribunal's Judgment and Reasons in the matter of *Hurle v London Fire Commissioner*, case number 3202069/2019;
        3.5.2. the Employment Tribunal's Judgment and Reasons in the matter of *Sappleton v London Fire Commissioner*, case numbers 2302517/2017V & 2303650/2018/B.

4. *Witnesses.* The parties reported that the availability of some witnesses meant that the witnesses needed to be heard in an unconventional order making it impossible to hear either party's entire case before hearing the other party's case. The tribunal showed complete flexibility and simply allowed counsel to agree between themselves who would be called and when. The witnesses for each party were as follows:

Claimant

4.1. Ryan Palmer, firefighter employed by the Respondent (day two);
4.2. Nigel Cox, firefighter employed by the Respondent and Fire Brigade Union (FBU) representative (day two in two tranches – the first effort to hear from Mr Cox had to be aborted because he did not have sufficient technology with him to simultaneously join the hearing and look at the bundles in electronic form);
4.3. Glen Eminson, retired Watch Manager formerly employed by the Respondent (day two);
4.4. Pat Garner, retired Watch Manager formerly employed by the Respondent (day two);
4.5. Tyrone Elcock, firefighter employed by the Respondent (day three);
4.6. Claimant (days three and four);
4.7. Nicola Jacques, firefighter employed by the Respondent (statement admitted but did not give oral evidence – see further below);
4.8. Richard Lockwood, retired Station Manager formerly employed by the Respondent and formerly a Fire Brigade Union representative (on day two the Claimant's counsel withdrew his statement in light of some late disclosure from the Respondent);
4.9. Donovan Sappleton, former firefighter formerly employed by the Respondent (not called and his witness statement was withdrawn in the Claimant's closing submissions).

Respondent

4.10. Susan Banning, community safety team leader (day two);
4.11. Philip Morton, group manager borough commander (day three);
4.12. Graeme Hunter, Station Manager (day five);
4.13. David Lindridge, Group Manager (day six);
4.14. Robert Scrivener, Station Manager (day six);
4.15. Andrew Cross, HR Adviser (day six);
4.16. David Amis (not called, unwell, statement admitted without objection)

5. In closing submissions a dispute arose as to whether or not Nicola Jacques' witness statement should be admitted into the evidence. At the outset of the hearing, the tribunal had been invited to read all of the witness statements which included Ms Jacques'. It did so. At that point in time Mr Keen did not raise any issue about Ms Jacques' statement. In closing submissions, he said this was because he had overlooked the fact that Ms Jacques' statement was in the witness statement bundle. He said he had not been clear that the Claimant was seeking to rely on her evidence given that she was not being called. He also noted that Ms Von Vachter did not, at the conclusion of the case for the Claimant, indicate that she wished to rely additionally on the evidence of Ms Jacques.

6. Ms Von Vachter told the tribunal that the reason Ms Jacques did not give evidence was because a family member had been hospitalised and so she was not able to attend at the time at which it had been anticipated that she would give evidence. She had overlooked explicitly saying at the close of the Claimant's case that she relied upon Ms Jacques statement.

7. All in all we considered that it was in the interests of justice and in accordance with the overriding objective to admit Ms Jacques' evidence. It is limited in scope and we are able to mitigate any prejudice to the Respondent in Ms Jacques not been tendered for cross examination by taking that into account when assessing weight.

8. *CVP problems*:

8.1. The hearing was conducted by CVP. Participants in the hearing had frequent connection problems. It was therefore often necessary to pause the hearing and wait for them to be resolved. The tribunal was always happy to do this. Connection problems are par for the course in CVP hearings and at one time or another affect almost everyone.

Chronological narrative

9. The tribunal makes the following findings on the balance of probabilities.

Background

10. At all material times the Claimant was employed as a firefighter in the London Fire Brigade. His employment commenced in May 2007. Prior to the index accident described below the Claimant was a fit and strong man.

11. The role of firefighter is defined in a role map. It contains nine main competencies:

    11.1. to inform and educate your community to improve awareness of fire safety matters;
    11.2. to take responsibility for effective performance
    11.3. save and preserve endangered life
    11.4. resolve operational incidents
    11.5. protect the environment from the effects of had of hazardous materials
    11.6. support the effectiveness of operational response
    11.7. support the development of colleagues in the workplace
    11.8. contribute to safety solutions to minimise risks to your community
    11.9. drive manoeuvre and redeploy fire service vehicles

12. London Fire Brigade is a large organisation with an in-house HR functions and a legal team.

13. The Respondent has a suite of policies relating to ill-health, disability and sickness absence. This includes a *Managing Attendance Policy* which is accompanied by a *Managing Attendance Handbook* that gives practical guidance on the policy. Alongside this there is a *Sickness Capability Process*. This is a staged process in fairly typical form. At the final stage there are a number of possibilities including dismissal, ill-health retirement and redeployment.

14. Between April 2014 and April 2016, there was a general hiatus in progressing long-term sickness absence cases pending negotiations with the FBU. Thus people on long-term sick leave were not progressed through the *Sickness Capability Process* during that period of time.

RTA and first period of sickness absence: 26 February 2014 – 19 July 2015

15. On 26 February 2014 the Claimant was involved in a road traffic accident in the course of his work. He was a passenger in a fire appliance on route to a call-out. He suffered injuries to his elbow, shoulder and jaw.

16. The Claimant commenced a period of sickness absence due to these injuries.

17. The Claimant's jaw problems were significant enough for him to be referred to Mr Lyons, Consultant Maxillofacial Surgeon. He was seen in Mr Lyons' clinic on 13 March 2014. Mr Lyons recorded in his clinic letter of 20 March 2014 that the Claimant described a

whiplash injury that had affected the right temporomandibular joint. The Claimant had reported concern that he was getting a very loud click and that it was uncomfortable from the right temporomandibular joint. Mr Lyons reported that the Claimant was not getting any pain on opening his mouth and that it did not really affect him in any way as regards his diet. On examination Mr Lyons noted an abnormality which at that time he was sure was a reducible anterior dislocation caused by the whiplash on the right temporomandibular joint. He prescribed a course of physiotherapy.

18. The Claimant's shoulder problems were significant enough for him to be referred to Mr Francis Lam, Consultant Orthopaedic Surgeon. The Claimant first saw Mr Lam on 18 March 2014. Mr Lam was unable to reach a definitive view in the absence of further investigations including an MRI scan. The Claimant saw Mr Lam again on 25 March 2014 but he had not at that time had the results of his MRI scan. Mr Lam suspected a SLAP tear.

19. On 18 March 2014 a member of the Respondent 's HR team wrote to the Claimant and noted that he had an entitlement to sick pay of 360 days at the full rate of pay of which he had already used 21 days. His full sick pay was therefore due to come to an end on 21 February 2015.

20. The Claimant had an MRI scan and Dr George, Consultant Radiologist, reported on it in a letter dated 27 March 2014. Dr George identified degenerative changes in the ACJ with interior osteophytes and capsular distension consistent with low grade impingement. There were other abnormalities including an almost complete tear of the supraspinatus tendon and tendonitis of that tendon.

21. The Claimant was seen in clinic again by Mr Lam on 1 April 2014. Mr Lam noted that the MRI scan showed near complete tear of the supraspinatus tendon and said that this would account for the pain and weakness the Claimant was experiencing. He noted the Claimant was likely to require further treatment and the treatment options. He implied that in the long term the Claimant would require surgical repair of the rotator cuff which carried with it "*a long recovery afterwards and as a firefighter he is likely to be out of action for a long period of time".*

22. On 4 April 2014 the Claimant was seen in occupational health by physiotherapist Ms Jenny Chancellor. The report records that the Claimant was not fit for operational duties that he was likely to be fit for substantive role, that there was significant impairment present in manual handling, climbing, mobility and flexibility. Further the Claimant was not fit to drive. The Claimant was unfit for operational training towards returning to operational duties, unfit for outside activities such as fire safety inspections, community safety activities or advice or outreach work and unfit for office based training or administration including personal computer work. It was not possible to give a prognosis of return to work. Ms Chancellor recorded that there was a TMJ displacement.

23. The Claimant was seen in occupational health by Ms Chancellor again on 30 April 2014; the report was in similar terms to the preceding one although it did not mention the Claimant's jaw.

24. On 13 May 2014, in response to a request from occupational health Mr Lam gave a further account of the Claimant's injuries. He said that symptoms from the Claimant's right shoulder were presently managed conservatively but that it was likely that in the long term when the symptoms warranted he would benefit from surgical treatment. In the case of the right shoulder that would mean repairing the rotator cuff. This would mean a period of convalescence of at least 4 to 6 months.

25. The Claimant was seen in occupational health by Ms Chancellor again on 28 May 2014. The report noted that the Claimant was likely to require an operation prior to returning to operational duties and that post operation a six month convalescence period was normal prior to a return to an operational role. The report did not mention the Claimant's jaw.

26. On 16 June 2014 the Claimant's base posting at Purley fire station (White Watch) was removed and he was placed in the long-term sickness pool. This was in accordance with the *Non-availability for full duties posting procedure.*

27. The Claimant was seen in occupational health by Ms Chancellor again on 11 July 2014. The report continued to record that the Claimant was unfit for operational duties, that he was likely to be fit for a substantive role, and that he had significant impairments in respect of manual handling, climbing, mobility, flexibility and that he remained unfit to drive. He was unfit for operational training, outside activities, office based training and administration. The report noted that the Claimant had a partial tear in his rotator cuff and that he was likely to need surgery. The prognosis was stated as being 'unfit at this time' and that it was 'hard to predict when a return to work would be possible'.

28. In April 2014 fit note expired prior to him obtaining his next fit note. Shortly thereafter the Claimant obtained a further fit note. The GP backed dated it by a couple of weeks so that there was no gap in coverage. The fit note indicated that the Claimant was unfit for any work at this time.

29. On 18 July 2014, the Clamant wrote to his GP noting that his sick note had expired on 11 July 2014 and asking for an extension. The GP then produced a further sick note and backdated it to ensure there was no gap in coverage.

30. The Claimant was seen in occupational health again on 13 August 2014. The assessment of the Claimant's fitness for work and the extent of his impairments was much the same. The narrative recorded a TMJ displacement under the heading of background / current position progress. The report made clear that surgery was the plan for the right shoulder. It was not possible to give a prognosis for return to work and a review following the Claimant being seen by a consultant was required.

31. The Claimant was seen in occupational health again on 13 August 2014. The assessment of the Claimant's fitness for work and the extent of his impairments was much the same. The narrative recorded a TMJ displacement under the heading of 'background / current position progress.' The report made clear that surgery was the plan for the right shoulder. It was not possible to give a prognosis for return to work and a review following the Claimant being seen by a consultant was required.

32. The Claimant was seen in occupational health again on 26 September 2014 and in the same way the report noted TMJ displacement. The assessment of his fitness to work was unchanged. It was noted that he was likely to need surgery prior to returning to his full duties and that it would be 3 to 6 months until he was fit for full duties after surgery.

33. The Claimant was seen in occupational health again on the 31st October 2014. The assessment of his fitness to work and impairment was unchanged. No prognosis could be given at that time.

34. On 24 October 2014 the Respondent wrote to the Claimant in relation to sick pay. Although the Claimant's sickness absence had been covered by GP certificates there were two periods in respect of which the Claimant had seen his GP after the event and the GP had retrospectively certified the sickness. Firstly, a period in April 2014. Secondly a period in July 2014. The letter told the Claimant that the Respondent would recoup the

occupational sick pay paid in respect of these periods by deducting it from his wages in tranches in the coming months.

35. This was in accordance with paragraph 4.6 of the Respondent s' *Managing Attendance Policy* which provides as follows: *where an employee considers they are likely to remain unfit at the expiry of their current fit note should contact their GP surgery up to 7 days before the expiry of the fit note so that the GP appointment can be arranged before or on the day the fit note expires. Where the employee has taken these steps , but the GP surgery is unable to offer an appointment before the expiry of the certificate, the employee will contact their manager to advise of the steps they have taken on the day of the GP appointment which has been offered. In these circumstances the brigade will accept the first backdating of the fit notes otherwise fit note will normally be regarded as covering absence only from the date of issue of the certificate.*

36. At this time the Respondent 's HR team were analysing the workforce's sick notes in batches and the Claimant's sick notes were picked up in the course of this.

37. These deductions are the first act of disability discrimination complained of. This is therefore a good moment to make findings about the Claimant's ability to carry out normal day to day activities between the index accident and October 2014. We find as follows:

    37.1. The Claimant's normal day to day activities were majorly restricted due to his shoulder injury:

        37.1.1. He was unable to engage in fitness activities such as attending the gym which had previously been his hobby;
        37.1.2. He required assistance from his partner to shower on account of pain in the shoulder;
        37.1.3. He was unable to iron clothes without severe discomfort;
        37.1.4. He had difficulty getting dressed – initially finding it very difficult to do that at all, but easing over time;
        37.1.5. He was unable to groom his own hair: the Claimant wore his hair in locks that needed regular twisting;
        37.1.6. He was unable to do DIY such as: painting; decorating; home improvements; gardening.
        37.1.7. He was unable to clean the bath/shower, had difficulty with the washing up and was unable to do vacuuming.
        37.1.8. He had to stop basic car maintenance;
        37.1.9. He had to stop playing football with his son;
        37.1.10. He avoided socialising with friends;
        37.1.11. He found driving painful;
        37.1.12. He was unable to work at all or otherwise participate properly in professional life.

    37.2. The Claimant's normal day to day activities were also significantly restricted by his jaw problem, though these problems were yet to peak:

        37.2.1. His jaw frequently clicked and felt misaligned. He would have to manually realign it and it would make a horrible crunching noise that was loud enough to draw attention. He found this not only extremely painful but also embarrassing so he withdrew from normal social activities and avoided going out and about. It also deterred him from laughing because that could trigger the problem;

37.2.2. He was unable to be intimate with his partner for fear of jaw pain that might cause;

37.2.3. His diet began to be affected, we find, shortly after his initial consultation with Mr Lyons (at which time he had been able to eat normally). He had to start avoiding hard foods such as apples.

38. On 4 November 2014, the Claimant's GP wrote to the Respondent and explained that the reason why the Claimant's sick notes had been backdated was because he had had difficulty in obtaining an appointment.

39. The Respondent accepted this explanation and the sick pay position was rectified and the sums deducted were repaid to the Claimant.

40. The Claimant had shoulder surgery on 8 December 2014. The surgery included arthroscopic Superior Labarum Anterior and Posterior (SLAP) repair, subacromial decompression and tenosynovectonmy. The Claimant's dominant right arm was placed in a sling which he was required to wear until March 2015. We find that this means he had very limited use of his dominant right arm and hand on account of the sling for three months ending shortly after the year anniversary of accident. The operation included inserting three pins into the shoulder to hold the surgery in place.

41. On 19 December 2014, the Claimant was seen in occupational health again by Ms Chancellor. The assessment of his fitness for work and impairments was unchanged. Under the heading 'background/current position', TMJ displacement was noted. The report noted that the Claimant currently had stitches in situ and was in the sling. In terms of prognosis the report noted that no physio assessment had been possible due to the sling and stitches but that normally a SLAP and shoulder repair required a period of 4 to 8 months before return to full activity.

42. The Claimant underwent a course of physiotherapy and it is likely that his symptoms would have been even worse had he not done that.

43. On 21 January 2015, the Claimant was told that he was to be placed on half pay from 21 February 2015 as his full sick pay had run out. The Claimant raised a grievance about that by letter dated 26 January 2015. In a grievance outcome letter dated 11 February 2015 the Claimant's pay was extended for a further month until 20 March 2015. Thereafter he moved on to half pay.

44. On 21 January 2015, the Claimant underwent an Initial Needs Assessment. It appears that this was carried out for the purposes of personal injury litigation related to the index accident. The report records that the Claimant thought he was unlikely to return to his substantive role. It also records that he felt he was limited to 30% of his usual power in the right arm and that he avoided lifting anything beyond the weight of a chemist bag.

45. On 29 January 2015, the Claimant was seen in occupational health again. TMJ displacement was noted under the heading of background/current position progress. The assessment of the Claimant's fitness for work and impairments was unchanged. He was to remain signed off until consultant review with an aim for FRP (firefighters rehabilitation programme) at the end of March as long as no surgery to the elbow was required (the Claimant suffered an elbow injury in the RTA but he has not relied on that in any way in these proceedings).

