EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Cooke**

Respondent: **London Fire Commissioner**

Heard at: **London South (via CVP)** **On: 04 to 08 July 2022 inclusive**

Before:

Employment Judge T.R. Smith

Ms K Beckett

Mr K . Murphy

Representation

Claimant: In person

Respondent: Mr J. Small (counsel)

JUDGMENT

The claimant's complaints of direct disability discrimination, discrimination arising from disability, unfair dismissal and an unlawful deduction of wages are not well founded and are dismissed.

Written reasons provided pursuant to Rule 62 (3) of the

Employment Tribunal's (constitution and rules of procedure) Regulations 2013.

The issues.

At a preliminary hearing held on 24 February 2022 the parties agreed the issues the tribunal would be required to address. Since that date various concessions and clarifications had been made by both parties, and the tribunal has reproduced the amended agreed issues, below: –

1.Unfair dismissal.

1.1 Had the respondent proved a potentially fair reason to dismiss the claimant? The reason relied on by the respondent was capability (ill-health).

1.2 Did the respondent genuinely believe the claimant was incapable of performing his normal role due to ill-health?

1.3 Was that belief based on reasonable grounds?

1.4 At the time for forming that belief, had the respondent carried out as much investigation as was reasonable in the circumstances?

1.5 Was the dismissal procedurally fair? Did the respondent breach the ACAS code of practice (if applicable)?

1.6 Did the dismissal fall within the range of reasonable responses open to the respondent to take?

1.7 If the dismissal was unfair, should any award be reduced on account of **Polkey** or contributory fault?

2.Direct discrimination.

2.1 Did the respondent treat the claimant less favourably than it treated, or would have treated, others?

2.2 The less favourable treatment relied on by the claimant was as follows:

(i) Not paying the claimant "due to service " ("DTS") sick pay.

(ii) Refusing to allow the claimant to be stationed closer to home

(iii) Dismissing the claimant

2.3 Was the reason for the unfavourable treatment the claimant's disability?

2.4 The claimant relied on hypothetical comparators.

3. Unfavourable treatment for something arising in consequence of disability.

3.1 Did the respondent treat the claimant unfavourably?

3.2 The unfavourable treatment relied on by the claimant was the same as that relied on for the direct discrimination claim, see 2.2 (i) to (iii).

3.3 What was the reason for the unfavourable treatment ("the something")?

3.4 The "something" relied on by the claimant were the effects of his back condition and its impact on his ability to do his normal job.

3.5 Did the "something" arise in consequence of the claimant's disability?

3.6 Was the treatment a proportionate means of achieving a legitimate aim?

3.7 The proportionate means of achieving a legitimate aim relied upon by the respondent were: –

a. Ensuring that employees were able to perform their duties without endangering their health or that of other workers or public service users;

b. Ensuring that employees who were carrying out light duties were given meaningful, appropriate and justifiable work to complete;

c. Ensuring that employees achieved acceptable levels of attendance at work and performed their substantive roles;

d. Ensuring operational efficiency and that additional financial pressure was not placed on the respondent; a publicly funded organisation which was under increasing budgetary pressure and scrutiny.

e. Ensuring that medical advice was followed to try to ensure that the health and safety of employees was not placed at risk;

f. Ensuring that government guidance and all legislation was followed in respect of coronavirus to try to ensure that the health and safety of employees and public service users were not placed at risk.

4.Unlawful deduction from wages.

4.1 Did the respondent, by failing to pay the claimant sickness pay in accordance with the DTS provisions make an unlawful deduction from the sums properly payable to the claimant?

4.2 If so, was the complaint presented before the end of the period of three months beginning with the last date payment should have been made, and if not, did the claimant satisfy the tribunal it was not reasonably practicable for the complaint to be presented before the end of the said period and was it then presented within such further period as the tribunal considered reasonable?

5.The parties had identified at the preliminary hearing as a potential issue whether the claimant was a disabled person but in a letter from the respondent dated 07 April 2022 the respondent conceded the claimant was a disabled person for the purposes of section 6 Equality Act 2010 ("EQA 10") at the time of the alleged discriminatory acts and that it knew or ought to have known of the disability at all material times.

6.At the start of the hearing the tribunal agreed with the parties that it would address the issue of liability only and remedy would be dealt with separately, if appropriate, at a subsequent hearing.

7.The tribunal drew to both parties' attention that at any remedy hearing it was of the provisional view, subject to hearing argument , that an adjustment could not be made under section 207A of the Trade Union and Labour Relations Consolidation Act 1992 for any breach of the ACAS code of practice as it was not applicable in an ill-health capability dismissal on the basis of the judgement in **Holmes -v- Qinetiq Ltd 2016 ICR 1016.**

The evidence.

8.The tribunal heard from the claimant himself.

9.For the respondent, the tribunal heard evidence from: –

9.1.Ms J Baker, administrative manager (and the claimant's line manager in respect of his health)
9.2.Ms P. Bayley, health and absence adviser,(with particular responsibility for supporting employees on long-term sickness absence)
9.3.Mr A Bevan, assistant director of health and safety
9.4.Mr A. Hearn, assistant commissioner
9.5.Mr P. Jennings, former assistant commissioner for fire safety.

10.The tribunal also had before it an agreed bundles of documents numbering 1630 pages. A reference in this judgement to a number is a reference to a page in that bundle. The tribunal found the size and repeated duplication of documentation in the bundle vexing.

11.The tribunal reminded the parties that it would only look at those documents it was specifically taken to in evidence.

Findings of fact.

12.The tribunal has not sought to resolve each and every dispute as to fact. It has only addressed those matters relevant to determine the issues agreed between the parties.

Background.

13.The claimant was born on 15 October 1972.

14.The claimant commenced employment with the respondent on 14 March 1994.

15,The claimant was employed by the respondent as a firefighter.

16.The claimant's retirement age was 60.

17.The decision to terminate the claimant's employment on the grounds of incapacity was taken on 31 July 2020 with an effective date of termination of 30 October 2020. Thus, at dismissal the claimant had 26 years' service.

18.During the claimant's employment he was issued with a written statement of employment particulars (195/199).

19.The claimant's contract incorporated the Scheme of Conditions of Service of the National Joint Council for Local Authorities and Fire Brigades, known colloquially as the grey book.

20.During his career the claimant worked at various fire stations throughout east London latterly at Hainault Fire Station in Redbridge.

21.The claimants residential address, at the time the dispute arose between the parties was in Cambridgeshire.

22.The commute between the claimant's home and Hainault Fire Station, assuming no untoward traffic delays would be, at its fastest, about one hour 35 minutes each way.

23.Hainault Fire Station was the closest station operated by the respondents to the claimant's residential address.

24.At all material times the claimant was a member of the Fire Brigade Union.

The respondent's organisation.

25.The respondent employs three distinct groups of staff on different terms and conditions namely operational, fire and rescue and control staff..

26.The claimant was employed in its operational group, to which the grey book applied.

27.The respondent operates 102 fire stations and one river station across its locality. Each station varies in establishment from 7 to 22 staff per watch. Each fire station has at least one fire appliance, crewed, when mobilised, by four or five firefighters.

28.An appliance crew would normally be managed by a leading firefighter (formerly a crew manager) and depending on the size of the station, the watch would be led by either a sub officer ("sub o"), formerly known as a watch manager A, or a station officer ("stn o"), formerly known as a watch manager B. In order to maintain 24-hour cover, the respondent utilised a shift system of four staffed watches (white, red, green and blue) at fire stations operating consecutively on a fixed rota pattern (2 days, 2 nights and 4 days off) throughout the year.

29.Given the time critical nature of operational work, the demands made upon firefighting staff, and the need to protect their safety and that of the public, there was a requirement that operational staff were fit to perform a full range of duties.

30.It is appropriate, at this stage, to briefly mention a number of respondent's policies that feature in the tribunal's judgement.

Sick pay.

31.The claimant was entitled, subject to satisfying certain requirements of the respondent's contractual sickness policy to 6 months full pay and six months half pay if absent due to sickness (88/92).It was not disputed that the claimant was paid this element of his contractual entitlement.

32.However if an absence was due to a work-related injury known as "due to service"("DTS") an employee was entitled to full pay for 12 months and half pay for a further six months . Entitlement to contractual sick pay did not count against entitlement for DTS. Thus an employee who had a DTS injury received an extended period of contractual sick pay.

33.A further advantage of DTS was that it delayed an employee going into a "no pay" situation which in turn had benefits for the employees' pensionable service.

