EMPLOYMENT TRIBUNALS

Claimant: Mr C Dobson

Respondent: London Fire Commissioner

HELD AT: London South ET by Cloud Video Platform

ON: 24 and 25 May 2022
16 June 2022 (in chambers)

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Mr Tomison, counsel
Respondent: Mr Amunwa, counsel

JUDGMENT

The claimant was not unfairly dismissed by the respondent. His claim fails and is dismissed.

REASONS

Procedural Matters and Preliminary Applications

1. By a claim form received on 30 April 2021 the claimant brings a claim of unfair dismissal against the respondent, having engaged in ACAS Early Conciliation from 22 December 2020 until 2 February 2021.

2. The respondent operates the London Fire Brigade. The claimant was employed as a firefighter for the respondent from 5 June 2000 until his dismissal on 28 September 2020 on notice, such notice expiring on 21 December 2020.

The Claimant's Postponement Application

3. The claimant applied for a second time prior to the hearing (23 May 2022) for a postponement of the hearing. The claimant's first postponement application of 10 May 2022 was refused in a letter from the Tribunal dated 17 May 2022, having been opposed by the respondent.

4. The reason for both postponement applications is, in summary, that the claimant lives in Argentina and was participating in the hearing from Argentina. He has a severe fear of flying and travelled to South America from the UK by a series of boats and overland connections, a journey that took several weeks at significant cost. He was given permission by the Tribunal to participate in the hearing by video, however, as a result of the decision in *Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 00286 (IAC)* he also needs to establish via enquiries with the Taking of Evidence Unit ("ToE") of the Foreign, Commonwealth and development Office ("FCO") whether Argentina objects to the giving of evidence to the ET from its territory.

5. Having first made enquiries of the ToE Unit on 6 and 7 April 2022, and having chased the FCO ToE directly and the claimant having attended the embassy in Argentina in person, the claimant by the start of this hearing had still not received confirmation that Argentina had no objection to him giving evidence from its territory. Therefore, according to *Agbabiaka* and the Presidential Guidance on taking oral evidence by video or telephone from persons located abroad dated 27 April 2022, without such confirmation the claimant is not able to give evidence in his own hearing.

6. The claimant's application was made on the basis that he had applied to the ToE Unit promptly, is unable to make alternative arrangements at short notice (given his inability to fly and the duration and expense of a journey back to the UK), and that refusing a postponement would deny the claimant the right to a fair trial in breach of Article 6 of the ECHR. He further notes that he should not be punished for delays in the ToE, as the Unit is newly established and there appears to be a significant backlog of queries. Finally, he submits that the respondents are not prejudiced by a postponement given that witness statements have already been drafted which reduces the impact of deterioration of evidence due to memories fading.

7. The claimant's counsel referred the Tribunal to *Teinaz v Wandsworth Borough Council [2002] ICR 1471 CA* in which it was noted that although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice.

8. The respondent objected to the postponement application. The respondent noted that as the application was being made less than 7 days before the start of the hearing, the provisions of rule 30A (and not rule 30) of the Employment Tribunals Rules of Procedure 2013 applied. In rule 30A a postponement should

only be granted on such short notice in exceptional circumstances (as per 30A(2)(c)) and is subject to costs considerations in rule 76(1)(c).

9. The respondent's counsel also submitted that the claimant should have approached the ToE sooner, and also that the claimant's evidence was not crucial for a fair hearing. The respondent's view is that as this is an unfair dismissal claim, the evidence of the respondent's witnesses is key and the claimant's evidence in this case is dispensable. Furthermore, there is no material dispute on key facts and the chronology of events is agreed. The main issues for the Tribunal to decide are those of reasonableness and the reason for dismissal. The respondent also noted that they would be prejudiced by a delay, given that the facts of this case relate to circumstances which first arose a long time ago and two of the respondent's main witnesses, Mr Hearn and Mr Bell, would imminently no longer be available as Mr Hearn was going on secondment and Mr Bell was retiring.

10. The Tribunal discussed the sufficiency of the time available for the hearing and noted that the hearing had been listed for two days, but that both parties had requested that it be extended to three days, a request which had been denied at an earlier stage in the proceedings by the Tribunal. Given the nature of the claim (unfair dismissal, where the potentially fair reason was in dispute), the respondent would ordinarily give evidence first and then the claimant. The hearing bundle was 963 pages long and there were 58 pages of witness evidence to read. The determination of this postponement application had inevitably delayed the start of the substantive hearing.