46. The Claimant was seen in clinic by Mr Lam on 10 March 2015. The clinic letter records that his symptoms were significantly improved following the operation but that he

continued to have discomfort at the end of the range of passive abduction and external rotation. He was advised to mobilise the shoulder as much as possible and told to return to weight training at the gym involving the shoulder. Mr Lam said that if the Claimant had made a full recovery in three month's time he didn't need to see him again routinely.

47. On 12 March 2015, Claimant was seen in occupational health again and under the heading of 'background/current position/progress' it was noted that TMJ displacement was ongoing. The assessment of the Claimant's fitness for work and impairment was unchanged. The advice was that the aim was for the Claimant to be fit for light duties within the next eight weeks and that it was hoped that he would improve sufficiently that he could be a candidate for the firefighters rehabilitation programme in due course. It remained the expectation that in due course he would be able to return to full duties.

48. On 6 May 2015, the Claimant was seen by occupational health again. The view as to his fitness for work remained unchanged, however there was a change to the assessment of his impairments. It was considered that he did have significant impairment of manual handling and climbing but that he did not have significant impairment of mobility or flexibility. There was however a significant impairment of "psychological matters". The plan was for the Claimant to be reviewed after seeing his consultant again with an aim of undertaking FRP in June 2015 with a return to full duties after that. There was no reference to his jaw.

49. The Claimant was seen by Mr Lam again on 8 June 2015. Mr Lam recorded that the Claimant was now six months post-surgery and that he had been shoulder pressing approximately 30 kg in the gym. (This is a fairly significant amount of weight for most people but was well down on the Claimant's pre-accident abilities). However, the Claimant felt sharp pain in the shoulder afterwards. Clinically he had a full range of movement and excellent strength. On examination the pain was limited to mild discomfort at the end of the range of external rotation which Mr Lam thought was more in keeping with mild post-operative stiffness than sinister soft tissue injury. Mr Lam considered that given the excellent movement and strength the Claimant had not suffered a major injury from the recent incident in the gym.

50. On 11 June 2015 Claimant was seen in occupational health. The assessment as to his fitness for work remained unchanged. However the opinion in relation to significant impairment had changed. It was now said that he did not have significant impairment of manual handling, climbing, mobility, flexibility or fine dexterity. It was noted that he was signed off by his consultant until 15 July 2015 and that he was due to join the FRP thereafter with an aim of returning to operational training. On this occasion there was not a reference to his jaw.

51. A Fit Note dated 25 July 2017, indicated that the Claimant may be fit for work with amended duties and altered hours in the period 18 July 2015 to 28 August 2015. The note recorded "*Rotator cuff shoulder syndrome and allied disorders*".

52. The next complaints of discrimination occurred from July 2015 onwards so it is necessary to update the impact of the Claimant's impairments on his normal day to day activities following the passage of time:

    52.1. The Claimant's normal day to day activities were majorly restricted due to his shoulder injury:

        52.1.1. Between October 2014 and the operation in December 2014 there was no change to the impact of the condition on normal day to day activities;

52.1.2. Following the surgery there must have been an initial period in which the Claimant was unable to do virtually anything with his right arm.

52.1.3. The Claimant's right dominant arm was in a sling from December 2014 to March 2015. During that time he must have had very little use of his right arm with a profound impact on his ability to carry out normal day to day activities like eating, washing, dressing, shopping, house work and more.

52.1.4. Driving remained painful.

52.1.5. From March 2015 onwards the Claimant began to feel the benefits of the surgery and his shoulder symptoms improved. However, he remained significantly restricted:

52.1.5.1. He returned to the gym but was unable to lift anything like he used to be able to lift. When he shoulder pressed 30kg he experienced sharp pain which was a deterrent to gym work;

52.1.5.2. He experienced significant pain in the ordinary course of going about day to day activities like washing, dressing and self-grooming;

52.1.5.3. He remained unfit for any work, even light duties and thus entirely unable to participate in professional life.

52.2. We find that the Claimant's normal day to day activities were also significantly restricted by his jaw problem, though these problems were still yet to peak and were at the same level as in October 2014 above.

Light duties: 20 July 2015 - 25 March 2016

53. On 20 July 2015 the Claimant returned to work on light duties (and returned to full pay). He was inducted into light duties at Lewisham fire station.

54. In the London Fire Brigade the term 'light duties' has a particular meaning. It means carrying out work in the light duties team. The light duties team carries out Community Fire Safety work (this work is not carried out exclusively by the Light Duties team and operational firefighters do some such work too). The principal activity is to carry out home fire safety visits (HFSVs). This involves attending the homes of members of the public and fitting smoke alarms. Usually this work is done in pairs. One firefighter fits a smoke alarm by gluing it to the ceiling standing on a stepladder or if one is not available by standing on boxes. The other firefighter talks to the home occupant and gives fire safety advice. This is regarded in the fire service as important work.

55. The light duties team operates in broadly the following way. Everyone involved in the team meets in the morning at wherever the team is based. They prepare for the day, including by loading up the car or minibus with smoke alarms and leaflets. They then head out in the cars/minibus to whatever addresses are being visited that day. The smoke alarms are kept in boxes of 20. Each box weighs about 4 kg.

56. The firefighters assigned to the light duties team are there because they are not fit for operational duties because of the physical or mental injury or both. The range of injuries firefighters may have is obviously very broad. Only some of the firefighters in the light duties team are fit to drive, and those who are not fit to drive cannot get to members of the public's homes unless they are driven by others.

57. The Claimant's light duties team was managed by Ms Susan Banning.

58. There was some dispute between the parties as to whether in the course of carrying out light duties the Claimant was required to undertake heavy lifting and/or work in extreme difficult conditions.

59. In our view, the light duties team did not engage in heavy lifting because even the boxes of 20 smoke alarms were only about 4 kg in weight and there was no evidence of a requirement to lift anything heavier. However, fixing a smoke alarm to a ceiling does involve working at height and working overhead with the arms above the shoulders.

60. The conditions that the Claimant and others in the light duties team worked in were whatever conditions presented themselves when they turned up at the homes of members of the public. There was an occasion on which a particular home that the Claimant serviced was highly unsanitary - the resident was a hoarder. We find that the conditions would only be extreme in exceptional cases but that it would not be unusual for the conditions to be difficult.

61. The Claimant was seen in Occupational Health again on 6 August 2015. The assessment of his fitness for work was that he was fit for light duties. The assessment of whether he had significant impairments was as per the previous appointment. The report noted that the Claimant had an issue with his TMJ that was ongoing but that it should not affect his return to an operational role. In terms of prognosis this was subject to information from an independent specialist.

62. The Claimant was seen by occupational health again on 24 September 2015, this time by Ms Sterling, physiotherapist. He was assessed as being fit for light duties. As regards significant impairment the only box that was ticked 'yes' was 'other'. The body of the report noted that he was waiting MRI scan for his jaw and that he thought that this could affect his ability to work in an operational role. He remained fit for light duties at present and his fitness for full duties depended on the outcome of specialist reports.

63. The Claimant was seen by Mr Lyons again in his clinic on 23 October 2015. Mr Lyons records in his clinic letter of 23 October 2015 that the Claimant reported that in the intervening 18 month period he had had frequent headaches and woken up at night with them, that he found he was unable to bite anything hard and that doing so engendered a clicking noise and an unusual sensation in the jaw. He further recorded that the Claimant said he was aware of grinding and that he found wearing breathing apparatus difficult. He also noted that symptoms were getting slightly worse and that the Claimant felt his jaw locked at times. On examination there was an obvious click from the right temporomandibular joints and possibly one from the left. Mr Lyons opined that the Claimant's problems were due to anterior dislocation on the right side and he requested an MRI scan. He indicated that the Claimant may come to surgery but in the meantime he would trial soft bite raiser before considering further. We pause to note that in our view this letter corroborates (and is part of the reason for) our findings that the Claimant did have significant jaw problems from the date of the index accident onwards notwithstanding that he did not see Mr Lyons between March 2014 and October 2015.

64. The Claimant underwent an MRI scan of the jaw on 10 November 2015. The consultant radiologist who reported on the scan considered that the findings were normal.

65. The Claimant was seen in occupational health on 19 November 2015. He was considered to be fit for light duties. The report recorded that the TMJ had ongoing alignment issues and that the Claimant felt it could affect operational duties when wearing breathing apparatus. It noted that advice from Mr Lyons would be required prior

to the Claimant returning to full duties. The prognosis for return to full duties remained unclear and subject to specialist advice.

66. A Fit Note dated 14 January 2016, indicated that the Claimant may be fit for work with amended duties and altered hours in the period 14 January 2016 to 14 March 2016. The note recorded "*locked temporomandibular joint bilaterally*".

67. The Claimant saw Mr Lyons on 27 January 2016. He reported to Mr Lyons that the sensations around his right joints still disturbed sleep at night and found his joint would lock in a right-sided lateral position and that it was sometimes sticking in that position. He said that he was aware of the click during maximum opening from the right side, he felt that his lower jaw had locked open on occasion and was getting some discomfort from the right side. On examination there was mild-to-moderate muscle spasm in the posterior digastric and right masseter muscle. Mr Lyons opined that the Claimant had a fairly mild temporomandibular joint dysfunction and said that he would provide him with the bite raising appliance and refer him for cognitive behavioural therapy as he suspected that the Claimant may have subconsciously developed some bad habits and patterns of jaw movement.

68. The Claimant was seen by Ms Chancellor again in occupational health on 20 January 2016. He was considered to be fit for light duties. The only significant impairment box that was checked was 'other'. Ms Chancellor noted that he had ongoing issues with his temporomandibular joint. She also noted that his GP had suggested amended duties as sleep was affected by his jaw and that he should discuss this with the light duties team. The prognosis for return to full duties remained unclear.

69. There is a dispute between the parties as to whether the Claimant had any significant difficulties in carrying out light duties between 20th of July 2015 and 25th of March 2016 on account of his injuries. We find that he did not.

70. The occupational health evidence was that, while the Claimant certainly had ongoing shoulder problems, he was fit for light duties. Further there is no record in this period of the Claimant reporting to occupational health any pain or difficulty in conducting light duties. We think that if the Claimant was struggling with light duties he would have told occupational health this and occupational health would have recorded that in their reports. Indeed this is exactly what happened later on in the chronology (see below).

71. It important to understand that the occupational health provider, HML, was by this stage a long-standing provider to London Fire Brigade that had specific knowledge and training in respect of the demands of both the firefighting role and the light duties role. Thus when occupational health advised the Claimant was fit for light duties this meant that in the advisor's opinion he was able to fit and install smoke alarms without any material problem (save if the contrary was indicated by the advisor – as it was later in the chronology).

72. There was a further dispute as to the Claimant's working hours and the extent to which they were altered. The Claimant's case broadly was that his fit notes indicated that he was fit to work with amended hours and amended duties. He contends that he raised this with Ms Banning twice but that his hours were not altered.

73. Ms Banning's evidence is that she did speak to the Claimant about these matters and that she did adjust his start times. She says that the normal start time was 8 am, and that she agreed with the Claimant that he could arrive at 9.30 am. He wanted to arrive at 10 am, but she refused to allow this because the Claimant was one of the drivers. If he did

not arrive until 10 am that would delay one of the vehicles leaving to carry out the home fire safety visits for too long, reducing the number of home fire safety visits carried out to an unacceptably low level.

74. The tribunal split in its findings on this issue:

    74.1. The minority (Ms Barratt) finds that the Claimant worked the same hours as everybody else. This is on the basis that at paragraph 30 of his witness statement the Claimant refers to working full days. The induction letter sent to the Claimant on 25 July 2015 was in standard form and did not make any special provision in respect of the Claimants working hours. Thereafter, there was nothing in writing indicating any change.

    74.2. The majority of the tribunal (Employment Judge Dyal and Ms Murphy) accepts Ms Banning's evidence. In brief that is because it considers Ms Banning's evidence to be the best evidence before the tribunal on the matter. Her evidence was clear and precise. In contrast the Claimant's evidence was rather vague. He deals with the matter at paragraph 30 of his witness statement where he certainly complains that his working day was too long. However he does not actually say what hours he was required to work albeit that he does refer to working a full day. The majority do not find the absence of a written document notifying the Claimant that he could come into work at 9.30 am to be very significant. Matters of that sort are often dealt with informally.

75. On 2 February 2016, the Claimant saw FF Sappleton distressed in the workplace. FF Sappleton reported to the Claimant that he was being harassed by management. The Claimant completed a form 10 report. A form 10 report is simply a way of recording an incident and drawing it to the attention of management.

76. The Claimant says he was asked by Ms Banning why he had sent the Form 10. Banning denies that. On this matter the tribunal prefers the Claimant's evidence. We considered his evidence to be clear and precise and to have a ring of truth about it.

Light duties ends, return to sick leave: 25 March 2016 – 2 October 2016

77. On 24 March 2016 the Claimant was signed off work by his GP for a period of two months with a locked temporomandibular joint.

78. In April 2016, the hiatus on managing long term sickness cases ended and the Respondent began to manage such cases again.

79. On 14 April 2016, the Respondent sent the Claimant the letter outlining his sick pay entitlement. The letter recorded that his sick leave was "*not due to service.*"

80. The classification of sick leave as due/not due to service is important for various reasons including that it affects sick pay entitlement and entitlements in respect of other benefits. It is also important to firefighters, including the Claimant, that if they are injured in the line of duty this is acknowledged by the employer. This seems only fair. After all, firefighters risk their safety, indeed their lives, to respond to emergencies.

81. Mr Cross explained that each time a person commences a period of sickness absence it is automatically classified as "not due to service". It is only reclassified as due to service if there is a request for that to happen and the request is accepted in accordance with the *Classification of due to service sickness absence policy*. This is because it would be too labour intensive to investigate whether or not each firefighter's absence was due to

service each time there is a period of absence. We accept that evidence (but that is not to say we approve of the practice. More neutral wording could be used that explains to the firefighter that the absence is automatically classified as not due to service even though it may be due to service - rather than simply asserting it is not due to service. This may help avoid causing offence.)

82. Mr Lyons saw the Claimant again in clinic on 22 April 2016. He recorded that the Claimant's symptoms of having difficulty locating his mandible and a spasm around mastication muscles did not seem to have abated. On examination there was no tenderness to feel in the mastication muscles on either side but there was obviously a loud click.

83. The Claimant was seen again in occupational health on 25 April 2016. This time he was seen by Dr Fiona Isherwood. Her opinion was that he was not fit for operational duties and not likely to be fit for a substantive role. Dr Isherwood considered the Claimant was unfit for any work at this time. She recorded that his current main problem was that he had constant jaw locking 5 to 6 times per day and he now had difficulty with pain and sleep and was on regular ibuprofen. She advised the Claimant to consider amitriptyline and increase painkillers. She noted he was currently waiting for a mouthguard to be fitted and to have CBT. The section which deals with prognosis is poorly printed in the tribunal's copy and cannot be read.

84. On 17 May 2016 the Claimant was signed off from work until 5 July 2016 by his GP with locked temporomandibular joint.

85. The Claimant saw Mr Lyons again on 24 May 2016 and was supplied with a soft bite raising appliance. He said that he suspected the Claimant would initially wear the appliance at night and that he might find it helpful to use 24/7. He suspected the Claimant would need it for at least one month, more likely three but that some people needed it for 6 to 12 months.

86. In the event the Claimant wore the bite raising appliance for at least twelve hours a day as he found it helpful. When he wore it his speech was virtually incomprehensible. It therefore had a significant impact on his ability to converse with people.

87. On 1 June 2016, the Claimant was invited to an attendance and support meeting ("ASM") and given the right to be accompanied.