34.DTS is subject to a detailed and somewhat complex policy (131 to 140) to which the tribunal had full regard.

Ill health and the respondent's policies.

35.The respondent operated sickness and managing attendance policies (106/130, 141 to 164) which the tribunal fully noted. Of particular significance, for the purpose of this judgement, the tribunal identified the following matters.

35.1 The policies had been negotiated following consultation with the recognised trade unions.

35.2 Absences were divided into either short or long term.

35.3 Long-term absence was defined as a period of 28 days or more. (As will be seen it was common ground that the claimant's absences due to ill-health fell within the definition of long-term).

35.4 Under the long-term absent aspect of the policy it was envisaged that there would be a stage I capability meeting after a period of six months continuous absence, then a stage II capability meeting if the absence continued for nine months and finally a stage III capability meeting if it continued for 12 months. At stage III a meeting termination of the employee's employment was a possible option.

35.5 Thus for long-term sickness it was anticipated that the three-stage procedure would be completed after approximately 12 months. The time periods were indicative.

35.6 Light or alternative duties were defined in the policy as being meaningful and justifiable and were not meant as a long-term solution for an employee who could not fulfil a full range of contractual duties

35.7 Light duties were not envisaged, normally, to last for more than six months.

35.8 Light or alternative duties were stepping stones to full operational effectiveness.

36.The fact that light or alternative duties were not envisaged to last for more than six months without express HR and managerial approval persuaded the tribunal that whilst there might be occasional cases when the time period was exceeded, they were unusual and a specific business case had to be prepared to justify the extension of the time limit.

37.The policies required the respondent to give consideration to reasonable adjustments where an employee was disabled and also, whether or not the employee was disabled, to the possibility of redeployment, prior to dismissal

38.In addition and, again prior to dismissal, the policies made provision for consideration of ill-health early retirement where an employee, because an underlying health condition or due to an inability to fulfil the full range of duties, were unable to provide efficient service and attend work on a regular basis.

39.Finally an appeal mechanism was available to a dissatisfied employee who was dismissed as a result of incapability

40.At this stage the tribunal considered it helpful to amplify a little upon how the issue of light duties operated in practice as they formed a significant element of the factual matrix.

Light duties.

41.At the material time there were four light duty hubs operated by the respondent, the north east hub based in Stratford, the north west hub based at Wembley, the south-west hub based at Hammersmith and the south-east hub based at Lewisham.

42.The respondent operated light duty hubs because there was very limited opportunities for meaningful light duties that could be performed at an employee's fire station, sufficient to occupy an employee for a full working shift. That is not to say that light duties were never available at a fire station. If a specific project had to be undertaken at a fire station that might be suitable for light duties but needed to be approved at Deputy Assistant Commissioner level, which the tribunal considered indicated that such opportunities were exceptional. To the extent there was any opportunity for light duties at a fire station it was project work which was undertaken by senior officers, not firefighters

43.The only other light duties at a fire station were where, an officer returning from ill-health, had to undertake induction and training and such light duties were to bring him or her up to full operational effectiveness. Such duties were very strictly time limited.

44.Light duties that the respondent could provide principally consisted of home fire visits, normally undertaken by two officers in order to comply with the respondent's lone working policy. This was a further factor as to why an employee was not able to undertake light duties from their own station.

45.The conclusion of the tribunal was the respondent had a justifiable business reason for operating light duty hubs in the manner that it did, and in practice there was virtually no light duty options to a firefighter at their own station if it was to last for more than a brief induction or training following a period of ill-health.

Ill-health early retirement.

46.The respondent operates a generous pension scheme which makes provision for the early release of benefits where an employee is permanently unable to fulfil their contractual duties.

47.To access ill-health early retirement an application must be made to what is known as the Independent Qualified Medical Practitioner ("IQMP")

48.The IQMP is wholly independent of the respondent. The respondent is bound by the decision of the IQMP unless that decision is successfully appealed.

49.An appeal lies to Fire and Rescue Service Medical Appeal Board. Again the decision of appeal board is binding on the respondent. The respondent has no

involvement in the functioning of the board, which is undertaken by a separate contractor.

50.An employee cannot make repeated requests to the IQMP.

51.The tribunal considered it significant to note that ill-health early retirement was entirely separate and distinct from DTS.

52.Moving away from the relevant policies is appropriate the tribunal now addresses the trigger which led to the claimant's dissatisfaction with the respondent, which can be traced back to an incident on 26 January 2017.

26 January 2017.

53.On 26 January 2017 the claimant was injured whilst on duty. Put succinctly the claimant and his watch were mobilised to a car fire. Whilst putting on his personal protective equipment the fire tender came to a sudden stop whilst attempting to leave the station. The claimant hit his head on a metal bulkhead. The agreed reason for the sudden stop was a fault with a charging cable which should have automatically detached from the tender when the ignition was turned on but did not. This led the tender driver to suddenly brake. According to the respondent's documentation, the failure of the charging cable to detach was a known fault

54.The claimant was not wearing a seatbelt.

55.The incident was subsequently entered into the respondent's accident book and a few days later the claimant visited his GP to report a head injury. He was not aware of any other apparent injury at that stage. As will be seen,, however the claimant was eventually diagnosed with damage to his back which he attributed to the incident on 26 January 2017, although the respondent had never accepted that causal link.

56.Much evidence was placed before the tribunal as to the adequacy of the recording of the incident on 26 January 2017, the statements that were prepared in respect of the accident, whether a seatbelt needed to be worn and whether there was a causal link between the claimant's disability and the incident .

57.The accident and the subsequent alleged health consequences suffered by the claimant are subject to separate personal injury proceedings in the County Court under claim reference Go8Y1802. The tribunal emphasised to the parties it was not its function to adjudicate and make detailed findings on what essentially is a personal

injury claim. It was only required to apply the factual matrix as it found it, to the agreed issues.

58.Moving forward in the chronology it was approximately four months later, on 10 May 2017 that the claimant commenced his first period of sickness. A GP fit note dated 15 May 2017 recorded the reason for absence as *"Back pain? Cause, currently being investigated",* and the claimant was signed off for two weeks (417). At the time the claimant attributed his pain to some form of kidney complaint and thereafter he was subject to extensive examinations and testing at hospital to try and ascertain the nature of his ill-health.

59.It would appear that it was only on 23 January 2018, for the first time, that it was suggested by the claimant's treating doctors that his condition was one that would require investigation by an orthopaedic specialist.

60.By 06 April 2018 the claimant's consultant reported (542) that the claimant had a disc tear at the L4/5 segment which was non-compressive, and to a lesser degree discopathy at the adjacent segment. Surgical treatment was not advisable and physiotherapy, together with a lifestyle adjustment was recommended, although referral to a pain clinic was also considered a possibility. The consultant recommended the claimant discuss his long-term future and ability to work with the respondent's occupational health department

61.During this first period of sickness the claimant was referred on a regular basis to the respondent's occupational health department for advice. There was also regular contact between the claimant and the respondent and also fit notes were provided by the claimant's GP.

62.The claimant started what was planned to be 12 weeks physiotherapy in May 2018 in order to try and improve his underlying health condition as he remained unfit for work. Unfortunately it was not a success. The claimant only completed two sessions as he found the same too painful.

63.The claimant's entitlement to contractual sick pay expired (after the respondent had extended the same for a further period of six weeks to see whether physiotherapy assisted the claimant) in early June and this led the claimant in the same month to make an application for DTS.

Application for DTS.

64.The earliest evidence, that the tribunal was taken, as to the claimant considering an application for DTS was contained in an email dated 26 April 2018 (551), some 15 months after the incident.

65.Ultimately in June 2018 the claimant applied for his absence from 10 May 2017, which he attributed to the incident of 26 January 2017, to be categorised as "DTS".

66.The application was unsuccessful as notified to the claimant by a letter dated 21 June 2018 (599/600). Put simply the respondent relied upon two grounds to reject the application, firstly the claimant was not, and it said should have, been, wearing a seatbelt when the fire tender moved off and secondly that the claimant had failed to show a causal connection between his back condition and the incident on 26 January 2017.

67.The claimant appealed that decision by means of letter dated 25 June 2018 (601). The claimant contended the primary reason for the accident was the respondent's defective equipment, that is the charging cable did not disconnect leading the driver of the tender to brake sharply. He alleged that he was not warned the tender was about to set off so did not need to have his seatbelt fastened, and alleged that statements had been prepared in respect of the incident by some crew members were untrue.