11. It was noted that the timing of the claimant's application meant that the determination was to be in accordance with rule 30A of the Tribunal Rules 2013 and that the Tribunal would be obliged to consider the issue of costs at a later stage under rule 76. The Tribunal was not prepared to proceed without hearing the claimant's evidence at all. Having considered the issues that the Tribunal would need to decide, the claimant's evidence would assist the Tribunal in reaching a fair and reasoned decision, although it was accepted that the majority of the evidence would come from the respondent. For example, it was not known at the start of the hearing what the cross-examination of the respondent's witnesses may uncover. There was also the issue of the lack of weight that could be attached to the claimant's witness statement if he did not appear to be questioned on it under oath.

12. It was accepted that the proceedings related to issues that arose a considerable time ago and it was noted that the chronology fixes the start of the claimant's material absences at January 2019, but with earlier absences from mid-2014 onwards. It was also accepted that the application to postpone was being remade late and that the respondent's witnesses were in attendance and ready to give evidence.

13. However, the Tribunal was not prepared to grant an indefinite postponement of the resumed hearing and the claimant's counsel accepted this. A date of September or October 2022 was fixed as appropriate for the parties to attend for a third and fourth day, to hear the claimant's evidence and deal with final submissions and remedy, if appropriate. The claimant's counsel accepted that if ToE had not given permission at that point, the hearing would conclude without the claimant's giving evidence. There was a discussion about practical measures that could be taken to assist, including travel to Uruguay to give evidence, where permission may be more readily obtained than in Argentina.

14. The Tribunal therefore saw no reason why the hearing could not proceed on the basis that the two days already listed were used for Tribunal reading and cross-examination of the respondent's three witnesses.

15. At the start of day two of this hearing, the claimant's counsel informed the Tribunal that the claimant had taken the decision that he in fact wished the hearing to conclude without resuming it at a later date for his evidence. He accepted that this meant that less weight would be placed on his written witness statement. He was asked to confirm that his legal representatives had discussed his options in this regard with him and that he had given his consent, and the claimant confirmed that this was the case.

16. Therefore, claimant did not give evidence on his own account although his written statement has been read and considered along with the statement of Mr MacVeigh who also did not appear to give evidence in person. The Tribunal heard from three witnesses for the respondent, Ms Bailey, health and absence advisor, Mr Hearn, then a Deputy Assistant Commissioner and Mr Bell, Assistant Commissioner.

17. At the outset of the hearing, it was agreed that the issues for the Tribunal to decide would be:

    - What was the reason for the claimant's dismissal? The respondent says ill-health incapacity for work. The burden of proof in establishing this is on the respondent;
    - Was the dismissal within the range of reasonable responses? Did the respondent act reasonably in all the circumstances in treating this reason as sufficient to dismiss the claimant? Issues for the Tribunal to take into account will include:
        i. The investigation undertaken by the respondent and any consultation with the claimant;
        ii. Whether the respondent could reasonably be expected to wait any longer for the claimant to return to work;
        iii. The size and resources of the respondent;

iv. The claimant's prior service with the respondent;

- The Tribunal will also consider whether, if the dismissal was procedurally unfair, whether to make any adjustment for the factors in *Polkey v AE Dayton Services Limited*.
- Did the claimant cause or contribute to his dismissal such that any compensation should be adjusted to take account of this?

18. During the respondent's closing statement, submissions were made as to whether at some future point, the claimant's contract would necessarily have terminated due to frustration. The respondent's submissions were that there was evidence of the claimant being wholly unable to do his role at all, as the claimant, being unable to fly, had chosen to relocate himself in Chile and had found himself unable to return to the UK. He had therefore, on the respondent's submission, put himself in a position where he couldn't do his job. The respondent submitted that the Tribunal ought to consider making a substantial reduction for *Polkey* because of this.

19. The claimant's counsel Mr Tomison objected to this point. He had already made his submissions by the time this issue was raised, and said that the claimant had not been aware that this would be part of the respondent's case and he had therefore not cross-examined on it. The Tribunal noted that the claimant had given some evidence on the point but accepted that there was a different emphasis in the respondent's original case, and therefore the claimant was permitted to make submissions on the point within seven days. The claimant did make those submissions and they have been considered. The respondent was given the opportunity to respond thereafter but confirmed that no further submissions would be made by them.