88. On 16 June 2016, the Claimant attended the ASM which was chaired by SM Scrivener assisted by Mr Cross.

89. After the meeting an outcome letter dated 24 June 2016 was sent to the Claimant. It included the following passage: *"Outcome: we agreed that your attendance will be monitored over the next three months and we would work together to try to achieve a return to work by 16 September 2016"* it also read *"during the meeting I explained the need for regular attendance to ensure the London Fire Brigade is able to plan and coordinate work to ensure effective service delivery. Employees unable to achieve reasonable attendance targets will be supported and managed through the brigade's managing attendance policy."*

90. There was some dispute between the parties as to whether the outcome letter from the meeting entirely reflected the discussion that have been had at the meeting. We do not ultimately think that anything turns on this. However, we think it likely that the messaging in the letter is much more formal and direct than was the case at the meeting and that the attendance target was probably not clearly explained at the meeting.

91. On 1 July 2016 Claimant was signed off by his GP again because of a locked temporomandibular joint until 2 September 2016.

92. The Claimant saw Mr Lyons again in clinic on 8 July 2016. Mr Lyons noted that the Claimant seemed to have improved and that he felt less discomfort and less clicking. However, he noted that the Claimant's jaw was still dislocating on the right side and that he needed to use masticating movements to put this back into place rather than using his hands. Mr Lyons wanted to see the Claimant again in three month's time to see if the dislocation was still a problem. He noted that there was a possibility that the minor surgical procedure may be needed such as an eminectomy.

93. On 20 July 2016, the Claimant by Dr Isherwood. Dr Isherwood's advice was the Claimant was not fit for operational duties, not likely to be fit for a substantive role and not fit for any work at the time. She recorded that the Claimant had had a difficult few months, that he had ongoing TMJ disruption and in the last month, had a mouthguard put in. She noted that on examination the jaw appeared more stable but still dislocating when fully extended. She noted that the Claimant still reported disrupted sleep and pain in the jaw and that the jaw misaligned five or six times a day. She indicated that jaw surgery may be required and she suggested the Claimant see his GP for a prescription of amitriptyline to assist with sleep.

94. Claimant was signed off by his GP again on 1 September 2016 until 3 October 2016 with locked temporomandibular joint and the use of a mouthguard.

95. It is time to update the findings on the impact of the Claimant's impairments on his normal day to day activities to cover this period (25 March 2016 – 2 October 2016):

    95.1. The Claimant's shoulder was relatively well in this period. It is clear that his shoulder problems had not completely resolved but they were now at a low level.

    95.2. The Claimant's jaw problems, however, peaked:

        95.2.1. The Claimant was in very frequent pain. His jaw would click and feel like it had misaligned several times per day. This deterred him from normal conversation, social activity and intimacy with his partner.
        95.2.2. The Claimant's speech was significantly impaired by wearing the bite appliance though it was entirely reasonable for him to wear it. This meant he could not engage in conversation in a normal or effective way while wearing the appliance, which he did for at least 12 hours per day, more initially;
        95.2.3. The Claimant's pain levels were sufficiently high that they disturbed his ability to go about normal day to day activities despite regular use of painkillers. No doubt the pain would have been worse in the absence of painkillers;
        95.2.4. The Claimant was unable to work at all, and therefore participate in professional life.

Return to light duties on 4 October 2016 – May 2017

96. A Fit Note dated 3 October 2016, indicated that the Claimant may be fit for work with amended duties and altered hours in the period 3 October 2016 to 5 December 2016. The note recorded "*locked temporomandibular joint*".

97. The Claimant returned to work on light duties on 4 October 2016. His base moved from Lewisham to Greenwich along with the rest of the light duties team. This added a couple of miles to the Claimant's journey to work. We find that the Claimant's working hours did not change at this time so the tribunal remains split on what those working hours were.

98. The Claimant was seen by occupational health on 25 October 2016. Dr Isherwood reported that the Claimant was not fit for operational duties, was likely to be fit for substantive role and that it was not the case that he was unfit for any work. The narrative indicated that the Claimant had been using a mouthguard since July, that he found it helpful to manage his condition and that he had reduced the amount that he was wearing it to 12 hours a day. He had reported better sleep and no difficulty with eating. The report did not tick yes to any of the significant impairment boxes. In response to management questions the report indicated that the Claimant was likely to be covered by the DDA (an imperfect but obvious reference to being a disabled person within the meaning of the Equality Act 2010). This was the first time OH had been asked to opine on disability status. The report also indicated that the prognosis was dependent on specialist advice.

99. A functional activity list was produced on this occasion. In the main it identified that the Claimant had no impairment in respect of the wide range of matters that were considered. This included various aspects of mobility including reaching and lifting. It identified a slight impairment with carrying, indicating that the Claimant was unsure about heavy weights. However, it noted that he could carry items of between 5-10 kg for at least 50m. It specifically indicated that there were no difficulties putting smoke alarms up on light duties. The report stated that there was no impairment of communication. However, it is notable that no consideration was given to whether the Claimant's ability to communicate was impaired by wearing the bite appliance. In our view, it was.

100. On 31 October 2016, the Claimant attended a meeting to represent FF Sappleton. The purpose of the meeting was to discuss the treatment of FF Sappleton, which was by then was the subject of employment tribunal proceedings. At the meeting the Claimant gave evidence which was subsequently used in employment tribunal proceedings. In the meeting the Claimant was asked by an HR officer if he was aware that FF Sappleton wanted to drop the case against the Respondent. He was also asked whether the case was for monetary gain. The Claimant expressed the view that Mr Sappleton was simply the victim of discriminatory practices.

101. On 2 November 2016 the Claimant attended a further ASM meeting. The meeting was chaired by SM Scrivener who was advised by Mr Cross.

102. By an undated outcome letter sent to the Claimant on 16 November 2016, Mr Scrivener wrote to the Claimant, noted that he had been on long-term sickness from 26 February 2014 to 18 July 2015, followed by a period of light duties from 19 July 2015 to 24 March 2016 and that he had been absent from on long-term sick leave from 25 March 2016 to 3 October 2016 and thereafter on light duties. He noted that the occupational health advice was that he was currently fit for light duties and that the Claimant's GP had suggested amended duties until December 2016. He noted that the Claimant continued to wear his mouthguard for 12 hours a day and that there was still some jaw dislocation.

103. The letter said that the Claimant had not been able to meet the targets set at the attendance support meeting of 16 June 2016 as he had not been able to return to work doing his full duties and therefore that he was moving to the first stage of the sickness capability process. At this point the management of the Claimant's absence passed to SM Hunter.

104. During the course of 2016, the Claimant would pop into Wallington Fire Station from time to time to see Mr Garner. We find that at some point in 2016, Mr Hunter said to Mr Garner words to the effect of "*we don't want people like that around here*" in reference to the Claimant.

105. Mr Hunter denies making that comment. However, we prefer Mr Garner's evidence::

105.1. Mr Garner's evidence was credible, clear and detailed (save as to the date of the comment). Further, Mr Garner is retired from the fire service, and we saw little reason why he would attend to give false evidence. He refused to be drawn or to speculate about what Mr Hunter meant by "*people like that*" which we think shows that he was properly limiting himself to matters within his own knowledge rather than using the proceedings to 'grind an axe'. His refusal to impute an improper (or any) motive to Mr Hunter was inconsistent with the possibility that he had attended to give false evidence helpful to the Claimant and harmful to the Respondent.

105.2. On the other hand we found Mr Hunter to be a less impressive witness. His recollection of events was not very good. Moreover in the course of giving his evidence he gave internally inconsistent answers initially answering in the affirmative in respect of a particular topic and a little later answering in the negative in respect of the self-same topic apparently without realising. One particular issue in respect of which Mr Hunter's evidence was highly implausible, and undermined our view of his evidence more generally, was his stated interpretation of the occupational health reports such as that of 25 October 2016. The occupational health doctor was asked "*would FF Modupe's current medical condition be considered a disability?*". The answer was "*Yes this is likely to fall under the DDA however this is a legal not medical decision*". Mr Hunter's position was that occupational health were advising that at some point in the future the Claimant might become a disabled person, but that the occupational health advice did not provide any adequate basis to consider the Claimant to be a disabled person at the time of the report. We consider this to be a deeply implausible interpretation of the occupational health advice and do not accept that this is what was in Mr Hunter's mind at the time. Mr Cross was advising Mr Hunter at the material times. Mr Cross was clear in his evidence to the tribunal that the occupational health advice was that the Claimant was likely to be a disabled person within the meaning of the Equality Act 2010 at the time of the advice. We have no doubt he advised Mr Hunter of this contemporaneously.

106. On 1 December 2016 the Claimant attended the first stage capability meeting. The Claimant whether he could be transferred to a different role or redeployed. At the meeting SM Hunter's position was that the Claimant could not be transferred to an alternative role as a "long-term temporary adjustment". SM Hunter's position was that a transfer to an alternative role could only be done on a permanent basis and then only if there was no prospect of a return to the role of a firefighter at all or alternatively within a reasonable period.

107. The Claimant's position at the meeting was that he fell outside the Capability Policy because he had returned to work on light duties which equated to a substantive role. He says that paragraph 2.1 of the Sickness capability procedure supports his position and that Mr Andrew Cross agreed to this at the meeting. The policy provides as follows paragraph 2.1*: this capability procedure will be used for managing absence in the case of both short term persistent absence and long-term absence which despite previous support of action has failed to either improve employees attendance record, achieve a return to work or a return to full substantive duties.*

108. The Claimant' position that returning to work on light duties is a return to full substantive duties is untenable - it is obvious that working on light duties is not a return to full substantive duties. The Claimant's full substantive duties were the role of a firefighter defined in the role map (above). Working on light duties fulfilled very few of the core duties of that role. It is inherently implausible that Mr Cross would have agreed with the Claimant that light duties amounted to a return to substantive role and we do not accept that he did.

109. The Claimant says that at the meeting Mr Cross told him that the purpose of the first stage of the capability process was just monitoring to ensure that progress was being made. We think it is likely that Mr Cross referred to monitoring progress, but unlikely that he said that was *all* the first stage of the capability process involved. In any event it is clear from the policy and indeed the outcome letter that followed the meeting that that is not all that it involved. It can also involve, and did in this case involve, setting targets.

110. An outcome letter dated 5 December 2016 from SM Hunter recorded: "*we also discussed that there were no provisions for long term temporary adjustments to be redeployed into another role during recovery no such role exist for firefighters. However, a permanent posting can be considered when it is considered that either there is no prospect of return to work with such a return to work is considered to be an unreasonable amount of time."* The letter indicated that work in light duties was unsustainable in the long term and that the Claimant's absence from his substantive role had an adverse effect on service delivery.

111. The Claimant responded to that letter with his own letter dated the 27 December 2016. The Claimant did not agree this absence from this work was adversely affecting service delivery on the basis that he had complied with the procedures during his period of ill-health and light duties. He took umbrage at the suggestion that his current predicament could not be sustained in the longer term. He did not accept that he had been supported throughout his absence. He also noted that contrary to the suggestion that there were no provisions for a long term temporary adjustment and the Respondent's position that no such roles exist for firefighters, Mr Cross had not totally ruled that out.

112. The Claimant saw Mr Lyons again on 21 December 2016. Mr Lyons noted that the Claimant had been managing well with his bite raising appliance, indeed that had worn it so often that he had destroyed it. He recorded the Claimant's account that he was still very much aware of clicking on dislocation on the right temporomandibular joints and he also recorded that the Claimant experienced slight discomfort on maximum opening but otherwise no discomfort during eating or any other manoeuvres. He noted on examination the Claimant's mouth opening was "superb", however he also noted that there was a lot of clicking on maximum opening on the right side. He said that he wanted to see the Claimant in the New Year and that the Claimant was making slow progress. He did not think surgery was in any way imminent.

113. In late December 2016 the Claimant attended a meeting to represent FF Sappleton during his phased return to work. He says that Mr Frame refused him the opportunity to offer input during the meeting and we accept that in the absence of any evidence to the contrary. Between January and April 2017 the Claimant attended several further hearings representing FF Sappleton regarding his grievances and complaints.

114. The Claimant was seen in clinic again by Mr Lyons on 8 February 2017. He recorded that the Claimant was still getting discomfort from the right temporomandibular area and was aware of a click. He noted that on examination mouth opening was reduced to 42 mm and that he could palpate a soft click, that there was little muscle tenderness and

that the soft bite raising appliance was fitted very nicely. Mr Lyons decided that he did not need to see the Claimant again unless this he had further problems. He said that he hoped that by using the appliance nocturnally the Claimant would get considerable relief with the passage of time and hopefully the temporomandibular joint problems would resolve.

115. On 6 February 2017, the Claimant submitted a fit note indicating that he was fit for work with altered duties. This related entirely to jaw issues and said nothing about shoulder problems.

116. The Claimant attended an interim ASM on 22 February 2017. The meeting was conducted by SM Hunter with Mr Cross in support. The Claimant's position at that meeting was that he was fit for light duties. This is confirmed by Mr Elcock at paragraph 5 of his statement. There is no suggestion that there were problems with the shoulder affecting the ability to fit smoke alarms. The outcome letter from that meeting implies that there was no suggestion at the meeting that the Claimant's shoulder was a problem for fitting smoke alarms. At the meeting Mr Cross advised Mr Hunter that redeployment could only be considered if the Claimant was unfit for a substantive role or that he would not be fit to return to his substantive role within a reasonable timescale.

117. Mr Hunter wrote to the Claimant by letter dated 14 March 2017 with an outcome of the interim ASM. He noted that the Claimant had not been able to make a return to work on full duties and set out the Claimant's history of absence on light duties. He recorded that the Claimant had told him that he had ongoing issues with his jaw including clicking and locking, that the Claimant told him his jaw locked at least four times a day and that it required a combined effort of both hands to straighten. He also recorded that the Claimant had been emphatic that this condition and locking of his jaw would make it extremely difficult or impossible to manage safely wearing breathing apparatus facemask in an irrespirable atmosphere. Finally, the letter recorded that the Claimant's best hope was that his jaw would have recovered by April. The outcome of the meeting was that Mr Hunter would write to the Claimant with a date for a further meeting in April 2017 and that they may move to the second stage of the sickness capability process at that point.

118. The Claimant did disagree with the content of outcome letter with a letter of his own dated 21 March 2017. In disagreeing with Mr Hunter's outcome letter the Claimant did not suggest or imply that it had omitted to make reference to fitting smoke alarms on account of shoulder pain or at all.

119. On 30 March 2017, the Claimant was seen by Dr Isherwood again. She reported that he was not fit for operational duties, was likely to be fit for substantive role, and that the Claimant was not unfit for any work. Under the significant impairments section she ticked 'no' save in the case of 'psychological'. She recorded that the Claimant had been 'Light Duties' for the last 6 months, putting up smoke alarms, but he had developed shoulder pains in the last 3 months. She said that the Claimant was taking regular pain relief as a result. The Claimant was having difficulty sleeping. She recorded that the Claimant had been signed off by his GP until mid-May due to concerns about TMJ instability and wearing a breathing apparatus mask. She indicated that she continued to await a report from Mr Lyons, that the report had been requested in December 2016 and had been chased. She stated that the Claimant could continue in light duties but that his role should be one that avoided raising his right arm over 90 degrees. In terms of prognosis her view was that the Claimant remained unfit for full duties with further information required regarding his TMJ.

120. In April 2017 the Claimant attended two hearings for firefighter Sappleton. There was a degree of tension at the meetings, and at one of them there was a robust discussion/disagreement about whether or not it was appropriate for Mr Morton to be both Mr Sappleton's welfare officer and ASM chair.

121. On 13 April 2017, the Claimant was seen again in OH this time by Ms Stirling, physiotherapist. She considered the Claimant unfit for operational duties, likely to be fit for substantive role, fit for outside activities including community safety activities, and office work. She checked the box to indicate a significant impairment to manual handling. She recorded that he continued to have pain on lifting his arm above 90 degrees. She further stated "*As directed by OHP is avoiding doing these movements whilst on LD and is helping" .* We pause to observe that this is significant because it suggests that the Claimant was working in light duties but not fitting smoke alarms since that would require overhead work. Ms Stirling's advice was that the Claimant could remain on light duties but should avoid lifting the arm above 90 degrees.

122. A Fit Note dated 19 April 2017 indicated that the Claimant may be fit for work with amended duties and altered hours in the period 5 April 2017 – 5 May 2017. The note recorded "*locked temporomandibular joint with Right Shoulder Injury*."

123. On 20 April 2017, the Claimant was reviewed by Ms Stirling. Her report and findings were much the same as in the preceding consultation.