68.The appeal commenced on 18 July 2018 and concluded on 30 August 2018. The appeal was rejected by Deputy Assistant Commissioner Hearn and his decision confirmed in a letter dated 04 September 2018 (670/671).

69.The tribunal noted that the hearing had been adjourned by Deputy Assistant Commissioner Hearn to give the claimant every opportunity to produce evidence to support his claim, for example his assertion as regards inaccuracies in the witness statements.

70.Whilst the claimant did present a medical report which stated *"I am theorising that it may be feasible that an accident in January may in theory have caused a small tear in Mr Cooke's back"* [tribunal's underlining] the tribunal concluded that it was reasonable for Deputy Assistant Commissioner Hearn to determine that the claimant's evidence fell well short of showing causation between the claimant's

current health challenges and the accident, causation being a relevant element of the test to qualify for DTS. Similarly the fact the claimant had repeated to a medical expert what he considered to be the cause of the injury, that was then repeated in a medical report was not evidence of causation, and again Deputy Assistant Commissioner Hearn was not acting unreasonably in rejecting that information when reaching his decision .

71.The claimant conceded in cross examination that at the appeal his points were considered and Deputy Assistant Commissioner Hearn had evidence that could support his conclusion although he considered some of the evidence put before the decision maker was wrong.

72.The tribunal concluded on the wording of the policy that Deputy Assistant Commissioner Hearn was entitled to reach the conclusion he did on the basis of the evidence. He did not have a closed mind, evidenced by the fact he adjourned matters to allow the claimant to submit further evidence.

73.Returning to the chronology there were a number of contacts between the claimant and Ms Barker (who was monitoring the claimant's ill-health), whilst the DTS application was being processed, the most significant being set out below.

First light duties request.

74.The claimant originally approached Ms Baker by email on 15 May 2018 (550) and asked whether he could undertake light duties from Hainault fire station on the basis that it was closer to his home than the Stratford light duties hub. The tribunal found as a fact that the distance between the claimant's home and Hainault was approximately the same although accepted the travel time could vary dependant on traffic conditions.

75.Ms Baker declined the request by an email dated 15 May 2018 (549) because at the time the claimant was unfit for work and there was no firm medical recommendation for light duties and, as already noted, community fire safety work was not carried out from operational fire stations but from one of the hubs.

76.As it transpired the claimant then received a further fit note from his doctor and continued to be signed off so, thus, the question of light duties was academic. In any

event there was no evidence before the tribunal that there were any meaningful light duties the claimant could have carried out at Hainault fire station.

Second request light duties.

77.At a meeting held on 02 July 2018 developments in the claimant's health and treatment were noted and it was agreed that since the last occupational health dated 11 April 2018 it would be appropriate for an updated report to be obtained.

78.There was a further short discussion as regards light duties. The claimant indicated he could not carry out home fire safety visits, which were the principal light duties. No other light duties were identified. The tribunal found that the respondent was entitled in those circumstances not to investigate the issue of light duties further.

79.Whilst further investigation into the claimant's health was ongoing the respondent convened a stage I sickness meeting. Whilst the tribunal noted that there was a delay in accordance with the respondent's procedures in arranging the meeting it did not find this caused the claimant prejudice.

The Stage I meeting, 27 July 2018.

80.The claimant and Ms Barker discussed the claimant's health situation at the stage I meeting and a further occupational health report (that had been obtained prior to the meeting) which indicated that the claimant remained unfit for work.

81.The claimant was now attending NHS fitness classes in place of physiotherapy but found those classes painful. The claimant continued to take painkillers and anti-inflammatory drugs. The claimant remained signed off by his GP.

82.The claimant could not give any indication when he considered he might be able to return to work.

83.A target was set for the claimant to return to full operational duties within three months. The claimant was advised that in the absence of any improvement the matter would proceed to a stage II meeting.

84.The discussion was confirmed in writing on 06 August 2018 (622/623). Unfortunately the claimant was unable to achieve the stage I target ,which ultimately led to a stage II meeting being convened.

Stage II meeting, 16 November 2018.

85.A stage II meeting ,chaired by Borough Commander Prasad took place with the claimant on 16 November 2018. The claimant remained signed off as unfit for work. There was no, sadly, improvement in his condition. A target was set for the claimant to return to full operational duties over the following period of three months.

86.Borough Commander Prasad indicated that in the absence of a return to work an appointment would be arranged with Ms Bayley to discuss possible redeployment and any reasonable adjustments.

87.The outcome of the meeting was confirmed in a letter dated 23 November 2018 (680/681).

88.As the claimant did not display any improvement in his health, such that he was likely to return to work in the target period, and further occupational health advice stated the claimant was unfit for work, this led the respondent to arrange a redeployment meeting.

Redeployment and reasonable adjustments investigation, 26 February 2019.

89.The claimant was invited to attend a meeting scheduled for 26 February 2019 with Ms Bayley, to discuss reasonable adjustments and, if they could not be accommodated, then redeployment opportunities. The invitation letter made it clear that the claimant could not be forced to accept redeployment and he was entitled to waive his right to be considered for redeployment if he so wished (707).

90.The respondent was not able to identify any redeployment opportunities.

91.The claimant declined to attend the meeting by means of an e-mail dated 25 February 2019 (723) and intimated that no adjustments could be made to his role and expressly waived his right to redeployment.

92.The claimant reiterated in evidence that were no reasonable adjustments that have made to his substantive duties.

93.The tribunal accepted that some operational staff found, as did the claimant, redeployment an unattractive option and is for this reason that the respondent had devised documentation which allowed an employee the option of waiving their right to redeployment.

94.The tribunal was satisfied that the claimant fully understood the effect of his waiver.. As he said in his own witness statement he considered redeployment would mean sitting in an office for long periods which he did not consider would assist his recovery and also he would be required to move onto a new contract which was likely to result in lower pay.

95.The claimant in his email of 25 February 2019 asked that referral be made to the IQMP.

96.On 05 March 2019 the claimant signed a document entitled "*redeployment waiver form: request to refer cases to IMQP"* (719). The form reminded the claimant that if he was not found to be permanently unfit his employment could ultimately be terminated on the grounds of incapability.

97.In view of the claimant's application to the IQMP the respondent paused its management of absence procedure

98.The claimant's application was considered by the IMQP on 22 May 2019 and a decision communicated to the claimant on 30 May 2019**.** The decision of the IMQP, was that the claimant was not totally incapacitated from the performance of his duties as a firefighter because treatment options for his degenerative condition of his lumbar spine remained untried and untested. Thus his application for ill health early retirement was rejected.

99.The claimant subsequently appealed that decision on 19 June 2019**.** The appeal was considered on 21 January 2020 by the Fire and Rescue Service Medical Appeal Board which consisted of two consultant occupational health physicians and a consultant orthopaedic consultant. The claimant attended the hearing along with his trade union official and made representations The unanimous decision of the Board was the claimant was not permanently disabled from his role as a firefighter.

100.Thus by the end of January 2020 both the claimant and the respondent knew that ill-health early retirement, with a release of the associated pension benefits was not a viable option.

101.However whilst the ill health early retirement application was being explored there were a number of further matters that occurred in the interim which the tribunal should briefly make reference to.

Meeting 27 June 2019.

102.An absence review meeting took place between Ms Barker and the claimant on 27 June 2019. There was no notable improvement in the claimant's health. It was noted the claimants IMQP application had been rejected but was subject to appeal.

103.Arrangements were made for a further occupational health report to be obtained and a discussion took place as regards the possibility of light duties at the respondent's North East hub based at Stratford. It should be recorded that the claimant had not been recommended as fit for light duties at this stage by either his GP or occupational health.

The meeting was confirmed in writing (787/788).

Meeting 26 July 2019.

104.The claimant attended a further meeting on 26 July 2019 by which stage occupational health had advised the claimant remained unfit for operational duties but now recommended light duties could be considered on a phased basis. This was supported by the claimant's GP.

105.As a result, the claimant and Ms Baker met to discuss the new medical evidence.

106.The claimant was told light duties were available at the Stratford hub. The claimant was allocated to Stratford because it was the closest hub to his substantive fire station.

107.Whilst the distance between the claimant's home and Hainault was about the same as between the claimant's home and Stratford the tribunal was prepared to accept in real world driving conditions the journey to Stratford may have taken longer

108.At the Stratford hub, at any one time there usually around 12 employees who'd been placed on light duties.