20. Given the claimant's difficulties in obtaining the consent to give evidence, it was agreed that the remedy hearing in this matter would be provisionally listed for 6 October 2022, to allow the claimant to make attempts to obtain the consent needed to give evidence as to remedy in the event that his claim was successful.

Findings of Fact

21. A number of the facts in these proceedings were not in dispute between the parties and where the Tribunal has made findings on any disputed facts, this is indicated in the judgment. The parties provided the Tribunal with evidence on some matters that were not directly relevant to the issues I had to decide. Where these reasons are silent on that evidence, it is not that it was not considered, but that it was not sufficiently relevant to be included in the findings of fact.

22. The parties provided a detailed agreed chronology to the Tribunal, which was of great assistance in understanding the factual context of the complaints. The

key dates from the agreed chronology, which are provided for the purpose of setting the findings of fact in context, are as follows. They show that the claimant had a history of non-attendance at the respondent.

23. From 1 July 2014 until 4 January 2015, the claimant was off sick for 6 months. From 29 April 2015 to 2 May 2017, a second career break was authorised for him, having taken a one-year career break ending in July 2010. Within six weeks of returning to work in May 2017, he was off sick with stress, anxiety and depression. He did not return to work until 8 October 2018. In the period from July 2017 until December 2017, he was required to attend five occupational health (hereafter, "OH") appointments but attended only one.

24. He attended an absence support meeting on 6 September 2017 but did not attend a further absence support meeting on 23 January 2018. The respondent began its capability procedure and the first stage meeting was held on 24 April 2018. The respondent's sickness capability procedure envisages a usual maximum of twelve months from the start of the first stage to the end of the third stage, but the claimant's third stage meeting did not take place until 28 September 2020.

25. The first stage meeting on 24 April 2018 had been rearranged from 7 March 2018 in part because the claimant had been travelling in Europe for "several weeks" (on the claimant's evidence to the respondent at the time). The claimant was told his absence would be monitored over the following three months with a view to returning to work in July 2018. However, the claimant provided a medical certificate dated 1 March 2018 stating that he was unfit to work for 6 months. On 8 October 2018 the claimant returned to work on light duties and remained on light duties despite OH advising on 10 October 2018 that he was fit for full duties.

26. On 22 January 2019 the claimant was signed off sick due to an injury he obtained on a breathing apparatus course the previous day. He did not return to work thereafter and remained absent until dismissal on 28 September 2020, with the end of his notice period being 12 weeks later in December 2020.

27. He attended a second stage capability meeting on 26 March 2019 at which it was decided that the claimant's attendance would be monitored for three months and assessed against attendance targets. He was told that he would be invited to attend an absence support meeting ("ASM") at the end of the three month period and if his attendance did not improve he would be moved to the third stage of the capability process which may result in his dismissal.

28. It is this target date of three months from 26 March 2019 (therefore approximately the end of June 2019) that Mr Hearn told the Tribunal was in his mind at the time he conducted the claimant's ASM on 28 September 2020.

29. Having requested that his absence as of 22 January 2019 be classed as "due to service", the respondent's management panel met on 9 April and decided that it would be classed as "due to service".

30. The claimant failed to attend three physiotherapy appointments with OH in April and May 2019, but attended an OH telephone appointment on 21 May 2019 and OH were told that he was in Slovenia, having driven there from the UK, and was still in pain.

31. Ms Bayley wrote to the claimant on 22 May 2019 to remind him of his contractual obligation to attend OH appointments and she noted that he had said he was residing in Slovenia and that having driven there his back injury became too painful to allow him to drive back.

32. On 3 June the claimant attended an OH appointment in person and OH advised that he was '*not fit for work at this point.*'. He did not attend a further ASM on 13 July 2019 or a reasonable adjustments and redeployment meeting on 6 August 2019. The latter went ahead in his absence with the claimant's union representative Mr Shek attending and redeployment was recommended by management.

33. The claimant was referred to the Independent Qualified Medical Practitioner ("IQMP") for consideration concerning ill-health retirement. A consent form was enclosed to allow disclosure of the IQMP's rationale to the respondent, but the claimant did not return the consent form.

34. Deputy Assistant Commissioner Richard Welch wrote to the claimant on 15 August 2019 to update him on his long-term sickness and contractual sick pay. The letter noted that he appeared to have been travelling back and forth to and from Slovenia on several occasions notwithstanding his medical condition and his contractual obligations not to aggravate this, and the claimant's contractual sick pay would therefore cease from 1 September 2019.