124. Also on 20 April 2017 the Claimant was seen by Dr El Nagieb, Consultant Occupational Health Physician. He advised the Claimant was not fit for operational duties but was likely to be fit for substantive role. He further advised that the Claimant had significant impairment of manual handling. He stated that the Claimant continued to suffer with jaw instability and that this would affect his ability to use BA. He stated "*unfortunately I have not been able to get an updated medical report from his specialist despite many attempts*." He therefore decided to try to get a report from an independent specialist. He stated that the Claimant was fit for his current level of light duties. He further stated, *"You are aware that he has a shoulder problem which restricts his ability to reach and lift. This should be taken into consideration in inspections and fitting fire alarms".*

125. On 8 May 2017 the Claimant was seen by Ms Stirling. Her assessment of the Claimant's fitness to work and of the functions he was impaired in respect of were unchanged. She stated that the Claimant was fit for Light Duties and said, "*as directed previously would be advisable to avoid over head work to allow symptoms to continue to calm".*

126. The Claimant was invited to a further ASM. The meeting ultimately took place on 17 May 2017. The meeting was chaired by SM Hunter with support from Mr Cross. The Claimant was represented by Mr Cox.

127. At the meeting, SM Hunter told the Claimant that he had not been able to carry out a substantive role for three years and that there was no indication of when would be able to do that. He explained that it was not sustainable to have him working in the light duty team indefinitely. This was on the basis that light duties were a temporary arrangement and there was no indication from the Claimant when he would be able to return to his full duties. The Claimant was told that he would progress to the second stage of capability process. The Claimant was also told that he had to cease doing light duties immediately and instead take sick leave.

128. An outcome letter dated 31 May 2017 was promulgated. The letter noted that recent occupational health advice dated 20 April 2017 said that the Claimant was unfit for his full operational role but was fit for light duties. The advice from the occupational health advisor on 8 May 2017 was that the Claimant was fit for light duties but should avoid overhead working. The letter went on to note that the Claimant had been absent for over three years from his full role and that there was no medical advice indicating that he was able to return to full duties. It noted that efforts were being taken to obtain a specialist referral to obtain a prognosis.

129. The letter noted that light duty arrangements were a stepping stone to full duties within a period of up to 6 months. It noted that the Claimant had been in light duties for excess of six months with no indication of a return to full duties. On that basis it stated: "*Therefore it has been decided to terminate your light duty arrangements that you need to remain absent sick with effect from tomorrow 18th of May 2017 until such time able to return to full duties within a reasonable amount of time when this can be reviewed.*"

130. It is important to note that no part of the reasoning for placing the Claimant on sick leave was anything at all to do with the fact that the Claimant was at that point unable to fit smoke alarms (though the OH advice in respect of that was known and noted).

131. At this moment in time, there was no particular pressure on places in the Light Duties team. According to Mr Cross, there were about 10 people on light duties in the Claimant's light duties team. The capacity of the team was greater than that, though there was not a fixed maximum capacity.

132. On 25 May 2017 the Claimant was seen again by Ms Stirling. Her assessment of the Claimant's fitness for work was unchanged. She noted that the Claimant's shoulder symptoms had improved "*and that not doing overhead work was helping*". This again suggested that the Claimant had been working in light duties but that he was not doing overhead work, thus not fitting smoke alarms. He had been at work for part of the period since the last review on 8 May 2017 (up until 17 May 2017).

133. A Fit Note dated 7 June 2017, indicated that the Claimant may be fit for work with amended duties and altered hours in the period 5 June 2017 to 3 July 2017. The note recorded "locked temporomandibular joint and Right Shoulder Pain".

134. Having made these findings of fact about this period of time we can now tackle several disputes between the parties about this period:

134.1. Firstly, whether and if so when the Claimant's shoulder injury made it painful to fit smoke alarms;
134.2. Secondly, when this came to management's attention;
134.3. Thirdly, management reaction when it did find out;
134.4. Fourthly, the extent to which the Claimant fitted smoke alarms after the onset of problems in doing so.

135. On the first matter our finding is that the Claimant began to experience pain fitting smoke alarms in January 2017. That is what the occupational health evidence suggests and we think that is the most reliable evidence on this matter at this distance from the events. We do not accept, as is the Claimant's case, that he had this difficulty from October 2016 onwards.

136. On the second matter, our finding is that management became aware of the shoulder problem at some point between 30 March 2017 and 3 April 2017 upon reading the OH report of 30 March 2017.

136.1. The Claimant the Claimant's evidence is that he reported the shoulder pain in February 2017 to his immediate line manager, Fitzroy Sterling (who in turn reported to Ms Banning). We find the Claimant's recollection is inaccurate. We think it is inconsistent with the Claimant's position at the interim ASM of 22 February 2018 and his correspondence thereafter. He made no mention there of a shoulder problem and that was clearly a forum in which to mention it. We think this indicates a reluctance on his part to share the information with management that makes an early disclosure to Mr Sterling improbable.

136.2. We therefore think the Respondent 's first awareness was Ms Banning receiving the OH report.

137. On the third matter, Ms Banning had a discussion with the Claimant about his ability to fit smoke alarms. The Claimant told her that he was able to lift his arm above his head and that he only had pain sometimes. Ms Banning therefore asked the Claimant to confirm to her whether he was fit for work on a daily basis. This was at the beginning of April 2017.

138. On the fourth matter, we find that in practice once the Claimant was advised by OH to avoid fitting smoke alarms he was able to do so. This must have been through informal arrangements with his colleagues on light duties. This enabled the problem to begin to resolve and the Claimant was making rapid progress towards being able to return to fitting smoke alarms by the time he was told to sign off sick from 18 May 2017.

139. We now update our findings on the impact of the Claimant's impairments during this period (October 2016 – May 2017):

139.1. The shoulder impairment:

139.1.1. Until January 2017 the Claimant's should symptoms were at a low level.

139.1.2. Between January 2017 and May 2017, the Claimant's shoulder symptoms worsened and he experienced problems with raising his right arm above 90 degrees. This did have a material impact on normal day to day activities:

139.1.2.1. It is likely to have made aspects of washing, dressing and grooming (including the Claimant twisting his hair) difficult and painful.

139.1.2.2. It would have been a barrier to carrying out the full duties of the Claimant's chosen profession (firefighter);

139.1.2.3. It made it difficult to conduct some aspects of light duties, like fitting smoke alarms. This is a very ordinary, DIY type of task, rather than a specialised work task.

139.1.3. These shoulder problems continued beyond May 2017 and were ongoing in October 2017 when the claim was presented albeit that they were rapidly improving by then. The impact on normal day to day activities however remained more than minor or trivial.

139.2. The Claimant's jaw problems:

139.2.1. These were improved from their peak in the previous period, however:

139.2.2. The Claimant continued to wear a bite appliance regularly and this affected his ability to communicate;

139.2.3. The Claimant continued to be very cautious and reduced his social activities on account of fear of jaw pain and embarrassment in the event of having to manipulate his jaw in public;

139.2.4. The (reasonable) working assumption was that the Claimant was unable to wear breathing apparatus which created a major barrier to participating in professional life given his chosen profession.

18 May 2017 onwards

140. By a letter dated 8 June 2017, the Claimant was informed by the Respondent that he would commence half pay from 14 November 2017 and that his current sickness absence was classed as not due to service. There was the same explanation for this as before and the position was eventually corrected.

141. The Claimant attended a firefighter charity rehabilitation programme on 11 June to 19 June 2017. This was an intensive course of therapy over the six days for trauma damage to his jaw and shoulder.

142. Dr El-Nagieb wrote a letter of instruction to Ms George, Consultant Maxillofacial and Plastic Surgeon, dated 5 June 2017. The letter briefly set out the history of the Claimant's jaw problems and described firefighter's breathing apparatus. It asked for Ms George's advice in relation to four issues:

1. *the nature of his current right temporomandibular joint problem and the diagnosis*
2. *advice on management plans*
3. *your views on his fitness for the role particularly wearing a self-contained breathing apparatus*
4. *your views on his long-term prognosis*

143. On 20th June 2017 the Claimant saw Ms George at the London Bridge Hospital. At the consultation the Claimant understood Ms George to be sympathetic to him and firefighters generally, and to have considered the questions she was asked to answer to be beyond her remit.

144. Ms George responded to Dr El-Nagieb by letter dated 20th of June 2017. She noted that the Claimant had attended the consultation. Her substantive response was as follows *"I note that in your letter you specifically request information as to his fitness to work regarding this injury and his long-term prognosis. I'm not able to answer these questions and I have advised the patient I'm not qualified to assess in this regard. I would advise contacting Mr Lyons who may be able to help."* We note that Mr Lyons was in the same discipline of medicine as Ms George.

145. By letter dated 9 June 2017, Borough Commander Lindridge invited the Claimant to a second stage capability meeting (p 370) to take place on 22 June. In a letter dated 22 June the Claimant complained about the ASM process and declined the invitation to the second stage capability meeting.

146. On 29 June 2017, the Claimant was seen in occupational health by Mr Abernethy, Physiotherapist. He assessed the Claimant as unfit for operational duties, likely to be fit for substantive role and to have a significant impairment of manual handling. He noted some improvement in the Claimant's symptoms and that he was doing some light

overhead work. The advice was for him to remain on light duties and follow the advice previously given regarding overhead work.

147. A Fit Note dated 12 July 2017, indicated that the Claimant may be fit for work with amended duties and altered hours in the period 3 July 2017 to 4 September 2017. The note recorded "*locked temporomandibular joint and Right Shoulder Pain*".

148. The Claimant was seen by Mr Abernethy again on 27 July 2017. His report was in similar terms. He noted a continued improvement, that overhead work was improving but still difficult. He stated that the Claimant was fit as per GP advice.

149. Mr Lindridge responded to the Claimant's letter on 1 August 2017 indicating that the management of the sickness absence would be discussed at the second stage capability meeting which would be rearranged once further medical advice was obtained.

150. In August 2017, Mr Elcock was at Purley Fire Station. We find that SM Scrivener said to him words to the effect that the Claimant was "*trying to bring the brigade to its knees*". Mr Scrivener denies saying this but we found Mr Elcock to be far the more impressive witness. Mr Elcock was very clear and to the point in his evidence. Further, the comment that SM Scrivener is alleged to have made is consistent with the views that he had/has about firefighters being paid when unfit for substantive duties on a long term basis (see below). For that reason also we find he made the comment.

151. On 3 August 2017, SM Scrivener telephoned the Claimant to make a welfare keeping in touch call. The Clamant did not answer and SM Scrivener inadvertently left answerphone message. The message recorded a conversation between SM Scrivener and a colleague in the following terms:

SM Button : I look at ... I look at ...I look back over my career. You'd be fucked ... Your guvnor would give you the biggest fucking bollocking and you'd go "fuck, I ain't doing that again."
SM Scrivener: Absolutely.
SM Button : And now it's like ... [Unintelligible]. I'd love to call the fucking people... Yeah, "You bloody bunch of cunts," yeah?
SM Scrivener: Now you have such, like . . . I . . . I -
SM Button : You, you'd be ...You'd be on your fucking desk with your fucking trousers down getting your arse spanked, going, "What, what are you doing, John?"
SM Scrivener: Absolutely. And it's just ridiculous. We, we are just ... We are. . . Our hands are tied and we just have to run with these, these stupid policies that are so easy to bend the rules. I mean, I just said, you know, to Andrew [Cross], I said, "How can he think ... " Well, because Graham [Hunter] hadn't completed something that I asked him to complete, saying it was due to service, and then, because he's had the amount of time off that he can, until I get that paperwork, we can't do that, we can't knock his pay down. I'm like, "It's ridiculous." It's ridiculous. 'Cause he sent that in Sep-, in, um, June, to Graham [Hunter], who hasn't replied to it, but I went, "That's June." He's been off nearly four years, since 2015. He's been on full pay.
SM Button : Yeah, he [unintelligible].
SM Scrivener: So I've ... I, I, I could now do what he's done and ... Like, if, if I really wanted to play the game now ... And really who's, who's gonna give a shit? No-one. No-one. I got my pension statement through yesterday…

152. In his evidence, SM Scrivener purported that the conversation was not about the Claimant but rather some other firefighter whose name he could not recall. This was in part on the basis that the Claimant's sick leave began in 2014 not 2015.

153. We found SM's Scrivener's evidence on this highly implausible. We think it is clear that the conversation related to the Claimant. The Claimant was on his mind since he was calling the Claimant and the details of the conversation broadly fit the Claimant's case. The Claimant was being managed by SM Scrivener, SM Hunter and Mr Cross. It is true that the Claimant's sick leave began in 2014 not 2015 but that is not at all probative. It is the kind inaccuracy that the routinely creeps into unguarded chat.

154. The Claimant was seen again in occupational health on 7 August 2017 by Dr El-Nagieb. He advised that the Claimant was unfit for operational duties, likely to be fit for substantive role, that he had significant impairment of manual handling, climbing, flexibility and 'other'. He stated that the Claimant's shoulder was getting progressively better and that a timeline of mid-September 2017 had been pencilled in as a mark of full functional recovery. However, he noted that the jaw issues remained problematic. Mouthguards and treatments at FFC had been helpful but that the Claimant experienced symptoms on a daily basis and had been through six courses of CBT which he found helpful. He noted that efforts were ongoing to get an independent specialist report. He stated that the jaw issues were the main barrier to returning to operational duties and that it remained difficult to get a specialist report. He noted that he was attempting to get an independent specialist report and/or a report from Mr Lyons. He concluded that the Claimant was fit for light duties. As yet no long term prognosis could be given.

155. On 11 August 2017, Dr El-Nagieb produced a Functional Activity List (FAL). It noted no impairments, save for slight impairment in climbing a ladder because the Claimant might find sustained reaching and pulling with his right arm uncomfortable and that the Claimant "*can find <u>sustained</u> lifting above head/shoulder level uncomfortable*" [emphasis added: we infer that some overhead work would have been possible by this stage]. He noted that a painful and unstable jaw could make wearing BA difficult and unsafe.

156. On 22 August 2017, Dr El-Nagieb wrote to the Claimant noting that the attempt to get a report from an independent maxillofacial surgeon had failed. He therefore wanted to ask certain questions of the Claimant's treating surgeon and asked for the Claimant's consent. He also asked for permission to send the Respondent the Functional Activity List which he had drawn up.

157. On 7 September 2017, the Claimant was seen by Mr Abernethy. He advised that the Claimant was not fit for operational duties, was likely to be fit for substantive role and had significant impairment of manual handling. He reported continued improvement to the Claimant's shoulder problems, that he was progressing his overhead work but continued to have symptoms with repetitive work. He was fit for light duties with the same advice as given on 29 June 2017.

158. On 8 September 2017, the Claimant responded to Dr El-Nagieb. He refused consent for the Respondent to have "insight anymore" to his GP records. He asked for sight of the questions that would be posed to Mr Lyons before giving consent. In respect of the FAL he stated that he wanted to see the questions before giving consent.

159. On 12 September 2017, the FAL Dr Nagieb prepared was sent to Mr Cross (it seems without the Claimant's consent). It appears that this occurred as a result of an administrative mix-up.

160. On 13 September 2017, Dr El-Nagieb, responded to the Claimant's letter to reassure him that confidentiality would be taken seriously, explaining the purpose of obtaining a report from Mr Lyons and stating that FAL was similar to that prepared by Dr Isherwood in 2016.

161. Mr Lindley wrote to the Claimant inviting him to a second stage capability meeting to take place on 20 October 2017. The Claimant responded to this letter with an email dated 16 October 2017. He said that the abuse of power being exerted upon individuals primarily BAME background within the authority has to be halted. He attached a letter. In the letter the Claimant alleged that Mr Lindridge lacked impartiality and that his correspondence had been inaccurate. In terms of redeployment the Claimant indicated that he would ensure through the backing of the FBU that all his contractual benefits as a firefighter were brought along to any proposed redeployed position.

162. On 2 November 2017, the second stage capability meeting proceeded in the Claimant's absence (he chose not to attend). In an outcome letter dated 2 November 2017, Mr Lindridge noted that, based on the occupational health advice, the Claimant remained unfit for work. He noted that on the basis of the most recent evidence it was the Claimant's jaw that was preventing him from returning to full duties.