109.The claimant asked if he could choose another hub because he was thinking of moving in with his partner, who lived in Guildford in Surrey.

110.Ms Barker indicated that she would be prepared to make enquiries as to whether opportunities existed at either the Hammersmith or Lewisham hub. The claimant considered Hammersmith might be a better location but the tribunal found

the meeting ended on the basis that he would consider his position and let Ms Barker know if he was interested in a post at a different hub. Ms Baker needed to speak to Deputy Assistant Commissioner Perez to seek approval if the claimant wished to work out of a different hub.

111.As it transpired the claimant did not explore the option of working out of a different hub.

112.The claimant initially started light duties on 20 September 2019 working three days a week until 18 October 2019 when his hours were increased to full-time, effective from 28 October 2019. The claimant remained in work until April 2020 when he started his second and last period of absence.

113.Whilst the claimant was undertaking light duties the respondent remained in touch with him and it is appropriate to mention one such meeting.

28 October 2019.

114.On 28 October 2019 Ms Baker met the claimant for a sickness review meeting. The claimant indicated that he was managing reasonably well although bending aggravated his back condition. The claimant mentioned the commute was aggravating pain in his back. An adjustment to start and finish hours were suggested to reduce time spent in traffic. The claimant did not explore the option further. The claimant was advised that stage III of the capability policy would be invoked and this was confirmed in writing on 29 October 2019 (809/810) although for a variety of reasons this was delayed until July the following year.

In the interim, pending the stage III meeting the country experienced a the covid pandemic

Covid 19.

115.The claimant continued undertaking light duties at Stratford until March 2020 when a national lockdown took place due to covid 19.

116.Whilst the travelling may have been onerous the claimant had maintained attendance at Stratford without any further sickness. Indeed the claimant said in an email of 18 March 2020 (1034) that he thought there was some *"slight improvement"* and even enquired whether redeployment could be reconsidered, to which he was advised to discuss that at the subsequent stage III meeting.

117.On 19 March 2020 staff were advised on light duties that they would no longer be carrying out standard home fire safety visits but those on light duties would assist with updating the respondents operational risk database.

118.On 21 March 2020 claimant asked whether he could return to full operational duties at Hainault and also queried whether he could be excused duties because of concerns as regards his partners mother's health.

119.The claimant was advised that an occupational health report would be required to determine if the claimant was fit for operational duties and the claimant could not be excused attendance from light duties.

120.A national lockdown took place on 23 March 2020**.** The claimant indicated that he did not regard light duties as essential work on the advice of his trade union and would not be attending work (1056)

121.The claimant was advised on 24 March 2020 that he should still report to work for light duties based at Ilford . Ilford was slightly closer to the claimant's home address than Stratford. All those working at the hubs were moved.

122.As it transpired the claimant did not return to work because as from 06 April 2020 the claimant commenced a further period of sickness leave and was signed off as unfit for work in any capacity.

123.The claimant was never able to return to either substantive or light duties after this date.

124.An occupational report dated 06 April 2020 found the claimant was unfit for either operational or light duties and would not be fit for operational duties in the foreseeable future (1080/1081).

125.Eventually the long-awaited stage III capability meeting was arranged. In fairness to the respondent both parties had at various stages sought adjournments for valid reasons.. The tribunal found that nothing turned on any delay and it did not cause the claimant unfairness.

Stage III capability meeting, 31 July 2020.

126.The claimant attended the stage iii meeting supported by his trade union representative, Mr Mc Laren. The meeting was chaired by Deputy Assistant Commissioner Rickard, supported by Ms Bayley

127.It is proper to record that the management pack was not full and complete and did not include the occupational health reports of 06 April 2020, 27 April and 01 July 2020. However Deputy Assistant Commissioner Rickard he did see them at the hearing as is clear firstly from the outcome letter as he noted that occupational health made reference to an independent report which was mentioned for the first time in the report of 06 April 2020 and secondly the e-mail from Ms Bayley sending the missing documents on the morning of the hearing (1352).

128.Deputy Assistant Commissioner Rickard rejected the suggestion of an independent report , as he considered it would add nothing useful and he already had significant medical evidence before him.. The tribunal considered that was a conclusion a reasonable employer was entitled to reach. The medical evidence before him was clear that the claimant was unfit for all duties and had been signed off for three months. The claimant himself accepted he was unfit for work.

129.The management pack also did not include the appeal board documents of January 2020 but the tribunal accepted that they were irrelevant to the issues that Deputy Assistant Commissioner Ricard had to address and therefore their exclusion was not unfair. If the tribunal was wrong at that point the matter was remedied by the appeal hearing when such document was before the decision-maker.

130.Deputy Assistant Commissioner Ricard noted that the normal support procedures of the respondent had been actioned.

131.Deputy Assistant Commissioner Ricard decided to dismiss the claimant with notice. He took into account the claimant's period absence commenced in May 2017 and, save for a period of approximately six months between September 2019 and March 2020 had been continuous, the occupational health evidence and the fact there was no clear indication when the claimant would be fit to carry out his substantive duties. He considered that the claimant had in excess of the time specified in the respondents managing attendance policy to demonstrate improvement and that continued absence could not be sustained have a regard for the needs of the service.

132.He noted neither occupational health nor the claimant could not suggest any reasonable adjustments, redeployment had been declined and early retirement rejected

133.The decision was communicated to the claimant by means of letter dated 03 August 2020 (1145/1147). Ultimately the agreed effective date of termination was 30 October 2020. The claimant was reminded of his right of appeal, which he subsequently exercised.

The appeal.

134.The claimant appealed his dismissal on 11 August 2020 (1175).

135.An appeal meeting was eventually arranged for 14 December 2020.

136.The claimant indicated on 11 December 2020 that he would not be attending in person but would rely upon representations made by his trade union official, Mr Mc Laren.

137.The appeal was chaired by Assistant Commissioner (now former) Jennings.

138.The appeal was conducted as a review rather than a rehearing. Notes were kept of the hearing (1346 /1351) and they were not challenged. The tribunal regarded them as a reasonable summary of the matters discussed

139.Deputy Assistant Commissioner Rickard presented the management statement of case. A Mr Amis provided HR support.

140.Assistant Commissioner Jennings had additional information before himself including an occupational health report dated 01 July 2020 (1112/1113) in which the advice was the claimant was not fit to return to operational duties in the forceable future and that a referral to an independent specialist was unlikely to change the claimant's prognosis(something that had been opined in the report of 06 April 2020) and a letter from occupational health dated 15 September 2020 (1166) confirming that the position remained as per the report of 01 July 2020.

141.Assistant Commissioner Jennings also had the documents that were not in the management pack at the stage III meeting. Thus to the extent there was any unfairness to the claimant, this was remedied by the appeal hearing.

142.The grounds of appeal were in essence that firstly the respondents managing attendance policy not been here adhered to, secondly the decision to dismiss had been made without consideration of all the relevant evidence with dismissal being too severe and thirdly new medical evidence had come to light.

143.The case put forward on behalf of the claimant in respect of the policy breaches was principally that they had been delays at the various stages of the process, the claimant should have been given light duties and documents had not been in the stage III management pack.

144.Assistant Commissioner Jennings did not find any delay prejudiced the claimant and the tribunal considered that was a conclusion he was entitled to reasonably reach.

145.It was contended, correctly that various documents were missing from the stage III meeting bundle particularly the occupational health report dated 06 April 2020 (1080/1081) and the appeal board report (914/926). This however had been remedied by the date of the appeal and the report of 06 April had been discussed at the stage III meeting. Assistant Commissioner Jennings concluded any error in respect of the pack was remedied at the stage III hearing and the appeal board notes were irrelevant.

146.On the claimant's behalf it was said that he should have been given light duties at his substantive fire station . That was rejected as no such duties existed and the claimant was treated in the same manner as other officers on light duties in that he was required to work out of one of the four hubs. The tribunal considered that was a reasonable conclusion Assistant Commissioner Jennings was entitled to reach.

147.Similarly the suggestion the claimant should have done light duties from home was rejected as no such meaningful and sustained light duties existed. The tribunal considered on the basis of the evidence before Assistant Commissioner Jennings it was reasonable for him to come to those conclusions.

148.Secondly the determining officer rejected the assertion that dismissal was too severe and noted that the claimant's own representative said that the claimant was unfit for operational duties.