35. On 3 September, the claimant raised a grievance against the decision to cease his contractual sick pay from 1 September 2019. On 27 September 2019 the claimant signed a redeployment waiver form, confirming that he did not wish to consider redeployment and waived his right to this.

36. An OH report on 8 October 2019 noted that the claimant was not fit to return to work at present and stated it would be difficult to predict a likely return. On 22 October 2019 the claimant provided a further sick note signing him off work for three months.

37. Following a grievance hearing on 22 October 2019, the claimant was informed on 30 October 2019 that his sick pay would be reinstated, which it was on 6 November 2019.

38. In November 2019, the claimant travelled by boat to New York, then overland to Los Angeles and subsequently by boat to Chile, a journey which took several weeks, with the intention of getting married. He has remained in South America since then.
39. The claimant was invited to a further ASM in January 2020 which he said he could not attend in person as he was out of the country, citing personal difficulties. On 5 February 2020 he informed the respondent that his union representative would attend on his behalf due to '*ongoing domestic difficulties*'. The ASM took place the following day and the claimant was advised that the respondent would proceed to a third stage capability meeting, which meeting was subsequently delayed due to Covid.

40. Between 10 March 2020 and July 2020, the claimant's situation was assessed as follows: via telephone on 3 April 2020 where he was classed as unfit for work. He was signed off by his GP on 16 June until 1 September 2020 as unfit for work with lower back pain. He was invited to a stage 3 capability meeting on 28 July which he asked to postpone as he was unable to attend, which request was refused and he was offered the opportunity to participate by video.

41. The third stage meeting with DAC Hearn on 28 July was adjourned to wait for an update from OH, who advised on 30 July 2020 that the claimant was fit to return to operational duties. The OH physician Dr Weston stated

    'I am hopeful Mr Dobson will be able to attend reliably going forward and the prognosis appears favourable. However, this cannot be predicted with any certainty and we know that previous patterns of attendance are often the most reliable predictors of further attendance.'

42. Dr Weston confirmed that it would be useful to obtain a report from the claimant's GP, with the claimant's consent. On 3 August 2020, the Stage 3 capability meeting was reconvened with DAC Hearn, Paula Bayley, the claimant and David Shek via video, however as no GP report was forthcoming the meeting was adjourned to obtain the claimant's GP records.

43. On 4 August 2020 Paula Bayley sent the claimant a GP consent form to complete. The following day the claimant emailed Paula Bayley stating that he could not complete the GP consent form on his mobile phone and did not have access to a computer. On 6 August Paula Bayley sent the claimant a GP consent form in a different format. The next day the claimant emailed Paula Bayley stating that he was unable to complete the form. On 11 August, Paula Bayley emailed the claimant to request the information from him and offering to

complete the form for him. On 13 August 2020, Paula Bayley had received the information and submitted the form to OH. Ms Bailey and DAC Hearn told the Tribunal that they considered it significant that the claimant took from 4 August until 13 August to complete the GP consent form, or to provide Ms Bailey with the information to do so.

44. On 4 September 2020, the claimant was due to return to work. The respondent allowed the claimant to use his annual leave. At the end of his annual leave period the claimant told the respondent that he was unable to return to the UK.

45. On 8 September 2020 the claimant was assessed by OH by telephone. Dr Weston reported that the claimant was physically and psychologically well with no recurrence of back pain.

46. On 15 September 2020, Paula Bayley emailed the claimant confirming that despite numerous requests, OH had not received his GP report. She advised him to contact his GP to explain the importance of providing the report.

47. A third stage capability process meeting was held with DAC Hearn, Paula Bayley, the claimant and David Shek via Teams on 28 September 2020. The respondent dismissed the claimant on the grounds that he had failed to meet the 3-month attendance target to return to work, as set by the Second Stage capability meeting on 26 March 2019. The decision was confirmed in writing on 29 September 2020.

48. On 1 October 2020 the claimant appealed on the grounds that the sanction of dismissal was too severe, the Managing Attendance Policy was not adhered to, medical information was not considered and new information had come to light.

49. On 16 November Appeal heard by Assistant Commissioner ('AC') Andy Bell, DAC Hearn, the claimant, David Shek and Gemma Gayfer of the respondent's HR department on 17 November 2020 via video. The respondent's OH confirmed to the respondent that the claimant's GP surgery had advised that they were waiting for the claimant to get a blood test done in order to be able to complete the GP report.