163. Mr Lindridge concluded that the Claimant had been unable to perform his role as an operational firefighter for over 3 ½ years and that there did not appear to be any reasonable prospect of him returning to his substantive role in the foreseeable future. He stated that it was not sustainable for the Claimant to work light duties indefinitely and that he had therefore decided it would be appropriate to actively seek redeployment opportunities for the Claimant and invite him to a separate meeting to discuss the redeployment process.

164. Mr Lindridge noted a further possible outcome was to refer the Claimant to an independent qualified medical practitioner to determine whether the Claimant was permanently unfit for work. However he was unable to take that option because the Claimant had not consented to the release of medical information. He further noted that the Claimant's attendance would be monitored over the next three months and that there was a risk of progressing to the third stage capability meeting which could result in termination if the Claimant had been able to return to regular attendance.

165. Claimant was invited to a reasonable adjustments and redeployment meeting by letter dated 10 November 2017 to take place on 22 November 2017 with Mr Obeh. It said that the purpose of the meeting was to look at the possibility of making adjustments to enable the Claimant to continue in his role and that in the event that adjustments were not practicable to his current role there would be a process for considering redeployment opportunities, and if there were none then arrangements would be made to get an opinion as to whether the Claimant was likely to be unfit to fulfil his role and therefore eligible to be retired on ill-health grounds.

166. The meeting with Mr Obeh ultimately took place on 21 December 2017. The Claimant was accompanied by an FBU representative. The outcome letter dated 3 January 2018 records that the Claimant had reported that his shoulder complaint had resolved but that his jaw complaint meant he remained unable to wear breathing apparatus. The letter further indicated that the Claimant had been interested in redeployment on a fixed term or secondment basis. The letter indicated that it was not possible to make reasonable adjustments to the firefighter role because it was a requirement of the role to wear breathing apparatus.

167. The letter stated that reasonable adjustments had been discussed and that they included redeployment into permanent vacancies subject to the normal recruitment process. It indicated that redeployment opportunities would be considered over a three month period and that the Claimant had been provided with a list of upcoming vacancies. It suggested that the Claimant had expressed an interest in three particular roles.

168. The letter noted if the Claimant was not successful in being redeployed by the end of the three-month redeployment a further meeting would be held and consideration given to passing the Claimant's records to the independent qualified medical practitioner for consideration of ill-health retirement.

169. The Claimant responded with a letter dated 14 January 2018. He complained about the accuracy of various parts of Mr Obeh's letter and stated that at the meeting he had asked to be considered for temporary placement within the command unit, hose layer unit, or operational support units on a temporary basis. He stated that, at the meeting his position had been that he was only interested in roles that attracted all of the benefits of being in a full operational role. On those bases the Claimant was not in fact interested in the three roles outlined in Mr Obeh's letter. The Claimant further noted that since the meeting in December 2017, other positions had been brought to his attention, but he was not interested in these because after a period of pay protection the term and conditions would be different to those of a firefighter.

170. On 16 January 2018 a fire safety pilot scheme role was drawn to the Claimant's attention and he expressed an interest in that role to the recruiting officer. Some further details were sent to the Claimant about the role on 16 January 2018. Correspondence about that role continued and showed some promise.

171. On 18 January 2018 the Claimant wrote to Dr El-Nagib giving his consent to occupational health obtaining a specialist report.

172. Occupational health duly obtained a report from Mr Lyons dated 9 February 2018. Mr Lyons recorded some history and stated that he suspected that the Claimant was at least a little better than when he had seen him in February 2017 and certainly that he would not expect Claimant's temporomandibular joint symptoms to restrict his daily living. In terms of wearing breathing apparatus he noted that biting down on the mouthpiece could increase temporomandibular joint symptoms. He noted there was contradictory evidence in the medical literature regarding whiplash injuries after road accidents. He said the expert opinion was evenly divided in respect of whether whiplash injuries could cause temporomandibular joint problems or not and therefore the assessment had to be made on an individual basis. He said that the Claimant had temporomandibular joint symptoms but they were only mild. He did not think the Claimant was a candidate for surgery in light of the MRI scan.

173. In terms of breathing apparatus he considered that it would be useful to trial them to see if the Claimant did experience an increase of symptoms. If so he said that there were two choices. The first was that he did not return to full duties as a fireman. The second was that a custom-made appliance would be needed and that it would not be expensive. It would be put into his mouth to support the back teeth so that the temporomandibular joint was not under extra strain.

174. He said that in terms of long-term functional impairment it was difficult to give a prognosis but it was fair to say that it was a chronic problem that could last for many years and may be for life albeit that it was mild.

175. It is notable that Mr Lyons's report essentially answered the questions that had been posed of Ms George.

176. The Claimant returned to full duties in May 2018 following a period of acclimatisation and training.

177. In 2021, the Claimant's employment came to an end through ill-health retirement. There is virtually no evidence about that before us but the ill-health retirement related to his jaw.

Comparators

178. We make the following findings about the comparators relied upon. We note that there was very little evidence about the comparators' protected characteristics save that in some cases we heard fragments of evidence about medical conditions they had. In her closing skeleton Ms Von Vachter identified some protected characteristics at paragraph 36.i. Mr Keen did not demur. We record those protected characteristics in parentheses below:

178.1. Mr Michael Kelf (white and not disabled). The Claimant suggests that Mr Kelf was excused from fitting smoke alarms and was therefore treated differently to him. That is not really right. What in fact happened was that early April 2017, when Ms Banning discussed the OH report of 30 March 2017 with the Claimant, the Claimant told her that Mr Kelf had an injury that meant he could not fit smoke alarms and that he had therefore not been doing so. Ms Banning raised this with Mr Kelf. He confirmed that was presently the case but said he was about to receive some physiotherapy at a residential course. Upon his return to work, Ms Banning checked whether he was able to fit smoke alarms and he reported that he was because the problem had resolved. Mr Kelf never had any dispensation from management excusing him from fitting smoke alarms. However, since members of the light duty team were left to sort out the duties each person performed among themselves, through informal arrangement with colleagues Mr Kelf did not fit smoke alarms for a brief period. This also happened in the Claimant's case.

178.2. Mick Burges (white). Mick Burges was a white male who was given the option of being redeployed. Mr Cross's evidence, which we accept, is that this was a permanent redeployment once it became clear that Mr Burges was unfit to work as a firefighter indefinitely. Permanent redeployment was made as an alternative to dismissal at stage 3 of the capability process. Mr Burges became a water hydration technician. N.b. Mr Burges is accidentally identified as Mick Burrell in certain places. This was corrected by a letter from the Claimant's solicitor dated 23 October 2018. Confusingly, the mistake persisted thereafter including in the list of issues and the Claimant's closing submissions. In case it is us that are in error and the Claimant really means to rely upon Mr Burrell, we note that there is no evidence before us about Mr Burrell's circumstances at all.

178.3. Firefighter Jakeman: despite appearing in the list of issues no evidence or case was advanced. This comparator was withdrawn in closing submissions.

178.4. Nicola Jacques. The relevance of Ms Jacques is that she spent a year doing light duties and at some stage had a phased return to work in accordance with OH advice. The year she spent in light duties was during the hiatus period when the Respondent was not progressing cases under the capability policy.

178.5. Mr Palmer (not disabled). The relevance of Mr Palmer is that he had a bad knee whilst working in the light duties team for the Claimant. This meant that he could not drive for a period of time and also that it was difficult for him to fit smoke alarms because it involved climbing a ladder or standing on a box. He sometimes

avoided fitting smoke alarms for that reason. This was not a formal arrangement but simply an informal one negotiated with co-workers.

178.6. Mr Eminson (white). He had a heart condition and worked with the Claimant on light duties. He tended to speak to the customer while others fitted smoke alarms. This was by informal arrangement. Mr Eminson spent more than 6 months on light duties. He had two periods, one of a month, and one of 7 months. The reason he was allowed to do this was because he was in his final year of service before being able to take his pension. There was an agreement between the Respondent and the FBU that in those circumstances the employee could remain on light duties until retirement. An early retirement would lead to a lower pension.

178.7. Victoria Madden. The Claimant's opening skeleton argument referred to her. However, there was no evidence about her and no case in relation to her was pursued. Ms Von Vachter confirmed in closing that she did not rely on Ms Madden.

Presentation of claim

179. The Claimant first presented a claim on 19 June 2017. However he failed to record an early conciliation number. As a result the claim was dismissed at a preliminary hearing on 6 October 2017.

180. The Claimant commenced early conciliation on 18 July 2017. The EC certificate was issued by email on 18 August 2017. The claim form was presented on 19 October 2017. By now the Claimant was assisted by solicitors.

Medico legal reports

181. The Claimant adduced a report of from Mr Andrew Forester, Consultant Orthopaedic surgeon, dated 22nd of June 2015. This report was produced for the purposes of personal injury proceedings so was not specifically directed at the definition of disability.

182. The Respondent adduced a report from Mr Peter Revington, consultant oral and maxillofacial surgeon dated 13 November 2018. This was a desktop report. Mr Revington did not consider the Claimant to be a disabled person within the meaning of the Equality Act 2010.

183. The Respondent also adduced a report from Mr Vyas, Consultant Orthopaedic Surgeon dated 23 November 2018. Mr Vyas did consider the Claimant to be a disabled person within the meaning of the Equality Act 2010.

184. We will not summarise those reports here, but note that we carefully took them into account as part of the material available to us when making our findings of fact above.

Law

The definition of disability

185. S.6(1) EqA provides:

A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) *the impairment has a substantial and adverse long-term effect on P's ability to carry out normal day to day activities.*

186. 'Substantial' is defined in s.212(1) EqA as '*more than minor or trivial'*.

187. The 'long-term' requirement is developed in para 2, Sch.1 to the EqA, which provides, so far as relevant:

(1) The effect of an impairment is long-term if –
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.
(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

188. '*Likely'*, in this context and elsewhere in the provisions defining disability, means 'could well happen', rather than 'more likely than not to happen' (*Boyle v SCA Packaging Ltd* [2009] ICR 1056, HL).

189. Sch.1, para 5(1) EqA provides (the doctrine of deduced effects):

(3) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:
(a) measures are being taken to correct it, and
(b) but for that, it would be likely to have that effect.
(4) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

190. The *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) gives non-exhaustive examples of day to day activities:

> *'[D2] In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.'*

191. Mr Keen submitted that "*Day to day activities includes work activities, and in the context of this case, the relevant abilities are in fact work related activities… Confirmation of this was provided in the pre-brexit EU case of Chacón Navas which held that disability in the context of the Framework Directive means "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned <u>in professional life</u>" (my emphasis). The emphasis on "professional life" was reaffirmed in HK Danmark acting on behalf of Ring v Dansk Almennyttigt Boligselskab & Anor C-335/11."* We agree, save that in this case both work related and non-work related activities are important.

192. The Tribunal's focus should be on what the employee cannot do (or what they can do with difficulty) rather than on what they can do.

193. The EqA does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial. Unless a matter can be classified as within the heading ‘trivial’ or ‘insubstantial’, it must be treated as substantial (***Aderemi v London and South Eastern Railway Ltd*** [2013] ICR 591 EAT at [14-15]).

194. The Code of Practice on Employment in 2011 includes a summary in relation to the definition of disability, at paras 2.8–2.20. Paragraph 2.20 further refers the reader to App. 1 to the Code. Under the heading *'What is a “substantial” adverse effect?'*, paras 8–10 of the appendix provide:

> *'8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.*
>
> *9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation* […]’

195. The *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) contains the following guidance as to the interaction between the ‘impairment’ requirement and the issue of ‘substantial adverse effects’:

> *‘A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.’*
> *[…]*
>
> *B4. An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.*
>
> *[…]*
>
> *C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the ‘long-term’ element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.’*

196. In J v DLA Piper UK LLP [2010] ICR 1052 EAT, Underhill P (as he was) made the following observations about deduced effects at [57]:

> '*Secondly*, there is the question of deduced effect. This was, as we have noted, the only way the case was pleaded, though it seems that the parties subsequently proceeded on the basis that "actual" adverse effects were also relied on. The Tribunal dealt with that issue by saying simply that "the Claimant did not adduce any clear or cogent evidence of this", referring to its observations about Dr Morris's evidence which we have set out at para 30 above. If, as we think, the Tribunal intended simply to discount Dr Morris's evidence because she was not a psychiatrist, that approach is wrong, for the reasons already given: we accept the contention to this effect at para 6.4 of the notice of appeal. But it may have meant only that her evidence was too brief to be "clear or cogent". If so, the point is debatable. Strictly speaking, the question that needed to be addressed was whether, on the hypothesis that the Claimant's ability to carry out normal day-to-day activities was not, as at June 2008, substantially affected, there would have been such an effect but for her treatment. Since Dr Morris did not accept that hypothesis, it is not surprising that she did not directly answer the question, saying only that without treatment the Claimant's condition would be "much worse". In view of our decision in the previous paragraph we need not decide the point, though we are inclined to think that the report can just about be read as supporting a "deduced effect" case. It is, even if so read, extremely brief, but there is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of antidepressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped: the proposition could of course be challenged, but in the absence of such challenge—there being none in Dr Gill's report—it is unclear what elaboration was required. Nor do we understand the relevance of the Tribunal's observation that Dr Morris's report was written in November/December 2008: it was clearly referring back to events at the material time.'

197. If there is material before the Tribunal to suggest that measures were being taken that may have altered the effects of the impairment, then it must consider whether the impairment would have had a substantial adverse effect in the absence of those measures (*Fathers v Pets at Home* Ltd, EAT 0424/13).

198. The assessment of disability status must be made based upon the basis of evidence as to circumstances prevailing at the time of the act of discrimination: *Richmond Adult Community College v McDougall* [2008] IRLR 227.

Direct discrimination

199. Section 13 EqA provides: *"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."*

200. Section 23 EqA provides:

> *(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.*
> *(2) The circumstances relating to a case include each person's abilities if –*

on a comparison for the purposes of section 13, the protected characteristic is disability…

201. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

202. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

203. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'

204. Mr Keen submitted as follows in relation to direct disability discrimination, and we agree:

The leading authority on the comparison exercise in a disability discrimination case is ***Owen v Amec Foster Wheeler Energy*** *Ltd [2019] EWCA Civ 822. Mr Owen had multiple health issues and was denied an overseas posting because medical concerns were raised in an occupational health assessment. Mr Owen argued that the reason the employer did not allow him to be posted overseas was the outcome of his medical assessment and that this was indissociable from his disabilities. He argued that, regardless of any benign motive that Amec may have had, there was a necessary and inherent link between the reason Amec*

made the decision and his disabilities. The Court of Appeal rejected this argument – the hypothetical comparator was a person who was not disabled but who was also deemed to be a high medical risk. That person would have been treated in exactly the same way. The Court of Appeal observed that the concept of disability is not binary and a person's health is not always entirely irrelevant to their ability to do a job.

Owen illustrates that, in direct disability discrimination cases the law draws a unique (in direct discrimination terms) dividing line between conduct that is because of disability and conduct that might be said to related to abilities. As the Court of Appeal observed, this arises from the non-binary nature of disability and the reality that employers are not required to employ people who are not able to perform the work…

Reasonable adjustments

205. Section 20(3) EQA 2010 provides:

> *"…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, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage."*

206. "*Substantial*" is defined at section 212(1) EQA 2010 to mean "*more than minor or trivial*".

207. An employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question (per paragraph 20(1) Schedule 8, EA 2010).

208. The *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 5.15 and 6.19 which emphases that employers must do all they can reasonably be expected to do to find out.

209. The relevant case law was summarised by HHJ Eady QC (as she then was) in *A Ltd v Z* [2020] ICR 199 EAT at [23]. Although this guidance was given in the context of s15 EQA, it can be read across to the s20 context:

> […]
> *(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect: see Donelien v Liberata UK Ltd (unreported) 16 December 2014, para 5, per Langstaff J (President), and also see Pnaiser v NHS England [2016] IRLR 170, para 69, per Simler J.*
> *(3) The question of reasonableness is one of fact and evaluation: see Donelien v Liberata UK Ltd [2018] IRLR 535, para 27; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.*
> *(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered*

substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see Herry v Dudley Metropolitan Borough Council [2017] ICR 610, per Judge David Richardson, citing J v DLA Piper UK llp [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so", per Langstaff J in Donelien 16 December 2014, para 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the code, which (relevantly) provides as follows:

> *5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.*
>
> *5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.*

(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: Ridout v TC Group [1998] IRLR 628; Secretary of State for Work and Pensions v Alam [2010] ICR 665 .