149.Thirdly what was said to be new medical evidence was a report from an independent consultant Professor Ranganathan dated 04 November 2020

(1213/1216) which stated the claimant's back condition had not improved and indeed the claimant was likely to experience increasingly frequent episodes of back pain and constant persistent sciatica. It effectively reinforced the occupational health advice that the claimant was unfit for operational duties. Assistant Commissioner Jennings did not consider this detracted from the decision to dismiss, but rather supported the respondent's own evidence..

150.To the extent it was said the decision to refuse ill health early retirement was wrong Assistant Commissioner Jennings considered the evidence before him was that the IQMP was an independent practitioner possessing the appropriate expertise qualifications and knowledge to determine whether an employee met the criteria for ill-health retirement and an independent medical board had reached the same conclusion earlier that year. All internal avenues available to the claimant as regards appealing the refusal of ill-health retirement had been exhausted. The respondent had taken advice as to whether the claimant's new medical evidence was likely to impact upon ill-health early retirement in that it was sent to occupational health with a request as to whether it was likely to lead to the IQMP reaching a different decision and the advice from occupational health dated 25 November 2020 was that it did not meet the current criteria for determining that the claimant was permanently unfit (1271) and this information was related to the claimant on 04 November 2020 (1304). Assistant Commissioner Jennings was entitled to come to the decision he did in respect of ill-health early retirement

151.Assistant Commissioner Jennings declined to uphold hold the appeal and confirmed the decision to dismiss by a letter dated 13 January 2021. (1402/1408).

Subsequent events.

152.Following termination the claimant was able to obtain early release of deferred pension benefits following an application to the IQMP in June 2021. The benefits were backdated to 28 October 2020, before termination. There was no evidence before the tribunal to demonstrate how the IQMP reached its decision or why it was backdated to this date.. Such a release was only available where a person ceased to be an active member of the pension scheme and thus this was not an option available to the claimant, whilst employed by the respondent.

153.It is however appropriate to note that from the documentation placed before it, the tribunal concluded different tests were applied in respect of ill-health early retirement and the release of deferred benefits. Looking at the regulations placed before the tribunal and in particular regulation 65 and 67 the threshold for release of deferred benefits was lower.

154.Thius the fact the claimant subsequently received access to his pension did not negate the decision taken by Assistant Commissioner Jennings based on the information before him at the time.

Discussion and conclusions.

Unfair dismissal

155.The tribunal should briefly outline the relevant legal principles it applied in reaching its conclusion on this head of claim.

156.Section 98 of the Employment Rights Act 1996 ("ERA 96") provides as follows: –

"(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2).A reason falls within this subsection if it

(a) relates to the capability… of the employee for performing work of the kind which he was employed by the employer to do."

157.The tribunal is then directed by parliament to address fairness under section 98 ERA 96 which sets out the test in the following terms: –

"(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

158.It is for the respondent to establish an honest belief on reasonable grounds that the employee was incapable of performing their role, see **Taylor-v- Alidair Ltd [1978] ICR 445.**

159.The case law has established a number of factors that may, depending upon the factual matrix, be relevant to the decision of fairness and is appropriate the tribunal summarises those principles so the parties can be assured that they were applied.

160.Firstly before the dismissal is fair the employer must carry out a reasonable investigation to ascertain the current medical position, although ultimately the decision is a managerial rather than a medical one, see **D.B. Schenker Rail (UK) Ltd -v- Doolan (UKEATS/0053/09/BI**

161.Secondly having obtained that information a reasonable employer must consider the requirements of the business, the employees past sickness record (which may include the nature of the illness and the length of the various absences) and the possibility of alternative employment see **Spencer -v- Paragon Wallpapers Ltd [1977] ICR 301** (which is likely to include the implementation of any reasonable adjustments under the EQA 2010)

162.Thirdly dismissal is unlikely to be fair without consultation between the employer and employee before reaching a final decision, **East Lindsay District Council -v- Daubney [1977] ICR 566.**

163.Fourthly having undertaken the above steps the central question is usually whether a reasonable employer would have waited longer to dismiss and, if so, for how long. The key issue is whether the employer reasonably believed that it could not wait any longer and not simply that it is genuinely held that view, see, **Stevenson -v- Iceland Foods Ltd UKEAT/0309/19**

164.Other factors that may be relevant, dependent upon the circumstances of the case, include whether consideration has been given to ill-health early retirement prior

to dismissal, see **First West Yorkshire Ltd -v- Haigh [2008] IRLR 182,** compliance with an attendance management procedure and whether any entitlement to contractual sick pay has expired.

165.The fact that an employer may have been in some way responsible for the claimant's illness is not determinative of fairness, **London Fire and Civil Defence Authority -v- Betty [1994] IRLR 384** and conversely neither does the fact the employee is blameless for their illness

166.The tribunal applied the above legal principles.

167.The first question for the tribunal to determine was whether the respondent has demonstrated a potentially fair reason for dismissal namely capability.

168.The tribunal is so satisfied having regard to the oral evidence placed before it and the substantial documentation.

169.It's reasoning for that conclusion can be summarised as follows

169.1.The documentation showed that the claimant was dealt with under the respondent's management of absence process and the central concern was the claimant's health, evidenced by the frequent referral to occupational health, the documentation from the claimant's GP and the various meetings, all of which were consistent with managing long-term sickness.

169.2.There was no cogent evidence before the tribunal that it was anything other than the claimant's capability that was the principal reason for his dismissal. Indeed it was the claimant's case throughout that he was unfit, the principal issue from his perspective being that he considered he should have been granted ill-health early retirement.

169.3.Whilst it is true the claimant had intimated, via solicitors, a personal injury claim the claimant did not content this was the reason for dismissal and indeed the fact that the respondent took so long between the intimation of the claim and termination points away from it having any such influence.

169.4.The tribunal noted as part of the submissions on behalf of the claimant at the appeal it was said "*ideally the best position* [was] *to get pensioned out because he is never going to get better …. cannot continue as a firefighter*"

170.In such circumstances looking holistically at all the evidence the tribunal concluded the respondent had shown the principal reason for the claimant's termination was capability, namely that the claimant was incapable of carrying out his contractual duties

171.The next question for the tribunal to address was that required by section 98 (4) of ERA 1996.

172.The tribunal concluded the decision to dismiss was fair. It reached this conclusion for the following reasons.

173..As at the conclusion of the internal proceedings the respondents had taken reasonable steps to ascertain the claimant's health evidenced by the occupational health reports of 06 April 2020, 01 July 2020, letter 15 September 2020 a further report 18 September 2020 and the claimant's own submitted medical evidence dated 04 November 2020.

174.Throughout the stage III hearing and appeal the claimant remained signed off as unfit for any work by his own GP.

175.The claimant was consulted at all stages prior to any decision being made to terminate his employment and was granted representation of both the stage III hearing and appeal.

176.In cross examination the claimant accepted that the dismissing officer at his stage III meeting was *"in a corner"* based on the evidence and, other than the claimant would have liked to have been granted early retirement, he accepted dismissal was the only other viable option.

172.5.The tribunal was satisfied that both decision-makers honestly applied their minds to the points raised by or on behalf of the claimant and came to reasoned conclusions for their respective decisions

177.At the date of dismissal the claimant had exhausted his right to contractual sick pay.

178.The respondent was entitled to take into account that at termination the claimant had been absent for approximately three years. The situation clearly could not continue indefinitely. There was no prospect of an early return.

179.Light duties have been tried but unfortunately the claimant had once again fallen ill, been totally unable to undertake any work from April 2020. The claimant suggested he should have been kept on light duties indefinitely. The respondent was in the tribunal's judgement entitled to reject that argument. Firstly under the respondent's policy, agreed with the recognised trade unions, light duties were normally limited for six months. Secondly the respondent was entitled to limit opportunities to light duties to those who are likely to be able to return to full operational duties and the claimant wasn't.

180.Before the tribunal it was suggested the claimant should have remained on light duties indefinitely and the claimant was able to point to another firefighter, firefighter E who suffer from a detached retina and was allocated light duties for in excess of three years.

181.The tribunal was mindful that how another employee was treated can be relevant both in respect of unfair dismissal and also in respect of discrimination, albeit the legal tests are different.

182..In terms of unfair dismissal there is only unfairness if the comparator was truly comparable.

183.The tribunal rejected the fact that firefighter E was on light duties for longer than the claimant as constituting any unfairness in the dismissal process.

184.It rejected the argument of unfairness for a number of reasons.

184.1.Firstly because the point was never put at either the stage III hearing or the appeal.