50. AC Bell wrote to the claimant on 27 November 2020, informing him that his appeal was not upheld.

51. The claimant raised an issue that the respondent did not consider alternatives to dismissal such as allowing him to complete DAMOP training remotely. However, it is accepted that the claimant was fit to return to work at the time he was dismissed and it is accepted that the respondent did not dismiss the claimant because he was stuck in South America, and so the need for alternative duties, I find, does not arise on the facts. In any event, I accept the respondent's evidence that it would simply not be possible to do an operational

firefighter's role remotely and that the elements of DAMOP training that could be done remotely were a very small percentage of the claimant's overall role.

52. The respondent terminated the claimant's employment on grounds of capability and the claimant was dismissed with notice on 21 December 2020.

53. The respondent's Sickness Capability Process document dated 26 August 2020, which was before the Tribunal in evidence, states that an employee can have the following expectations of the process (at section 5.4):

> *"5.4 Any decision to dismiss an employee will only be taken when: • The employee has been formally advised that failure to attend work on a regular basis could lead to dismissal. This applies equally to cases of both short term persistent and long-term absence.*
> - *The employee and trade union representative have had an opportunity to explain the absence record and the reasons for it.*
> - *Management has explained the requirement for the employee to attend work on a regular basis and has given the employee the opportunity to prove that they can attend work on a regular basis.*
> - *Reasonable adjustments to the post have been considered, as required under the Equality Act. and it has been determined that no further adjustments can be made.*
> - *Where applicable, the option of a suitable alternative position has been fully considered.*
> - *Medical advice has been obtained to ascertain the nature of the illness/ailment, its likely duration, whether the employee is likely to make a full recovery and if not what work they are able to perform.*
> - *III Health Retirement has been considered where appropriate.*
>
> *IMPORTANT: Clearly each case will require to be considered on its own merits and careful judgement exercised before reaching a decision to dismiss on the basis of capability."*

54. Evidence was given by the respondent's witnesses, and most notably DAC Hearn, as to the effect on the respondent of keeping the claimant's job available to him during the prolonged periods of absence. It was put to the respondent that there was no cost, either in purely financial terms or in terms of a lack of operational resources, in doing so. I accept the respondent's evidence that this was not the case.

55. It is not disputed between the parties that the claimant had exhausted his sick pay and was on nil pay in September 2020. He was also, at that time, in the respondent's Long Term Sick pool of staff, as opposed to being assigned to a particular watch. It is the claimant's case that this therefore did not affect service delivery on the front line. The respondent's evidence and especially that of DAC Hearn was that the claimant's continued absence did affect service delivery as

the claimant and others in the Long Term Sick pool were counted in the respondent's overall head count. The head count was limited in that the respondent was not able to recruit new firefighters to replace the claimant while he remained in the Long Term Sick pool. Therefore, the respondent was understaffed by the number of firefighters in that pool and while the individuals in the pool remained employed by the respondent, the respondent was not able to recruit to replace them. I accept the respondent's evidence in that regard.

56. It was also put to DAC Hearn that it was unreasonable, having waited as long as the respondent did for the claimant to return to work, to terminate his employment when they did, when the medical evidence indicated he was well and fit to return to work. I accept the claimant's evidence that in September 2020 he was fit and well and had made a full recovery. The claimant's GP had signed him as fit for work on 17 July 2020. The claimant says that the respondent acted unfairly in that it did not wait until the claimant's GP provided the medical evidence that the OH report said should be obtained. I find that, given the particularly long duration of the claimant's sickness absences and given the delay between stage 2 and stage 3 of the process, DAC Hearn was particularly unwilling to wait any longer for the claimant's GP report to be obtained, having postponed the stage three meeting by a month once already to wait for it to be provided.

57. DAC Hearn's evidence to the Tribunal was that he took account of the advice given by the OH physician Dr Weston on 30 July 2020. She had assessed the claimant remotely as being fit for work. Her report, however, was less definitive and it stated:

'I am hopeful Mr Dobson will be able to attend reliably going forward and the prognosis appears favourable. However, this cannot be predicted with any certainty and we know that previous patterns of attendance are often the most reliable predictors of further attendance'

58. I find that this quote from Dr Weston struck a chord with DAC Hearn, and he cited it in his evidence before the Tribunal. Given the history of the claimant's absences, DAC Hearn reached a conclusion in the circumstances that was that the claimant was highly likely to not maintain a pattern of reliable and consistent attendance going forward. As set out above, the claimant's history of attendance and the frequency and duration of his absences is notable. I find that DAC Hearn took into account that some of the claimant's absences were caused by injuries during service. However, DAC Hearn concluded that the claimant was not sufficiently able to demonstrate that he was fully committed to remaining in active service.