(7) Reasonableness, for the purposes of section 15(2) , must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code.

210. General guidance as to the overall approach to reasonable adjustments was given in ***Environment Agency v Rowan*** [2008] ICR 218:

    210.1. The PCP must be identified;
    210.2. The identity of the non-disabled comparators must be identified (where appropriate);
    210.3. The nature and extent of the substantial disadvantage suffered by C must be identified;
    210.4. The reasonableness of the adjustment claimed must be analysed.

211. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal (***Morse v Wiltshire County Council*** [1998] IRLR 352).

212. The Equality and Human Rights Commission Code of Practice gives useful guidance at paragraphs 6.28 and 6.29 upon potentially relevant factors.

Harassment related to disability

213. 22. Section 26 EQA 2010 provides:

    (1) A *person (A) harasses another (B) if –*
    (a) A engages in unwanted conduct related to a relevant characteristic, and
    (b) the conduct has the purpose or effect of –
    (i) violating B's dignity, or –
    (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B [for short we will refer to this as a "proscribed environment"].
    …

(4) In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

214. In ***Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."

215. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

15…*A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."*

22…We accept that 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…"

216. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

217. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristics is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

218. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

219. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.

[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.

[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

Victimisation

220. Section 27 EQA 2010 provides as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because–
(a) B does a protected act, or
(b) A believes that B has done, or may do a protected act.
(2) Each of the following is a protected act –
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

221. In ***Chief Constable of the West Yorkshire Police v Khan*** [2001] IRLR 830 Lord Nicholls said *"The primary object of the victimisation provisions is to ensure that*

persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so."

222. In ***Aziz v Trinity Street Taxis Ltd*** [1988] IRLR 204, at 29, dealing with the Race Relations Act equivalent to section 27(2)(c) EQA 2010:

 "An act can, in our judgment, properly be said to be done 'by reference to the Act' [the Race Relations Act] if it is done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act."

223. The putative discriminator has to have knowledge of the protected act. See, for example, ***South London Healthcare NHS Trust v Al-Rubeyi*** at UKEAT/0269/09/SM.

224. An unjustified sense of grievance cannot amount to a detriment: ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285).

The burden of proof

225. The burden of proof provisions are contained in s.136(1)-(3) EqA:

 (1) This section applies to any proceedings relating to a contravention of this Act.
 (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
 (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

226. The effect of these provisions was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

 'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:
 (1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):
 "56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.
 57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"
 (2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:
 "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

227. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

228. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

229. In a complaint of failure to make reasonable adjustments the Claimant has the burden of proving that the PCP, physical feature or failure to provide auxiliary aid, would put him at a substantial disadvantage compared to others who are not disabled. The burden does not shift unless there is evidence of some apparently reasonable adjustment which could have been made. This does not necessarily mean providing the detailed adjustment but at the least requires the broad nature of the adjustment to be clear enough for the Respondent to understand and engage with it. See ***Project Management Institute v Latif*** [2007] IRLR 579.

230. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

<u>*Time limits*</u>

231. S.123(1)(a) EqA provides that:

(1) [Subject to [sections 140A and 140B],] Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.
[…]
(3) For the purposes of this section--
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided
on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

232. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

233. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In ***Hendricks v Commissioner of Police of the Metropolis*** [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

234. The law in respect of continuing conduct is, in our view, rather different in the context of reasonable adjustments and has additional complexity. The tribunal specifically referred counsel to the following authorities and asked them to deal with them: ***Matuszowicz v Kingston Upon Hull City Council*** [2009] ICR 1170, ***Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil*** UKEAT/0097/13/BA and ***Abertawe University Local Health Board v Morgan*** [2018] ICR 1194.

235. Mr Keen made the following submission about ***Matuszowicz***: *"the CofA held that s.3 of Sch.3 of the DDA 1995 provided that a deliberate omission was deemed to occur when it was decided upon and that a person can be taken to have decided upon that omission either (a) when he does an act inconsistent with the doing of the omitted act or (b) after that period of time within which a reasonable person would have acted. Lord Justice Lloyd held that the effect of para 3(4) was to treat an inadvertent omission by the employer as an act that was done deliberately either when the employer had performed an act inconsistent with the omitted act or after that period of time within which a reasonable person would have acted. His Lordship also stated that since the allegation in Matuszowicz, concerned a continuing omission, the time limit was governed by paragraph 3 of Schedule 3. Lord Justice Sedley agreed with the judgment of Lord Justice Lloyd and stated that it was worth stressing that the effect of paragraph 3 of Schedule 3 "is to eliminate continuing omissions from the computation of time by deeming them to be acts committed at a notional moment." Their Lordships therefore agreed that even where an act is a continuing omission the time limits were governed by paragraph 3."* Mr Keen did not refer to ***Jamil.***

236. Ms Von Vachter made the following submission about ***Jamil:*** "*it was held that the duty to make adjustments once established runs from day to day."* She went on, *"Accordingly it is respectfully submitted that the Claimant finally had to accept that the Respondent was not going to make the adjustments necessary when he was taken off light duties and compulsorily placed on sick leave (despite having a fit note certifying him fit for work) on 17 May 2017… In any event the duty to make adjustment did not disappear just because the Claimant had realised that they were not going to be made; they continued to accrue day to day".* We understood this to mean that there was a continuing conduct such that time began to run afresh each day that the failure to make adjustments persisted. She did not deal with ***Matuszowicz.***

237. In ***Abertawe*** the Court of Appeal essentially built upon the jurisprudence of ***Matuszowicz.*** It held as follows (this is extracted from the headnote, which in our view accurately captures the principles):

section 123(4) of the Equality Act 2010 dealt only with the question of when time began to run for the purpose of calculating the time limit for bringing proceedings in relation to acts or omissions which extended over a period; that, in the case of omissions, the approach taken in section 123(4) was to establish a default rule that time began to run at the end of the period in which the employer might reasonably have been expected to comply with the relevant duty; that ascertaining when the employer might reasonably have been expected to comply with its duty was not the same as ascertaining when the duty to comply began; that pursuant to section 20(3) of the Act, the duty to comply with the relevant 2010 requirement began as soon as the employer was able to take steps which it was reasonable for it to have to take to avoid the relevant disadvantage; that, in contrast, the period in which the employer might reasonably have been expected to comply with its duty ought in principle to be assessed from the Claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the Claimant at the relevant time; and that, accordingly, there was no inconsistency between the tribunal's finding that time did not begin to run for bringing the reasonable adjustments claim until August and its conclusion that the claim 1 2011 was well founded.

238. In our view the law is as stated in ***Matuszowicz*** and developed in ***Abertawe***. ***Jamil*** is not consistent with that approach. We are confident that it is the former strand of authorities we must follow. Firstly, ***Matuszowicz*** and ***Abertawe*** are Court of Appeal decisions. Secondly, although ***Jamil*** is more recent than ***Matuszowicz*** it appears to have been decided *per incuriam*. So far as can be seen from the transcript of the EAT's decision, the EAT was not referred either to ***Matuszowicz*** or to the fact that the Equality Act 2010 deals with acts and missions differently when it comes to limitation (see s.123(3) – (4) above).

239. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which may include factors such as: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (***Abertawe***).

Discussion and conclusions

Disability status

240. We have no doubt that the Claimant was a disabled person at all relevant times. The relevant times began in October 2014 so it is useful to start with that date:

240.1. The Claimant plainly had physical impairments at that time:

240.1.1. Shoulder impairment: we do not think that the precise characterisation of the shoulder impairment matters for current purposes. However characterised it was an impairment. In case it is necessary to be more specific, the impairment was comprised of partial rotator cuff tear and/or a SLAP tear and/or Subacromial impingement. There were also degenerative changes (acromio-clavicular arthritis).

240.1.2. A jaw impairment: the precise diagnosis for this is unclear but again we do not think it matters. In October 2014, it appeared to be a mechanical problem

(anterior dislocation) with the jaw. Later in the chronology it appeared more likely, given the normal MRI scan findings, to be TMJ dysfunction. Either way it was an impairment.

240.2. The shoulder impairment was clearly long-term even if (as it must be) that assessment is based on information available at the time rather than upon hindsight. It had already lasted about six months by October 2014 and there was still a serious problem. On 26 September 2014 the OH advice was that the Claimant was likely to need surgery. There was no known date for surgery at that time and it was obvious that it would not happen instantly. It actually happened in December 2014 which is probably sooner than might have been anticipated if one had to guess. The OH evidence at that time was that it would be 3 to 6 months following the operation before the Claimant would likely to be able to return to full duties. It was undoubtedly the case that the impairment could well last for more than a year and indeed that looked highly probable as at October 2014.

240.3. At this point there was no prognosis for the jaw problem. The impairment had lasted for five or six months already and there was no indication of it spontaneously resolving. Looking at matters as at October 2014, it could well have happened that the jaw impairment would last for 12 months or more there being no evidence that the problem was going to spontaneously resolve prior to the 12 month anniversary and/or no evidence that there was reason to have any confidence that it would spontaneously resolve prior to the 12 month anniversary.

240.4. We made findings of fact above about the impact of each physical impairment on the Claimant's normal day to day activities as at October 2014. On any view the impact was a substantial one: it was much more than minor or trivial. We say that about both the shoulder impairment and the jaw impairment looking at them separately. The case is even clearer if the combined impact of the impairments is considered (which it permissibly can and should be).

240.5. Further, if any thought had been given to the matter, it would have been obvious that substantial adverse effect on normal day to day activities could well (indeed was very likely to) continue beyond the 12 month anniversary of the index accident:

240.6. Dealing first with the shoulder:

240.6.1. it was obvious that the operation would not (or probably would not) happen instantly but rather a couple of months minimum into the future.

240.6.2. it was obvious that there would be a significant convalescence period during which the Claimant's condition would initially be worse before beginning to recover;

240.6.3. it was obvious that, in short, the substantial adverse effect on normal day to day activities could easily continue beyond the 12 month anniversary and certainly that this could well happen.

240.7. Dealing with the jaw:

240.7.1. as above there was no particular reason to think that the jaw problems would have spontaneously resolved or significantly improve and there was a clear likelihood – it could well happen – that it would continue at the same level to and beyond the 12 month anniversary of the index accident.

241. The case on disability became even clearer by the 12 month anniversary of the index

accident in late February 2015. In addition to the above history:

241.1. It was a known fact that the Claimant had to wear his right dominant arm in a sling for three months following the operation on 8 December 2014. This meant he was still in a sling at the 12 month anniversary of the index accident in February 2015. It was obvious that wearing the dominant arm in a sling would remove the ability to use that arm and the dominant hand and obvious that this would have a substantial adverse effect on normal day to day activities both of a domestic nature and a professional nature.

241.2. The jaw problems had not resolved but had continued.

242. From around March 2015 onwards the Claimant's shoulder began to improve. However, the problems never resolved completely before January 2017 when there was a relapse of the shoulder problems which continued until the claim was presented in October 2017. We have set out above our findings on the impact of the impairment on normal day to day activities over this period of time: it was more than minor or trivial.

243. The Claimant's jaw problems generally got worse after March 2015. We refer generally to our findings of fact on the impact on normal day to day activities and add a few additional points:

243.1. By October 2015 the Claimant returned to Mr Lyons' clinic (see details above).
243.2. By March 2016 the Claimant's jaw problems were so bad that he was signed off as being unfit for any work by his GP.
243.3. On 25 April 2016, Dr Isherwood in occupational health concurred with the GP's assessment. Indeed she advised the Claimant to consider amitriptyline and to increase his pain killers.
243.4. In May 2016 the Claimant was provided with a bite raising appliance that he wore for at least 12 hours a day for months on end. Whilst wearing it he was unable to communicate properly using speech.
243.5. In July 2016, the Claimant's jaw symptoms were still very serious and he remained unfit for any work.
243.6. This state of affairs continued until October 2016 when he Claimant was able to return to light duties but not to his actual job because he was unable to wear breathing apparatus.
243.7. From May 2017 to the presentation of the claim, the jaw problems were improved but the Claimant remained excluded from his professional life because of his jaw impairment (coupled with the Respondent 's view that it could not accommodate that Claimant in light duties any longer).

244. We note that the Claimant does not need to show that he continued to meet the s.6(1) EQA at all points of the chronology. Given the terms of s.6(4) EQA if he met the definition of disability at any point, thereafter he was a disabled person within the meaning of the EQA regardless of whether or not he continued to meet the definition at s.6(1) EQA.

245. We also note that the above analysis is made without reference to deduced effects. This reflects the way the claim was presented and argued. There was no attempt to systematically explain what treatment (e.g. medication, physiotherapy, CBT) the Claimant had, when and what impact it had upon him. Indeed no mention of deduced effects was made in closing submissions by the Claimant's counsel. However, it is clear from the evidence we have that the Claimant did take pain killers at times, that he underwent several courses of physiotherapy and CBT. We think there can be no real doubt that if the Claimant had not received these interventions the impact of the impairments on normal day to day activities would have been significantly worse. This

is based upon common sense. Clinicians are vanishingly unlikely to have prescribed these interventions unless there was a decent prospect of them helping. There is no evidence that the interventions did not help. However, to be clear, our findings on disability status stand even without any regard to deduced effects.

246. Before leaving this topic it is necessary for us to explain why we take a different view to Mr Revington on certain essential aspects of the question of whether or not the Claimant was a disabled person:

246.1. Mr Revington infers that as at 19 July 2015 the Claimant was not suffering from a long term impairment or indeed any impairment related to the temporomandibular joint. This is on the basis that the Claimant was not seen by Mr Lyons between March 2014 and October 2015 and that there is a lack of documentary evidence in relation to the same. He is entitled to his view, but we do not agree with it. As set out above, in our view the Claimant did have a jaw impairment in this period. It is documented fairly consistently in occupational health reports and in the Claimant's evidence which we have heard. It is also corroborated by the terms of Mr Lyon's clinic letter in October 2015 which records that the Claimant reported that he had had significant jaw problems in the intervening period between his first and second consultation with Mr Lyons.

246.2. Mr Revington concludes with similar reasoning that as at July 2015 the Claimant did not have a long-term impairment. Our findings of fact show otherwise.

246.3. Mr Revington says that as at 19 July 2015 the Claimant's condition was not one that was likely to recur. We reject this aspect of his opinion. Firstly, it is totally unreasoned. Secondly, it also inconsistent with another aspect of his opinion that we do accept, namely that TMJ often recurs with stressful life events of an ordinary sort. Mr Revington notes that "*many patients with temporomandibular joint dysfunction syndrome will undergo periodic relapses based on their para-functional habits if they are exposed to further stressful life events which cause them to indulge once more in particular practices that result in muscle spasm that give rise to the symptoms. These life events include divorce, moving house, changing job and bereavement."* Thus recurrence is clearly something that could well happen. Thirdly, we find that the problem was still ongoing at this point so the question of recurrence was not really the pertinent one.

246.4. Mr Revington, says that the Claimant's condition was not long-term on the basis that the Claimant's symptoms resolved by February 2017. We do not agree that the symptoms had entirely resolved by then, but even if they had, given the definition of long-term the impairment was long-term. It appears that Mr Revington did not had the correct test of long-term in mind.

246.5. Mr Revington was asked to give an opinion on the impact on normal day-to-day activities. He was erroneously asked to advise on whether the impact was substantial (that is not a matter for an expert evidence but for the tribunal). He advised that the effects are generally minor and went on to say that the effects are unlikely to be directly causally related to the index accident. As to that:

246.5.1. We took into account Mr Revington's evidence about how TMJ usually affects people. However, we remain entitled to, and do, find that it affected the Claimant differently.