184.2.Secondly the tribunal not be satisfied the position of the claimant and firefighter E was truly comparable. The tribunal found that with the alleged comparator there was uncertainty as to the claimant's prognosis and he required a number of surgical interventions and experienced complications but it was anticipated that ultimately he would return to work. The tribunal noted that ultimately firefighter E was able to return to full duties by August 2021. It had never been anticipated, certainly by the stage III hearing and thereafter, that the claimant would ever return to full duties.

184.3.Thirdly, the claimant was not on light duties as at the date of dismissal and the medical evidence pointed to the fact the claimant would not be fit for either his substantive or light duties in the foreseeable future. The respondent could not reasonably have maintained the claimant on light duties when he was unfit for such work. Allied to this point the claimant had suggested it was unfair to require him to carry out light duties from the Stratford hub due to the travelling. Whilst the tribunal accepted that increased travel time did occur it was not satisfied this significantly impacted on the claimant's recovery given in his email of March 2020 he referred to experiencing a *"slight improvement"* and enquired about redeployment and even returning to operational duties(1047), although the tribunal accepts the latter was probably wishful thinking. As it was, at no stage was the claimant signed off as being fit to return to operational duties and has already been noted the claimant fell sick again in April 2020, never to return.

184.Reasonable adjustments and redeployment had been examined prior to any decision being made to terminate the claimant's employment. The claimant himself accepted that no reasonable adjustments could be made and made an informed decision as to why he was not prepared to consider redeployment.

185.Ill-health early retirement had been examined. It has been rejected by both the IQMP and the independent medical board. Whilst the tribunal has been alive to the fact the claimant was extremely critical of those conclusions it is not for this tribunal to determine whether ill-health early retirement should have been granted. What it had to decide was whether a reasonable employer in the light of those reports and in the light of the claimant's representations was acting unreasonably in refusing ill-health early retirement. The tribunal could not say the respondent was acting unreasonably and that another reasonable employer in similar circumstances would not have taken the same decision as it did..

186.The tribunal was alive to the fact this was a large employer and the claimant attributed his injury to an incident at work on 25 January 2017. However what the tribunal had to ask itself is whether a reasonable employer would have waited any longer. The tribunal decided it would not, in the light of the firm medical evidence and the claimant's own representations that he was unfit for work.

187.For all the above reasons it follows that the claim of unfair dismissal must be dismissed.

Unlawful deduction from wages

188.The tribunal is a creature of statute and its jurisdiction is governed by the powers given to it by Parliament.

189.Section 23(2) ERA 96 provides:-

"(2) Subject to subsection (4) an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with -

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made…"

Subparagraph (4) provides

"(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable".

190.Time in respect of a series of deductions runs from the last deduction or non-payment.

191.If a claim is presented out of time the tribunal has to determine whether it was not reasonably practicable to be presented within time and then and only then, it is was so satisfied, whether the claim was then presented within such further period as was reasonable.

192.The tribunal noted the judgement of the Court of Appeal in **Palmer -v- Southend-on-Sea Borough Council 1984 IRLR 115** which set out a useful review of the relevant authorities.

193.In essence the claimant's case was that he should have been awarded DTS. The failure, he said to award him DTS was unlawful deduction from wages because under the terms of the respondents scheme such money was properly payable.

194.In the tribunal's judgement when the claimant's contractual sick pay ended on 21 June 2018 time started to run in respect of any unlawful deduction in respect of DTS.

195.However if the tribunal was wrong on that point, at the very latest, the claimant knew his DTS was unsuccessful when his appeal against refusal was concluded on 13 August 2018 and notified to him in writing on 04 September 2018 (670/671).

196.The claimant did not present his claim until 01 December 2020, approximately 27 months after the rejection of his appeal. On any analysis the claimant's claim in this regard was lodged out of time.

197.The following additional findings are relevant in respect of the time issue.

198.The claimant immediately considered the decision to refuse DTS was wrong.

199.The claimant was a union member and had the support of the FBU throughout his employment with the and knew they could provide support

200.The claimant had, certainly from 2017, access to the Internet and was aware of the existence of employment tribunals. He therefore had the means to make enquiries as regards time limits. He also had an opportunity to make express enquiries via his trade union.

201.The claimant contended it was not recently practicable to present the claim at an earlier stage because he was worried as to his health.

202.The tribunal rejected that argument.

203.The claimant was perfectly able to issue instructions to solicitors in September 2018, despite his health, as is evidenced by the fact that he had instructed Thompson's solicitors in respect of the incident on 25 January 2017, and they had written a detailed letter before action to the respondents on 10 September 2018.

204.As the claimant was able to give instructions to his solicitors as regards a personal injury claim he was, in the tribunal's judgement, equally able to obtain advice in respect of an alleged unlawful deduction from pay.

205.Whilst the tribunal accepted the claimant may well have been worried as to his health it did not accept that it was so severe that he could not rationally give

instructions to either his union or his solicitors, or carry out appropriate online searches so he himself could pursue matters via employment tribunal.

206.The tribunal noted that prior to the presentation of the claim there was a period from September 2019 when the claimant was working, undertaking light duties and regularly travelling to and from his girlfriend's house. His light duties involved visiting members of the public and liaising and engaging with them. There was no reason therefore why despite any health challenges,, even at this late stage, the claimant could not have issued a claim.

207.The claimant has not persuaded the tribunal, and the burden was on him, that it was not reasonably practicable to present his claim within time.

208.Even if the tribunal was wrong on that point the tribunal was not satisfied the claimant then presented his claim within such further period as was reasonable. Given that the claimant was working from September 2019 there was no impediment preventing presentation, yet the claimant still waited a further 15 months.

209.In all the circumstances the tribunal must dismiss the claim for an unlawful deduction from wages because it does not have jurisdiction to entertain the merits or otherwise of the complaint.

Law - Direct discrimination.

210.The tribunal should briefly outline the relevant legal principles it applied in reaching its conclusion on this head of claim.

211.The burden of proof is set out in section 136 of the EQA10. It does not change the requirement on a claimant that in a discrimination case that it is for the claimant to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the tribunal could infer an unlawful act of discrimination, see **Royal Mail Group Ltd -v-Efobi 2021 UKSC 33**

212.Direct discrimination is defined in section 13 (1) EQA 10 as follows: –

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

213.The legislative test is therefore broken down into two elements namely less favourable treatment and the reason for that treatment. In some cases, however, it

may be appropriate to ask the latter question first, see, **Shamoon -v-The Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** as explained in **Stockton-on-Tees Borough Council -v-Aylott [2010] IRLR 994** where it was suggested that it would often be appropriate to start by identifying the reasons for the treatment the complainant complained of. If the answer was that the reason was a protected characteristic then the finding of less favourable treatment was likely to follow as a matter of inevitability. This may be particularly appropriate in cases hypothetical comparators: **Laing -v- Manchester City Council [2006] IRLR 748.**

214.The test of what amounts to less favourable treatment is an objective one. The fact that a complainant believes they have been treated less favourably than a comparator does not of itself establish that there has been less favourable treatment: **Burrett v West Birmingham Health Authority [1994] IRLR 7.**

215.Direct discrimination is concerned with less favourable, rather than unfavourable, treatment. It is the equality rather than the quality of the treatment that matters. Unreasonable treatment is not less favourable treatment, see **Glasgow City Council-v- Zahar [1998] ICR 120** and unreasonable behaviour cannot found an inference of discrimination, although a lack of explanation for the unreasonable treatment (as opposed to the unreasonableness of the treatment) might found such an inference: **Bahl -v- Law Society [2004] IRLR 799**.

216.As the statutory definition requires less favourable treatment that in turn requires a comparison to be made..

217.Section 23 EQA10 states :

"(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.

218.Where the protected characteristic is disability, as here, section 23(2) EQA 10 requires that the circumstances must not materially differ between the complainant and comparator, specifically includes a person's disabilities. In other words the complainant and comparator must have the same abilities and this may mean that the appropriate comparator is also a disabled person.

219.Whether the comparator is appropriate is one of fact and degree and the complainant and comparator do not need to be identical in every respect: **Hewage -v-Grampian Health Board [2012] UKSC 37**.

220.The second element is the treatment must be because of the protected characteristic. The courts have divided cases of direct discrimination into two categories, the first whether treatment in issue is discriminatory on its face and the second where the treatment is not objectively discriminatory but the tribunal has to know something about the respondent's reasons for their actions in order to know whether the less favourable treatment could be said to be because of the protected characteristic.