59. For example, DAC Hearn noted that the claimant had given evidence that he used the time being at home during lockdown to really focus on his rehabilitation

exercises. DAC Hearn's view was that the claimant ought to have been taking proactive steps to focus on this anyway, and that the coincidental circumstances of a lockdown ought not to have been the reason why he began to focus on it. DAC Hearn told the Tribunal that he had placed the claimant's comments and approach within the context of other members of the respondent's firefighting staff who he had assessed when carrying out sickness capability processes, who had been off sick and who had, in his view, generally shown much more active commitment to returning to work and much more determination to work on rehabilitation than the claimant had.

60. Both DAC Hearn and Ms Bailey expressed frustration at the length of time that the claimant took to respond to Ms Bailey's request that the claimant's GP be provided with his consent to issue a report. Although on behalf the claimant it was submitted that he did not have access to a computer and was operating off a mobile phone, I accept that nonetheless it took him a very long time to respond as required.

61. This, taken with Dr Weston's comments about the likely pattern of further attendance and the claimant's comments about his efforts to rehabilitate were clearly key influential factors in DAC Hearn's decision to dismiss the claimant.

62. Neither DAC Hearn nor AC Bell gave evidence that the claimant's decision to relocate to South America or the fact that he remained there as a consequence of Covid lockdowns influenced their decisions with regard to terminating his employment. I accept their evidence in this regard.

63. It was put to DAC Hearn that the real reason for the claimant's dismissal was not capability, but misconduct, that he was dismissed, at least in part, for "malingering" and that consequently the respondent had not followed a fair procedure in dismissing the claimant, as the respondent had not been open and transparent with the claimant as to their rationale for dismissing him. DAC Hearn told the Tribunal that it was not part of the respondent's processes to consider this kind of non-attendance and lengthy sickness absences as part of the disciplinary procedure and that he believed that the trade unions would be unhappy had the respondent approach long-term sickness absences in this way. It is the respondent's case that the claimant was not dismissed for this reason. The respondent submitted that dealing with the claimant's absences via the capability process rather than via a conduct process meant that it was handled more sympathetically.

64. DAC Hearn's evidence was that he considered the claimant to have displayed "*a consistent record of non-improvement*" in his sickness absences. He also told the Tribunal that he had taken into account the fact that the claimant's absence was due to injury sustained in service, but that this was just one element of his sickness absence in what DAC Hearn described as "*an*

excessive case". The claimant's latest period of sickness absence was, he said, "*the second time in exactly the same circumstances*" and that whether due to service or otherwise, the claimant had "*not been an operational firefighter for three and a half years*" at the time of his dismissal. I find that he also took into account the fact that the claimant had a record of a failure to attend OH meetings and other support meetings, without providing a reason for doing so.

65. AC Bell also gave evidence that the claimant was dismissed for "*persistent nonattendance*" and that therefore waiting for the claimant to produce a further GP report would have made no difference to the decision to dismiss him.

66. On an examination of the respondent's relevant policies, it is clear that the absence management policy sets an expectation of a twelve-month duration of the absence management process, from stage one to stage three, with informal discussions having taken place prior to the start of stage one, at paragraph 2.2 of the respondent's sickness capability process document dated 26 August 2020, a copy of which was before the Tribunal in evidence.

67. It is clear that both DAC Hearn and AC Bell considered that the respondent did not have sufficient confidence in the claimant's future ability to sustain a regular attendance at work, based on his extensive absences over the previous years and based on the fact that he had not persuaded either of them during the stage three meeting or the appeal meeting that his approach to attending work was sufficiently different for them to have confidence that the pattern of attendance would be different.

68. The claimant alleges that the decision to dismiss him was premeditated, in that DAC Hearn read out a pre-prepared statement on 28 September 2020 at the conclusion of the stage three capability meeting. However, I accept that this was one of two alternative statements that DAC Hearn prepared and that the other statement allowed for the possibility that the claimant's employment would continue. I also accept that this issue was raised with AC Bell on appeal and taken into consideration by him when he upheld the decision to dismiss.