246.5.2. It is unclear why Mr Revington offers this opinion on causation at this juncture of his report (he was not asked to). But in any event, in the final paragraph of section 3 of his report Mr Revington says that on the balance of possibilities "*it would appear that the Claimant's symptoms are largely related to his para-functional habits i.e. grinding as*

> *evidenced by his use of the bite raising appliance with which he was provided linked through the stressful situation in which he found himself as a consequence of the accident in which he was involved.*"

Knowledge of disability

247. Disability and knowledge of disability are two different matters. However, in this case in our view the evidence and factors that resolve those two issues have a huge overlap. That is because the overwhelming majority of the matters we have set out above that lead us to conclude that the Claimant was disabled were clear and transparent contemporaneously to the Respondent (not least because he visited OH so frequently). Or if they were not, they would have been had the Respondent turned its mind to the question of whether the Claimant was disabled and made reasonable inquiries – e.g. asking Occupational Health for an opinion on disability status and/or asking the Claimant to give a detailed account of how his impairments affected his normal day to day activities.

248. The Respondent does not appear to have actually considered the question of whether the Claimant was disabled or not until the referral to Occupational Health in October 2016 (at which point the opinion was that he was indeed likely to be a disabled person). However, there was a vast amount of information by October 2014 to indicate that the Claimant might well be a disabled person within the meaning of the Equality Act 2010. One of the reasons we have set out so much of the Occupational Health evidence in our findings of fact is to illustrate this point. In light of that, there was every reason for the Respondent to have considered the issue by October 2014. Had it done so, it surely would have (or at least ought reasonably to have):

    248.1. either itself concluded that the Claimant was probably a disabled person within the meaning of the Equality Act 2010 having discussed e.g. the impact of the impairments on the Claimant's normal day to day activities with the Claimant; and/or
    248.2. obtained advice, for instance form occupational health, that would surely have reached that same conclusion.

249. The case on knowledge becomes ever stronger as the chronology goes on. Given what was known about the Claimant's shoulder by the year anniversary of the index accident, if the Respondent had turned its mind to the question of disability status it would surely have found the case for disability was irresistible (or ought reasonably to have).

250. The only matter which we think may not have been transparent contemporaneously with events is the seriousness of the Claimant's jaw injury. It probably did not in fact become clear to the Respondent until late 2015 that there was a major issue with the jaw. However:

    250.1. this is largely immaterial because the Respondent ought reasonably to have known that the shoulder problems alone were sufficient to render the Claimant a disabled person from October 2014 onwards;
    250.2. in any event, had the Respondent acted reasonably and considered whether the Claimant was a disabled person at any time from October 2014 onwards, in so doing it would have been only prudent and sensible to consider whether the jaw impairment did or did not contribute to the case for disability status. It was well known that there was an ongoing issue with the jaw since it was frequently recorded by Occupational Health. In the course of considering that, it is likely that further details would have emerged (through discussion with the Claimant)

about the extent of his jaw problems.

251. In summary, at all material times the Respondent ought reasonably to have known that the Claimant was a disabled person.

Failure to make reasonable adjustments; *ss20&21 EqA;*

Did the Respondent impose the PCP on this Claimant in October 2014 that all sick notes must be submitted on the same or almost the same day as the date of certificated absence?

252. The Respondent did not apply this PCP although it did apply a similar but different one. The PCP applied was follows: *where an employee considers they are likely to remain unfit at the expiry of their current fit note should contact their GP surgery up to 7 days before the expiry of the fit note so that the GP appointment can be arranged before or on the day the fit note expires. Where the employee has taken these steps , but the GP surgery is unable to offer an appointment before the expiry of the certificate, the employee will contact their manager to advise of the steps they have taken on the day of the GP appointment which has been offered. In these circumstances the brigade will accept the first backdating of the fit notes otherwise fit note will normally be regarded as covering absence only from the date of issue of the certificate.*

Did the PCP put the Claimant at a substantial disadvantage compared to others?

253. The PCP that was applied did not put the Claimant at substantial disadvantage compared to others who are not disabled. The Claimant's explanation for his backdated sick pay came after the event. If he had explained prior to the expiry of his fit notes that he was struggling to get the GP appointment he would not have been denied sick pay. Once he gave that explanation, the sick pay that has been had been deducted was restored.

254. There is no evidence that it was any more difficult for the Claimant than anyone else who was not disabled to comply with the PCP that was actually applied. There was nothing stopping the Claimant from notifying the Respondent in advance of his fit notes expiring in the event of there being a difficulty in obtaining a GP certificate before the expiration of the current one. There was nothing about his disability that made it any more difficult for him to do that than anyone else.

255. Further the evidence before us shows that typically the way in which the Claimant obtained fit notes from his GP was to write to the GP and ask for further fit notes. He did this twice in the relevant period, on 18 July 2014 where his fit note had expired on 11 July 2014. And on 12 August 2014 where the fit note had expired on 11 August 2014. There is no evidence to suggest there would have been any difficulty in writing these letters earlier in anticipation of the fit notes expiring.

Was it a reasonable adjustment to allow some leeway for a disabled employee or at least make enquiries about the reasons for late submission before docking pay.

256. The Claimant was given leeway. Having failed to comply with the policy, once he explained the reason for providing a backdated fit note the money that was deducted was repaid to him.

In August and October 2015 did the Respondent impose the PCP of requiring the Claimant to report for work at 9 am every morning?

257. The majority of the employment tribunal find that this PCP was not applied and did not exist: the Claimant was required to come to work at 9:30 am. The minority of the employment tribunal find that this PCP was applied.

Did the PCP put the Claimant at a substantial disadvantage compared to others who are not disabled, in that it increased driving time (at rush hour) causing him pain and suffering?

258. The context is that the Claimant wanted to arrive at work at 10 am. We accept that arriving at 9 am or alternatively 9:30 am probably meant a slightly longer journey than arriving at 10 am.

259. We accept that the Claimant suffered some pain when driving. That said we consider the extent of the pain to be modest, though more than minor or trivial. If it were otherwise we think that the Claimant would have probably avoided driving to work, and avoided being one of the drivers when at work and there is no suggestion that this is something he ever did or wanted to do.

260. We therefore think that there was a substantial disadvantage compared to other employees who are not disabled, but only just.

Did the Respondent fail to make any required adjustment?

261. The adjustment sought here was an arrival time of 10 am. We do not think that this is something the Respondent ought reasonably to have allowed. First of all the difference to the Claimant between arriving at 9 am, 9:30 am or 10 am was more than minor or trivial, but not by much. It meant a slightly longer journey time and the pain when driving was modest.

262. Against that, we accept Ms Banning's evidence that there was a strong business need for the Claimant to arrive before 10am given that he was (without any objection on his part) one of the drivers. The later he arrived, the later the other employee or employees whom he was driving that day departed from the office and the fewer home safety five visits could be carried out. 10am was simply too late for the good and efficient running of the Light Duties team.

263. We consider that on balance it was entirely reasonable to give precedence to this real and significant operational requirement.

Did the Respondent impose the PCP of a requirement to carry out physically demanding work at above head height from 19 July 2015 to 24 March 2016 and October 2016 to May 2017?

264. The Claimant was required to work in the light duties team and this did normally involve doing overhead work. However, from around the beginning of April 2017 to the end of the second period relied on (i.e., May 2017) he did not in fact do this by reason of an informal arrangement with colleagues.

265. We would not characterise the work as being particularly physically demanding (though obviously it was physical task). It did not involve any heavy lifting; sticking a smoke alarm to the ceiling was not heavy work. It was also a task of short duration though it did need to be repeated a few times in the course of a working day.

Did it put the Claimant at a substantial disadvantage compared to others who are not disabled, namely by causing pain and suffering?

266. The PCP did not cause the Claimant pain or suffering in the period 19 July 2015 to 24 March 2016 when doing light duties and therefore did not put him at a substantial disadvantage compared to others who were not disabled.

267. In the second period, from January 2017 to the end March the Claimant was experiencing more than minor or trivial pain doing overhead work and we accept this therefore put him at a substantial disadvantage compared to other employees who were not disabled and could therefore conduct their duties without pain or suffering. The Respondent did not know and could not reasonably have known this until it received the OH report of 30 March 2017 that being the first indication of a problem.

268. From April 2017 onwards the Claimant ceased doing overhead work and the substantial disadvantage ceased.

Ought the Claimant to have been excused from doing overhead work?

269. The task of fitting smoke alarms was never formally removed. There was no reason for it to be removed until the OH report of 30 March 2017 since until then the advice from OH and the impression from the Claimant was that he was fit for that work. It cannot be said that prior to 30 March 2017 the Respondent ought reasonably to have made this adjustment.

270. After OH reported pain doing this task on 30 March 2017, the task was not intentionally removed from the Claimant by the Respondent. However, the working arrangements were sufficiently flexible that this happened in any event. We find that the Claimant was able to avoid the task through informal arrangement with his co-workers. The adjustment was thus made though not by specific design. However, what is important is that the adjustment was made – however fortuitously from the Respondent's perspective.

From July 2015 until the date of the claim [October 2017] did the Respondent apply a PCP insofar as it had a rule that officers on altered work regimes could not be temporarily assigned?

271. The minority (Ms Barratt) holds that this PCP did exist on the basis that Mr Cross said in evidence that redeployment was not offered unless there was a permanent disability and/or that the employee could not return to their substantive role. Only then could the employee apply for redeployment.

272. The majority of employment tribunal (Employment Judge Dyal and Ms Murphy) hold that there was no PCP to this effect and/or no such PCP was applied to the Claimant. There were indeed restrictions on 'temporarily assigning' firefighters to other roles but this had nothing to do with whether or not the firefighter was on an 'altered work regime'. In other words, being on altered duties was not an additional barrier to temporary assignment to another role. It was simply irrelevant to it. The rule alleged in this PCP did not exist.

273. This complaint must fail since the majority find that there was no such PCP.

Between July 2015 and date of claim (excluding periods of sickness absence 3/16 – 10/16 and May 17 to date of claim) did the Respondent apply the PCP of a rule that officers on altered work regimes could not be placed on a phased return to work scheme?

274. There was no such PCP. There was simply no link between having an altered work regime and having a phased return to work. Phased returns were permitted when required including when the employee was on an altered work regime.

275. In case it is suggested that the fact that the *Claimant* did not have a phased return to work is indicative of their being a practice we reject that. It is true that the Claimant did not have a phased return to work in the sense of hours and/or duties being restored in a graduated way. However that was nothing to do with the fact that he was on light duties. It was simply because there was no indication that he needed a phased return.

276. There is also no reason to think that the Claimant would have been assisted by a phased return. He was able to return to light duties without a phased return. He was not at any time able to return to his substantive role either with or without a phased return.

Did the Respondent apply a PCP which was the rule that officers on altered work regimes could not be assigned to light duties for more than 6 months.

277. The Respondent did have essentially this PCP and did apply it to the Claimant. The Managing Attendance Handbook says this at paragraph 1.8:

> *light duties are considered the support mechanism that will result in the employee returning to their substantive post and should therefore not be seen as a long-term arrangement but rather a short-term support mechanism… Given the purposes of alternative light duties is to provide support to an employee with a view to them returning to their substantive post managers are encouraged to offer alternative light duties for as short a period of time as possible but in general should not have this place for any longer than the six month period. Each case should be managed on an individual basis and if the manager determined that alternative/light duties may be required for a longer period they should discuss this with an HR adviser at least four weeks in advance of the six-month period coming to an end, and this will need to be agreed with the manager of appropriate seniority.*

278. Mr Keen submitted that no such PCP was applied to the Claimant given that he spent July 2015 to March 2016 and then October 2016 to May 2017 on light duties (i.e., much more than six months). We see his point, but we disagree.

279. It must be remembered that there was a hiatus in the management of long-term ill-health cases between April 2014 and April 2016. That is the reason why this PCP was not applied to the Claimant's in his first stint of light duties. However, it was precisely because of this PCP that the Claimant's second stint on light duties was brought to an end. Even the outcome letter dated 31st of May 2017 made this very clear. It said *"we discussed your light duty arrangements in that light duties as a provision of a stepping stone to full duties within a reasonable period of time of up to 6 months. You have been on light duties in excess of six months and there is no indication of a return to full duties. Therefore it has been decided to terminate your light duty arrangements and you will remain absent on sick with effect from tomorrow 18th of May 2017."*

280. We find that this did put the Claimant at a substantial disadvantage compared to the Respondent's other employees who are not disabled. He unlike they was required to take sick leave when what he wanted to do was to work. Of itself that was a substantial disadvantage. It meant isolation from work, the workplace, the company of colleagues, the feeling of belonging and from his professional life. It also meant that he used up his sick pay entitlement with the prospect therefore of suffering unpaid leave in the future if the sick leave persisted. Given his disability there was a very real prospect of that. That was also in our view a substantial disadvantage which employees who were not disabled

typically did not face. Employees who where not disabled would be able to do their jobs so would not suffer this disadvantage and/or in the event of not being able to do their job would be far more likely to be able to return to their job within a period of six months or less of light duties.

281. The substantial disadvantage here is very obvious and the Respondent plainly had knowledge of it. It knew it was requiring the Claimant to take sick leave, that paid sick leave was limited, and that being on sick leave meant isolation from work and the workplace. If – somehow - it did not have actual knowledge then it ought reasonably to have known since the substantial disadvantage would have been apparent given a few moments of thought.

Was it a reasonable adjustment to allow this disabled employee to remain on light duties for more than 6 months?

282. In our view, the Respondent ought reasonably to have allowed the Claimant to remain on light duties beyond May 2017.

283. We agree with Mr Keen that it is relevant to take into account, in assessing what is reasonable, the period of time that the Claimant spent on light duties in both stints, how long it had been since he had been able to perform the role of the firefighter (not since February 2014) and the period of time already spent on sick leave. And we do so.

284. However, we nonetheless think it would have been reasonable and would have avoided the substantial disadvantage complained of, to allow the Claimant to remain on light duties.

285. There was in fact no particular difficulty with the Claimant remaining on light duties. The evidence is that the light duties team was not full up and there is no evidence that there was any particular pressure on places in it at the time. There is nothing to suggest that if the Claimant had remained on light duties this would have blocked or been a barrier to any other firefighter that needed to go on to light duties doing so – given that the team was not full.

286. The work that the light duties team did was important and was of real value to the Respondent. It was work that needed to be done on an ongoing basis including at this time.

287. We also accept Mr Keen's point that working on light duties could not be entirely open-ended, but we are not suggesting that it needed to be. Importantly, there was nothing stopping the Respondent from progressing the Claimant through the capability procedure concurrently with him working on light duties. The Respondent was entitled to progress the Claimant through the capability process whilst he was working on light duties which would inevitably bring things to a head. The capability process in fact did bring things to a head towards the end of 2017 and early 2018 - it is just that it could and should have done this whilst the Claimant remained on light duties. (We emphasise that working in light duties was not a bar to progressing through the stages of the capability policy. Indeed, the reason why the Claimant was progressed to stage I of the capability process was because he had returned to work but had done so on light duties rather than on full duties in October 2016.)

288. It seemed to us to be wasteful and pointless to put the Claimant on sick leave and do nothing of any value to the Respondent when there was no actual barrier other than a

general policy that light duties should not continue for six months to the Claimant carrying out useful work for the Respondent in the light duties team.

289. We have asked ourselves whether the problems the Claimant was having with carrying out overhead work in 2017 alter the analysis. We have concluded not:

289.1. Firstly we note that, this formed no part of the reason why the Claimant's light duties were terminated and he was required to go on sick leave. This is clear from the letter following the ASM in May 2017. It is also clear that it was known at that meeting that the Claimant had a current restriction on overhead work.

289.2. Secondly, it formed no part of the Respondent 's defence, not even in closing submissions and counsel was specifically invited to address the reasonableness of this adjustment.

289.3. Thirdly, and no doubt this explains the foregoing, the evidence shows that there was scope for the employees on light duties team to avoid fitting smoke alarms or at least avoid doing so regularly/repetitively and that this could be achieved through the distribution of duties between co-workers. It is our finding that this is what happened in the Claimant's case between April 2017 and May 2017 (as had happened in others cases also). He did this without any apparent problem and we see no reason why this could not have carried on. It is also notable that the occupational health reports show that the Claimant symptoms were improving rapidly.

Did the Respondent apply a PCP that only allowed firefighters who were fully fit for work to return to work at all?

290. The Respondent did not have or apply this PCP. There were a number of circumstances in which employees who were not fit for full duties could return to work. These included:

290.1. returning to work in the light duties team;

290.2. in the event of permanent unfitness for work or an inability to return to full duties within a reasonable period, redeployment to another role;

290.3. in the event of fitness for full duties being close, returning to work to complete the Firefighters Rehabilitation Programme.