221.In the first category motive is irrelevant although motivation is not. That said motive or intention will plainly be compelling evidence pointing to a finding of unlawful discrimination: **Nagarajan -v- London Regional Transport [2000] 1 AC 501.**

222.In the second category it is not sufficient for a complainant to show they been treated less favourably than their chosen comparator. It is only if the protected characteristic is a substantial or operative reason, though not necessarily the sole or intended reason, for the less favourable treatment that liability is established. The tribunal is concerned with what consciously or was unconsciously was the alleged discriminators reasons for the behaviour.

223.The tribunal then applied those principles to its findings of fact.

Dismissal

224.The tribunal started with the issue of dismissal.

225.What was the reason for the claimant dismissed? The tribunal was satisfied that the claimant was dismissed because the respondent considered, for the reasons already given, that the claimant was incapable of carrying out his contractual duties.

226.The claimant has been unable to demonstrate to the tribunal that another firefighter incapable of carrying out his or her contractual duties would not have been dealt with in an identical manner. In the claimant's own evidence he agreed that dismissal was only viable option and in the circumstances the tribunal is not persuaded that he can now argue that a comparator would not be dismissed in the same circumstances.

227.Whilst in the list of issues the claimant indicated he relied upon a hypothetical comparator in the course of evidence he made reference to firefighter E. The tribunal

had insufficient evidence as to whether firefighter E was disabled but even if he was that did not prevent a comparison been undertaken.

228.Whilst it is true the claimant was treated less favourably than firefighter E the reason for that treatment had nothing whatsoever to do with the claimant's disability. Firefighter E was treated differently because the medical evidence was that he was likely to return to full duties and in the interim was undertaking light duties. Unfortunately complications arose in his treatment which delayed a return to full operational duties.. As has already been noted firefighter E did ultimately return to full operational duties. Contrasted with the claimant the claimant was not able to continue undertaking light duties and there was no indication that he would be fit to return to full operational duties. The claimant and firefighter E were not truly comparable as there were material differences in their circumstances.

229.It follows therefore the complaint of direct discrimination on this ground must fail.

Not paying DTS

230.The tribunal is not satisfied that it was an act of direct discrimination to fail to pay the claimant DTS.

231.The fact he was disabled had nothing to do with the refusal.

232.The reason the claimant's application for DTS was refused was because in the respondent's opinion he failed to satisfy the requirements of its policy.

233.Firstly that he had failed to comply with the respondent's procedure as regards the wearing of a seatbelt and secondly there was insufficient evidence to show a causal connection between the accident and the medical condition subsequently relied upon by the claimant namely damage to his back.

234.It is not the role of the tribunal to determine whether or not the respondent's judgement was right. What it has to consider is whether the claimant's disability was the cause or a substantial influence on the refusal of the claim.

235.There is no evidence before the tribunal, let alone evidence to reverse the burden of proof that a person in similar circumstances would not equally have had their claim rejected. It follows therefore this complaint must be dismissed.

Refusal to allow the claimant to be stationed closer to his home.

236.The claimant has not led sufficient evidence to show that a hypothetical comparator would have been treated more favourably.

237.The respondent had established four light duty hubs. The principal light duties were home fire visits and, for good reason the respondent considered that such duties should be undertaken by at least two firefighters.

238.There was no evidence before the tribunal that a hypothetical comparator who became unfit to fulfil their contractual duties would not have been transferred to a light duties' hub. The weight of the evidence pointed to firefighters who were unfit for full duties worked out of the hubs

239.The tribunal was satisfied that there was no evidence that light duties existed at the claimant's Hainault station, when the claimant had been certified as being fit for light duties, which fell within the respondent's definition namely that they were meaningful and would occupy the claimant for his contractual hours.

240.The refusal therefore had nothing to do with the claimant's disability. It was not an act of direct discrimination as a comparator would have been treated in a similar manner.

Discrimination arising from disability.

241.The tribunal applied the following legal principles in reaching its determination.

242.Section 15 EQA 2010 provides: –

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

243.The Claimant only need establish unfavourable treatment, not less favourable treatment. As it is not necessary to establish less favourable treatment no comparator is required.

244.The concept of unfavourable treatment is *"… measured against an objective sense of that which is adverse as compared with that which is beneficial"* and *" the sense of placing a hurdle in front of, or creating a particular difficulty or, or disadvantaging a person .."* so said the EAT in **Trustees of Swansea University Pension and Assurance Scheme -v- Williams UKEAT 0415/1** approved by the Court of Appeal at **2017 EWCA 1008**

245.Section 15(1) (a) contains a double causation test. Firstly the unfavourable treatment must be "because of" the relevant *"something"* and secondly that *"something"* must itself be *"arising consequence"* of the disability, see **Basildon and Thurrock NHS Foundation Trust -v- Weerasinghe [2016] ICR 305.** The same case stressed it was not simply a question of whether the claimant was treated less favourably because of their disability.

246.Starting with the first element namely the *"because of "* issue the focus is on the alleged discriminators reasons for the action and therefore the tribunal must consider the decision-makers conscious and subconscious thought process, see **Robinson -v- Department for Work and Pensions [2020] IRLR 884.**

247.The *"something"* must more than trivially influence the treatment; but it does not have to be the sole or principal cause. There is no requirement that the alleged discriminator should have known that the relevant something arose from the claimant's disability, see **City of York Council -v- Grosset [2018] EWCA Civ 1105.**

248.The second element, the *"in consequence"* issue there is no need to look at what was in the mind of the alleged discriminator and it is a matter of objective fact decided in the light of all the evidence. There may be a number of links in the chain and more than one relevant consequence of the disability may require consideration.

249.The approach a tribunal is required to take was helpfully summarised in **Pnasier -v- NHS England [2016] IRLR170** in which the following steps were suggested: –

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An

examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so to, there may be more than one reason in a section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial influence on the unfavourable treatment), and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.

(d) The Tribunal must determine whether the reason/cause or, if more than one, a reason or cause is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regards to the legislative history of section 15 of the act…,the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it may be a question of fact arising robustly in each case where something can properly be said to arise in consequence of disability.

(e)…the more links in the chain there are between disability and the reason for the impugned treatment, the harder it is likely to establish the requisite connection as matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

…(i)…it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal may ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that causes the unfavourable treatment".

Justification.

250.The test is whether the unfavourable treatment is a proportionate means of achieving a legitimate aim.

251.To be proportionate the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so. In particular a tribunal must consider whether a lesser measure would be a proportionate means of achieving the employers' legitimate aim, see **Naeem –v- Secretary of State for Justice 2017 UKSC 27**

Dismissal.

252.The tribunal is satisfied that the claimant's dismissal was less favourable treatment. The reason the claimant was dismissed was due to his poor attendance record which in turn was as a result of his disability namely his back.

253.The issue therefore is whether the respondent can show the dismissal was a proportionate means of achieving a legitimate aim.

254.The tribunal had already found the capability dismissal unfair. Whilst acknowledging the test under section 15 was not identical it reminded itself of the Court of Appeal judgement in **O'Brien -v- Bolton St Catherine's Academy [2017] ICR 737** which had emphasised that it was undesirable, particularly in a capability dismissal and a claim under section 15 based on dismissal, for the range of reasonable responses test and the proportionality test to yield different results. To tribunal therefore has relied upon its reasoning in respect of the reasonable responses test to determine that the respondent has shown the dismissal was justified.

255.However for an abundance of caution even if the tribunal was not entitled to rely upon that reasoning in respect of the unfair dismissal claim it was satisfied that on the basis of the evidence put forward the respondent has discharged the evidential burden upon it.

256.The tribunal was satisfied respondent has shown that it cannot be expected to sustain long periods of employee absence particularly in its operational workforce. Absences impacted upon budgets because they required to be covered, either by over time or payment for additional hours.

257.A consistent approach to addressing ill-health in a manner agreed with the trade unions promoted good industrial relations and also sought to address the respondent's obligations to manage the health and welfare not only its own employees but also members of the public.

258.In addition the tribunal found that it was justifiable to dismiss the claimant for the legitimate aim of ensuring operational efficiency in a public funded organisation which was subject to tight budgetary constraints.

259.The tribunal noted that the claimant did not challenge the evidence of Assistant Commissioner Jennings in respect of the respondents' legitimate aims.

The tribunal is satisfied that in the particular circumstances of this case no less action could be taken by the respondent to achieve its legitimate aims.

Not paying DTS.