The Law

69. There are five potentially fair reasons for dismissal set out in S.98(1)(b) and (2) of the Employment Rights Act 1996 (ERA). The reason pleaded by the respondent in these proceedings is ill-health, that is, a reason related to the capability or qualifications of the employee for performing work of the kind which he was employed to do. It is for the employer to show on the balance of probabilities that the principal reason was a potentially fair reason.

70. If the employer establishes a fair reason, the determination of the question of whether the dismissal is fair or unfair (as per s98(4) ERA):

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

71. The test of whether or not the employer acted involves a Tribunal determining 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved' (*NC Watling and Co Ltd v Richardson 1978 ICR 1049, EAT*). It is a well-established principle that it is the employer's conduct which the Tribunal must assess, not the unfairness or injustice to the employee. Tribunals are to ask: did the employer's action fall within the band (or range) of reasonable responses open to an employer (*Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT*)?

72. *Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA,* is authority for the principle that a decision must not be reached by a process of the Tribunal substituting itself for the employer and forming an opinion of what it would have done had they been the employer.

73. In ill-health capability dismissals, if the employer was in any way responsible for the employee's illness that led to the dismissal this may be a factor that is taken into account by a Tribunal when deciding on the fairness of the dismissal. (*Royal Bank of Scotland v McAdie 2008 ICR 1087, CA*).

74. A factor for the Tribunal to consider is whether the employer could reasonably have been expected to keep the employee's job open any longer (*Spencer v Paragon Wallpapers Ltd 1977 ICR 301, EAT; Monmouthshire County Council v Harris EAT 0332/14*). This is a question of fact and will turn on the circumstances of each case, including the nature of the employee's job and the nature of their illness or injury.

75. Another factor to be considered is the continued payment of contractual sick pay or otherwise in deciding whether an employer could be expected to wait longer before dismissing. *S v Dundee City Council 2014 IRLR 131, Ct Sess (Inner House),* took into account the fact that an employee who remained employed after sick pay had ceased to be payable would have led to minimal costs to the employer to remain in employment and therefore the employer could have waited longer before dismissing.

76. In *O'Brien v Bolton St Catherine's Academy 2017 ICR 737, CA,* Underhill LJ noted "*a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis*' and '*In principle, the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified*".

77. The Tribunal must also take into account the likelihood of improvements in the employee's attendance record and the likelihood of good prospects for the future (*Post Office v Stones EAT 390/80).*

78. An employer is entitled to look at an employee's overall attendance in order to consider whether there is a likelihood of satisfactory attendance in the future. So far as general fairness is concerned, the question is not whether other employers in similar circumstances might have allowed additional time to see whether the employee's attendance improved before dismissing but whether what the employer did fell within the band of reasonable responses (*Kelly v Royal Mail Group Ltd EAT 0262/18* where the Tribunal found the dismissal was for some other substantial reason.)

79. Length of service can be a relevant factor, with the key question being whether, on the circumstances of a case, the length of the employee's service, and the manner in which he or she worked during that period, allows an inference that indicates that the employee is likely to return to work as soon as he or she can. Long service may show that the employee is 'a good and willing worker with a good attendance record, someone who would do his utmost to get back to work as soon as he could' (*S v Dundee City Council 2014 IRLR 131, Ct Sess (Inner House)*) but long service *per se* should not be a factor indicating that a dismissal for ill health was unfair.

Application of the law to the facts found

80. I find on the balance of probabilities that the respondent dismissed the claimant for capability, for non-attendance. I do not find that the real reason for the dismissal was misconduct. Although I accept that DAC Hearn was influenced by what he considered to be the claimant's inadequate efforts to co-operate in ensuring his return to work, both in terms of when he began to concentrate on his rehabilitation and in terms of the time it took him to complete the GP consent form, I find that this falls within the ambit of capability.

81. The Sickness Capability Process document, at section 5.4 provides that a number of steps must be taken by the respondent before any decision to dismiss is taken. Only one of those is the obtaining of medical advice, which the respondent did do, and the claimant was confirmed as being fit for work, with

the recommendation that a GP report be obtained. However, given that the claimant was already confirmed fit for work by his GP on 17 July 2020, the failure to wait for a more detailed GP's report confirming this would not, I find, have made any difference to the respondent's decision to dismiss.

82. The other steps that needed to be taken (as per section 5.4) before the decision to dismiss was made were more determinative of the decision to dismiss the claimant, and they were:

    - That the employee and his union representative had the opportunity to explain the absence record and the reasons for it;
    - Management has explained the need for the employee to attend work on a regular basis and have given the employee the opportunity to prove that they can attend work on a regular basis; and
    - Where applicable, the option of a suitable alternative position has been fully considered.