291. There was a different PCP that limited time spent on light duties to six months but that has been relied upon separately and immediately above.

292. This complaint must therefore fail.

Harassment related to disability and/or race

In June 2017 seeking information from a maxillofacial surgeon who had examined the Claimant, which information was beyond the scope of her remit.

293. The Respondent did seek information from a maxillofacial surgeon, Ms George, and this did relate to disability. It did not relate to race.

294. We set out in our findings of fact the information it sought from Ms George. It was utterly unobjectionable. The information sought was highly relevant to the management of the Claimant's case and the letter of instruction to was entirely appropriate. That Ms George declined to answer the questions posed is perhaps surprising but that was a

matter for her and her professional judgment. It did not in any way render the information sought inappropriate nor beyond the remit of that which could properly be asked. Essentially the same questions were later answered by Mr Lyons a clinician practising in the same discipline of medicine as Ms George.

295. The conduct may have been unwanted on the Claimant's part and he may consider that it had the purpose or effect of violating his dignity or creating a proscribed environment. However, the purpose of the letter was simply to get an opinion on the Claimant's fitness for work. And, objectively, it clearly did not have the effect of violating the Claimant's dignity or creating a proscribed environment or come close to doing so.

In May and July 2017 Station Manager Hunter asking the Claimant either to book sick or return to full operational duties.

296. This does not quite characterise Station Manager Hunter's position correctly. His position was that by May 2017, since the Claimant could not return to operational duties and since in his view the Claimant had spent long enough on light duties, he had to go on sick leave. He did not give the Claimant option of returning to full operational duties (given the Claimant's ill-health).

297. This was unwanted conduct on the Claimant's part. Having heard the Claimant's evidence, the reason why we understand him to consider this matter to be an act of harassment is that he considers that he was effectively being asked to commit fraud. His reasoning is that he was fit for some work and the Respondent was asking him to take sick leave thus purporting that he was unfit for work. That reasoning is plainly wrong.

298. Fraud requires dishonesty. There was nothing dishonest about taking sick leave in these circumstances. If an employee is unfit for their substantive role, and the employer does not have any alternative work it considers it can/is prepared to offer the employee, then the employee can rightly and properly take sick leave without the slightest dishonesty. There is not even anything unusual about this; employees very frequently take sick leave because there unfit for their own role and the employer has no alternative work at all, or in other cases, no alternative work it considers suitable for the employee.

299. The conduct relates to the Claimant's disability because that is why he was unable to perform his full duties and was told to book sick. It did not in any way relate to this race.

300. The conduct did not have the purpose of violating the Claimant's dignity or of creating a proscribed environment. Nor, objectively, did it have that effect. While we disagree with the managerial action that Station Manager Hunter took we do not think that it violated the Claimant's dignity nor that it created a proscribed environment. He took the managerial action in a moderate and temperate way and he and Mr Cross expressed their disagreements with the Claimant's position in a professional manner.

In August 2017 Station Manager Scrivener making derogatory comments about the Claimant during a telephone call with SM Button which was inadvertently heard by the Claimant.

301. We found as a fact that the conversation that was recorded on the Claimant's answerphone did indeed relate to the Claimant. This was certainly unwanted conduct that offended the Claimant.

302. The content of the conversation recorded is remarkable. It's littered with the foulest of language and culminates essentially in implied allegations that the Claimant had been off work for far too long, that he did not deserve the pay that he had received and that he was in some way playing the system.

303. The conduct related to disability. The Claimant 's pattern of attendance and sickness absence was all on account of disability and the answerphone message was squarely about those things. The conduct had nothing at all to do with race.

304. The purpose of the conduct was for two colleagues to 'blow off steam' and we accept that the message was not intended for the Claimant to hear. However, we have no hesitation in finding that the message had the effect of creating a proscribed environment. What was said was highly offensive, speaks for itself and easily crossed the threshold of creating an offensive state of affairs.

Mr Scrivener making derogatory comment to Tyrone Elcock about the Claimant

305. In closing submissions it was clarified that the comment was saying that the Claimant was bringing the force to its knees.

306. We have found as a fact that Mr Scrivener did say this. We have given thought to the intended meaning of the comment. Clearly it was rhetorical since nothing the Claimant could do as an individual could bring the force to its knees. But we think having taken into account Mr Scrivener's hostile views to the Respondent's sick pay and managing attendance policies, he meant that the Claimant was, to use another colloquialism, '*bleeding the Respondent dry'* by claiming full pay whilst being unfit for his substantive duties for so long.

307. The conduct was certainly unwanted on the Claimant's part.

308. The purpose of the comment was to encourage the Claimant to return to work. However, the effect of the comment was that the Claimant found it highly offensive. We think that, objectively, this was an offensive thing to ask Mr Elcock to relay to the Claimant and did create a proscribed environment. It would have done so in our view all on its own, but even more clearly does so when it is combined with the message that Mr Scrivener left on the Claimant's answerphone.

309. We consider that the comment did relate to disability because once again it related to the Claimant's pattern of attendance and sickness absence and that was, squarely, caused by his disability.

In May 2017 not allowing the Claimant to return to work when his GP confirmed that he was fit for light duties.

310. We do not see any material difference between this allegation and the allegation above that we have already dealt with that "*In May and July 2017 Station Manager Hunter asking the Claimant either to book sick or return to full operational duties."* We repeat our analysis.

Direct discrimination because of race and/or disability; s 13 EqA

311. The Claimant describes his racial group as Black African. We accept that the Claimant had the protected characteristic and the protected characteristic of disability.

312. Before making our conclusions on the reason why the matters complained of here happened we reminded ourselves that discrimination is usually hidden. We stood back from the facts as a whole and asked ourselves what inferences might be drawn. We were particularly struck by:

312.1. Mr Hunter's comment that '*we don't want people like that around here'* in reference to the Claimant;
312.2. Mr Scrivener's attitude towards the Claimant's sick-leave, light duties and pay during those periods;
312.3. Mr Elcock's opinion (given in the course of his evidence) that there was a race discrimination problem within the Respondent .

313. We considered that these matters did indicate that there was a possibility of discrimination because of race or disability. However, we ultimately took the view that there was other much more powerful evidence that showed that the Claimant had not been discriminated against because of race or disability and that we were in a position to positively find that he had not been.

On or around 19 July 2015 asking the Claimant to carry out the task of installing smoke alarms, lifting heavy items and working in extreme and difficult conditions.

314. The Claimant was required to install smoke alarms at this time. The Claimant was not required to undertake heavy lifting. The heaviest items were 4kg boxes containing 20 smoke alarms. The Claimant was asked to work in members of the public's homes. Sometimes they could be difficult conditions; occasionally they could be extreme conditions.

315. The reason why the Claimant was asked to do these things was simply because he had been assigned to the light duties team and this is what the work of the light duties team involved.

316. We do not accept that he was treated differently to any comparator (e.g. Messers Kelf, Eminson and Palmer). The evidence shows that the members of the light duty team were left to divide up the duties between themselves and that they did so. This did mean that sometimes people who found it difficult to install smoke alarms avoided doing so. However on the evidence this was the product of informal relations and negotiations between co-workers, rather than a working arrangement approved or organised by management. On our findings of fact, the same thing happened in the Claimant's own case when in 2017 he began to find it difficult to install smoke alarms. The evidence shows, in our view, that for a period of time he was able to remain on light duties team and avoid that work.

317. In any event we are quite sure that none of this had anything to do with the Claimant's race or his disability.

318. A hypothetical comparator of a different race and/or without the Claimant's disability would have been treated in exactly the same way.

Not being offered the option of redeployment between 16 June 2016 and the date of claim.

319. It is true that the Claimant was not offered redeployment in this period of time. However that was nothing to do with race or disability. It was because the Respondent was not prepared to redeploy the Claimant to an alternative role other than light duties, unless and until it was satisfied either that the Claimant was permanently unfit for work or that he would be unable to return to the role of a firefighter within a reasonable period. Throughout this period of time the prognosis remained unclear.

320. It is no doubt true that there are other employees who have been redeployed. Of the

comparators listed Mr Burges was redeployed. However this was a permanent redeployment made as an alternative to dismissal at stage 3 of the capability process when it became clear that he could not return to a substantive role. The Claimant was also offered permanent redeployment in his case at stage 2 of the capability process. There was no less favourable treatment of the Claimant compared to Mr Burges.

321. A hypothetical comparator of a different race and/or without the Claimant's disability would have been treated in exactly the same way.

Not being offered a phased return to work between July 2015 and May 2017 (excluding the period of sickness absence 3/16 – 10/16).

322. It is true that the Claimant was not offered a phased return to work. However this had nothing whatsoever to do with race or disability. There was never any advice that the Claimant needed a phased return to work. A phased return would not have assisted in any way during this period to get the Claimant back to his firefighting role because he was simply unfit for it and that was what the medical evidence showed. There is no evidence that he needed a phased return to light duties.

323. Firefighter Jacques did have a phased return to work. However that was because it was what occupational health advised in her case. Her circumstances were therefore materially different.

324. A hypothetical comparator of a different race and/or without the Claimant's disability would have been treated in exactly the same way.

In May 2017 until the date of claim, not being allowed to return to work despite evidence from his GP that he was fit for light duties.

325. This is true but was not because of the Claimant's race or because of his disability.

326. The reason the Claimant was not allowed to return to full duties was because the medical advice was that he was not fit for full duties. The reason that the Claimant was not permitted to return to light duties during this period was because the Respondent considered light duties to be a temporary measure and the Claimant had spent over six months in light duties.

327. There is some evidence of other people spending longer in light duties than the Claimant did (Nicola Jacques). However that all relates to the pre-April 2016 period. There was a period of two years within which the Respondent was not progressing long-term ill-health cases. Therefore time spent on light duties in that period was not subject to the six month policy. The Claimant himself benefited from this in his first period of light duties between July 2015 and March 2016, when he was on light duties for a period of eight months without any suggestion that he would be progressed through the capability policy. There was thus no material difference of treatment. A relevant hypothetical comparator would have been treated in the same way as the Claimant.

Victimisation

328. The Claimant did give evidence for FF Sappleton in the employment tribunal and that was a protected act.

Detriment because of protected act

329. Although the Claimant gave a significant amount of evidence about his support for FF Sappleton in his witness statement, which is reflected in the tribunal's findings of fact, the victimisation claim was otherwise barely pursued at all at the hearing.

330. It was not put to any of the Respondent 's witnesses that they had treated the Claimant in the way that they had because of the protected act or more generally because of the Claimant's support for Mr Sappleton.

331. In the Claimant's written closing submissions, which run to 23 typed pages, victimisation is dealt with at paragraphs 85 through to 89. Those paragraphs deal entirely with the law, save for the final sentence of paragraph 89 which reads *"it is notable that most of the matters complained of by the Claimant occurred after he had started assisting his colleague (February 2016)".*

332. Overall, we do not think that the Claimant has come close to establishing a prima facie case that any of the treatment complained of was because of the protected act. No coherent case has been advanced. The one matter mentioned at paragraph 89 of Ms Von Vachter's skeleton argument, though broadly true, comes nowhere near shifting the burden of proof. Given that ill health capability cases were not progressed between April 2014 and April 2016 in a case of this sort it is unsurprising that the majority of the complaints occurred after that watershed. We remind ourselves of what we said above about discrimination being hidden and consider much the same point applies to victimisation. We also remind ourselves in particular about Mr Hunter's comment to effect that "*we do not want people like that around here"*. It was not put to him that this was a reference to the Claimant supporting FF Sappleton and for that reason, but also more generally, we see no good reason to conclude it was.

333. In any event, we positively find that none of the treatment complained of was because the protected act:

333.1. We have already made findings of fact about the reasons for the treatment additionally complained of as direct discrimination and we repeat that here;

333.2. As to the allegations additionally complained of as harassment:

333.2.1. The reason the letter was sent to Ms George in the terms it was, was to get her medical opinion on the issues posed;

333.2.2. The reason SM Hunter asked the Claimant to book sick unless he could return to full duties was that the Claimant had been on light duties over six months and SM Hunter considered it no longer appropriate for the Claimant to remain on light duties, it was unclear what the prognosis was in terms of a return to full duties and SM Hunter thought he had been on light duties long enough;

333.2.3. The reason SM Scrivener made derogatory comments on the answerphone message was because he did not know he was being recorded and was venting his displeasure with the Claimant's sick leave and sick pay which he thought to be excessive. The reason SM Scrivener made the comment about bringing the brigade to its knees was to try and get the Claimant to return to work following leave that he considered was excessive;

333.2.4. The reason the Claimant was not allowed to return to work in May 2017 when his GP confirmed he was fit for light duties was he was not fit for full duties, it was unclear what the prognosis was in terms a return to full duties and SM Hunter thought he had been on light duties long enough.

333.3. Turning to the complaints additionally complained of as failure to make reasonable adjustments:

333.3.1. The PCP in respect of sick notes and sick pay pre-dated the protected act and had nothing to do with it.

333.3.2. The PCP in respect of attending work at 9 am was not applied at all on the majority view. In any event, if it was applied it was applied because it was the normal start time for the team. The adjustment the Claimant says should have been made was not made because of an operational requirement for him to attend work.

333.3.3. The PCP of carrying out physically demanding work at above head height was applied (to the extent that it was) because that was the work of the light duties team. The adjustment sought was not made because initially it was not needed. Once needed, the Claimant was able to informally avoid the work in the same was as other colleagues.

333.3.4. The PCP relating to officers on altered work regimes not being temporarily reassigned did not exist (in the majority's view).

333.3.5. The PCP relating to officers not being assigned to light duties for more than six months was applied to the Claimant because it was a policy of general application for people in his position. Mr Hunter did not allow the Claimant to remain on light duties any longer because he believed the Claimant had been on light duties long enough having regard to the Managing Attendance Policy/Guidance.

333.3.6. The PCP of only allowing fully fit firefighters to return to work at all did not exist.

Limitation

334. The complaints of harassment related to disability that have succeeded were presented within the primary limitation period.

335. However, the complaint of failure to make reasonable adjustments has not been. In our judgment time ran from the date that it was clear to the Claimant that the adjustments would not be made. That was 17 May 2018 when the Respondent 's position was made plain in unambiguous terms in the ASM meeting. The complaint was therefore presented about one month out of time.

336. In our view it is just and equitable to extend time:

336.1. The delay was short: in the order of one month.

336.2. The reason for the delay was that the Claimant lodged an ET1 on 19 June 2017 without going through early conciliation. This was simply an error based upon a lack of knowledge on his part. That ET1 was dismissed at a preliminary hearing on 6 October 2017. The Claimant then lodged a fresh ET1, on 19 October 2017. In the meantime that Claimant had (wisely) obtained assistance from solicitors.

336.3. When considering whether the cogency of the evidence has been affected by the delay, it is important to have the right delay in mind. The relevant delay is the delay occasioned by the presentation of the case one month after the expiry of the primary limitation period. We do not think that delay had any material impact on the cogency of the evidence. There were many further delays in the case that led to it being heard in the summer of 2021, but they were unrelated to the late presentation of the claim.

336.4. The steps the Claimant took to take advice are not precisely clear, but it is clear that he took advice fairly quickly, since he was represented by a solicitor at the

preliminary hearing of 6 October 2017, and solicitors prepared the second ET one that is the subject of this claim.

336.5. The most important factor is the balance of prejudice. We consider that there would be very significant prejudice to the Claimant if we refused to extend time. We have found that the complaint of failure to make reasonable adjustments is well-founded on its merits. He would therefore be deprived of something of great substance were we to refuse to extend time. On the other hand if we do extend time, the Respondent will be liable for the claim. However, it has had a fair opportunity to defend the claim, and the late presentation of the claim did not in our view make it any more difficult to defend the claim. To extend time would therefore only prejudice the Respondent to the extent of depriving it of a windfall.

336.6. The balance of prejudice clearly favours extending time, and overall taking that into account that as well as all other relevant factors, we have no doubt that is just and equitable to extend time.

Conclusion

337. The case will now be listed for a remedy hearing.

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Employment Judge Dyal

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Date 16.08.2021