83. Taking the last point first, the claimant was offered but expressly rejected redeployment and was assessed as not being permanently unfit for work. As was found above, the option of carrying out DAMOP training was raised but was not suitable alternative employment. In any event, at the time of his dismissal the claimant was considered fit to return to work.
84. In relation to the first point, the claimant and his union representative had the opportunity to explain the claimant's absence record at a number of meetings across the sickness capability process.

85. Finally, in relation to the second point, the claimant and his union representative were given the opportunity to prove that he could attend work on a regular basis in future, but failed to persuade DAC Hearn and AC Bell that this would be the case. They were both particularly concerned by the claimant's failure to demonstrate that he had taken all proactive steps to ensure his rehabilitation as soon as he could. I also find on the balance of probabilities that the delay in giving consent for the GP report was a further indication of this, so far as DAC Hearn was concerned. The conclusion reached by DAC Hearn and AC Bell was not unreasonable. The claimant's rehabilitation from injury and recovery from any future injuries necessarily requires co-operation and effort from him. It was DAC Hearn's view that the claimant had not done enough and that this had been a significant factor in the persistent pattern of absences over the previous years.

86. I find that it was therefore not enough that the claimant was fit and well (subject to the GP report) at the time he was dismissed. DAC Hearn reasonably concluded, having discussed the situation with the claimant, that it was likely that the claimant would continue with a pattern of regular non-attendance at work in future.

87. The claimant's fitness for work and medical evidence to assess this is just one element of the case that the respondent's decision-makers are to take into account. Given the length of time that the claimant had been absent since the three month deadline for a further review (three months from 26 March 2019), it was reasonable for the respondent to not wait any longer.

88. In any event, the medical evidence that was obtained, that of the OH assessor Dr Weston, highlighted that the best predictor of future attendance patterns was past attendance patterns, which advice was taken into account by DAC Hearn in his decision to dismiss.

89. DAC Hearn reasonably took the entirety of the claimant's absences into account. He told the Tribunal, as stated above, that the claimant had not worked as an operational firefighter for three and a half years by September 2020. I accept the respondent's evidence and that of DAC Hearn in particular about the operational and financial impact of long-term absences on the overall headcount and the impact of the claimant being in the long term sickness pool in reducing the number of firefighters that can staff the individual fire stations, even though he was not being paid at the time of his dismissal. I accept that it was reasonable to need to manage and reduce the pool of those on long-term sickness absence, given its impact on the respondent's staffing numbers.

90. The claimant raises the issue that the respondent should have been more lenient in applying the sickness absence processes to him because his absence was caused by an injury that was due to service. The respondent's decision makers both confirmed, and I accept, that the issue of the absence being due to service was taken into account. I also note that the respondent has already waited far longer between each of the stages in the absence management process than the policy envisages, and had rescheduled meetings to accommodate the claimant's location and difficulties with availability, even if delays due to Covid are discounted. It cannot be said that the respondent has rigidly applied the policy with no consideration being given to the cause of the injury or the claimant's personal circumstances, such that the procedure was unfair for this reason.

91. Furthermore, in the claimant's case I accept that it was reasonable that his long service was not taken into account in mitigation in the decision to dismiss him. On the contrary, his length of service appears to have acted against him, in that the respondent had as evidence, a repeated pattern of non-attendance which stretched back a significant number of years. That this was taken into account in an assessment of his likelihood of future good attendance or otherwise, was reasonable and indeed was part of the medical advice supplied to DAC Hearn by Dr Weston.

92. As is noted in *O'Brien v Bolton St Catherine's Academy 2017 ICR 737, CA,* by Underhill LJ: "*a time comes when an employer is entitled to some finality."* DAC Hearn took the decision that the respondent was entitled to some finality in the claimant's case and that the respondent was not obliged to take further risks that the claimant would repeat the pattern of persistent absences in the future. Taking all the circumstances into account, I find that he acted reasonably in treating the claimant's absences as sufficient reason to dismiss him when he did. It cannot be said that no reasonable employer would have taken that decision at the time. The dismissal and the process followed by the respondent were fair in all the circumstances, in that they fell within the range of reasonable responses open to the employer. The claim fails and is dismissed.

Remedy Hearing

93. For the sake of completeness, it is hereby confirmed that the remedy hearing listed for 6 October 2022 is cancelled.

Employment Judge Barker

Date: 13 July 2022