260.This point can be dealt with quite simply. Whilst the non-payment of DTS could in the tribunal's judgement amount to a detriment the reason for the non-payment did not arise out of the something but by the application of the respondent's policy in respect of eligibility for DTS. The respondent determined they were entitled to reject the claim both because the claimant was not wearing a seatbelt and because there were not satisfied that the injury relied upon was caused by the accident. The tribunal is satisfied that the respondents applied that policy. Whether they were right in their interpretation of the policy is irrelevant.

Working closer to home

261.The claimant was not subjected to unfavourable treatment by being required to work out of Stratford.

262.The claimant had only been certified as fit for light duties and the respondent was required to abide by that medical recommendation.

263.The nature and availability ability of light duties was such that they were carried out from one of the light duty hubs. As the tribunal has already found long-term light duties were not available for firefighters at their station and there were no light duties in the relevant period available at Hainault which satisfied the respondents definition of light duties. It is not therefore unfavourable treatment to refuse to transfer the claimant to Hainault when there are no light duties

265.In any event the reason the claimant was not offered work at Hainault was not because of the something but because there was no work available.

266.If the tribunal was wrong on that point it found that the application of the light duties policy had a legitimate aim and was justified and was proportionate. The purpose of the policy was to ensure that fire stations were properly staffed in order to provide an efficient and effective service and secondly to ensure their consistent treatment of employees who'd been allocated to light duties.

Conclusion.

267.In the circumstances, and not without some sympathy for the claimant, the Tribunal determined that the claimant's claims must be dismissed.

Employment Judge T.R.Smith

Date: 10 August 2022

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EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Cooke**

Respondent: **London Fire Commissioner**

Heard at: **London South (via CVP)** **On: 04 to 08 July 2022 inclusive**

Before:

Employment Judge T.R. Smith

Ms K Beckett

Mr K . Murphy

Representation

Claimant: In person

Respondent: Mr J. Small (counsel)

JUDGMENT

The claimant's complaints of direct disability discrimination, discrimination arising from disability, unfair dismissal and an unlawful deduction of wages are not well founded and are dismissed.

Written reasons provided pursuant to Rule 62 (3) of the

Employment Tribunal's (constitution and rules of procedure) Regulations 2013.

The issues.

At a preliminary hearing held on 24 February 2022 the parties agreed the issues the tribunal would be required to address. Since that date various concessions and clarifications had been made by both parties, and the tribunal has reproduced the amended agreed issues, below: –

1.Unfair dismissal.

1.1 Had the respondent proved a potentially fair reason to dismiss the claimant? The reason relied on by the respondent was capability (ill-health).

1.2 Did the respondent genuinely believe the claimant was incapable of performing his normal role due to ill-health?

1.3 Was that belief based on reasonable grounds?

1.4 At the time for forming that belief, had the respondent carried out as much investigation as was reasonable in the circumstances?

1.5 Was the dismissal procedurally fair? Did the respondent breach the ACAS code of practice (if applicable)?

1.6 Did the dismissal fall within the range of reasonable responses open to the respondent to take?

1.7 If the dismissal was unfair, should any award be reduced on account of **Polkey** or contributory fault?

2.Direct discrimination.

2.1 Did the respondent treat the claimant less favourably than it treated, or would have treated, others?

2.2 The less favourable treatment relied on by the claimant was as follows:

(i) Not paying the claimant "due to service " ("DTS") sick pay.

(ii) Refusing to allow the claimant to be stationed closer to home

(iii) Dismissing the claimant

2.3 Was the reason for the unfavourable treatment the claimant's disability?

2.4 The claimant relied on hypothetical comparators.

3. Unfavourable treatment for something arising in consequence of disability.

3.1 Did the respondent treat the claimant unfavourably?

3.2 The unfavourable treatment relied on by the claimant was the same as that relied on for the direct discrimination claim, see 2.2 (i) to (iii).

3.3 What was the reason for the unfavourable treatment ("the something")?

3.4 The "something" relied on by the claimant were the effects of his back condition and its impact on his ability to do his normal job.

3.5 Did the "something" arise in consequence of the claimant's disability?

3.6 Was the treatment a proportionate means of achieving a legitimate aim?

3.7 The proportionate means of achieving a legitimate aim relied upon by the respondent were: –

a. Ensuring that employees were able to perform their duties without endangering their health or that of other workers or public service users;

b. Ensuring that employees who were carrying out light duties were given meaningful, appropriate and justifiable work to complete;

c. Ensuring that employees achieved acceptable levels of attendance at work and performed their substantive roles;

d. Ensuring operational efficiency and that additional financial pressure was not placed on the respondent; a publicly funded organisation which was under increasing budgetary pressure and scrutiny.

e. Ensuring that medical advice was followed to try to ensure that the health and safety of employees was not placed at risk;

f. Ensuring that government guidance and all legislation was followed in respect of coronavirus to try to ensure that the health and safety of employees and public service users were not placed at risk.

4.Unlawful deduction from wages.

4.1 Did the respondent, by failing to pay the claimant sickness pay in accordance with the DTS provisions make an unlawful deduction from the sums properly payable to the claimant?

4.2 If so, was the complaint presented before the end of the period of three months beginning with the last date payment should have been made, and if not, did the claimant satisfy the tribunal it was not reasonably practicable for the complaint to be presented before the end of the said period and was it then presented within such further period as the tribunal considered reasonable?

5.The parties had identified at the preliminary hearing as a potential issue whether the claimant was a disabled person but in a letter from the respondent dated 07 April 2022 the respondent conceded the claimant was a disabled person for the purposes of section 6 Equality Act 2010 ("EQA 10") at the time of the alleged discriminatory acts and that it knew or ought to have known of the disability at all material times.

6.At the start of the hearing the tribunal agreed with the parties that it would address the issue of liability only and remedy would be dealt with separately, if appropriate, at a subsequent hearing.

7.The tribunal drew to both parties' attention that at any remedy hearing it was of the provisional view, subject to hearing argument , that an adjustment could not be made under section 207A of the Trade Union and Labour Relations Consolidation Act 1992 for any breach of the ACAS code of practice as it was not applicable in an ill-health capability dismissal on the basis of the judgement in **Holmes -v- Qinetiq Ltd 2016 ICR 1016.**

The evidence.

8.The tribunal heard from the claimant himself.

9.For the respondent, the tribunal heard evidence from: –

9.1.Ms J Baker, administrative manager (and the claimant's line manager in respect of his health)
9.2.Ms P. Bayley, health and absence adviser,(with particular responsibility for supporting employees on long-term sickness absence)
9.3.Mr A Bevan, assistant director of health and safety
9.4.Mr A. Hearn, assistant commissioner
9.5.Mr P. Jennings, former assistant commissioner for fire safety.

10.The tribunal also had before it an agreed bundles of documents numbering 1630 pages. A reference in this judgement to a number is a reference to a page in that bundle. The tribunal found the size and repeated duplication of documentation in the bundle vexing.

11.The tribunal reminded the parties that it would only look at those documents it was specifically taken to in evidence.

Findings of fact.

12.The tribunal has not sought to resolve each and every dispute as to fact. It has only addressed those matters relevant to determine the issues agreed between the parties.

Background.

13.The claimant was born on 15 October 1972.

14.The claimant commenced employment with the respondent on 14 March 1994.

15,The claimant was employed by the respondent as a firefighter.

16.The claimant's retirement age was 60.

17.The decision to terminate the claimant's employment on the grounds of incapacity was taken on 31 July 2020 with an effective date of termination of 30 October 2020. Thus, at dismissal the claimant had 26 years' service.

18.During the claimant's employment he was issued with a written statement of employment particulars (195/199).

19.The claimant's contract incorporated the Scheme of Conditions of Service of the National Joint Council for Local Authorities and Fire Brigades, known colloquially as the grey book.

20.During his career the claimant worked at various fire stations throughout east London latterly at Hainault Fire Station in Redbridge.

21.The claimants residential address, at the time the dispute arose between the parties was in Cambridgeshire.

22.The commute between the claimant's home and Hainault Fire Station, assuming no untoward traffic delays would be, at its fastest, about one hour 35 minutes each way.

23.Hainault Fire Station was the closest station operated by the respondents to the claimant's residential address.

24.At all material times the claimant was a member of the Fire Brigade Union.

The respondent's organisation.

25.The respondent employs three distinct groups of staff on different terms and conditions namely operational, fire and rescue and control staff..

26.The claimant was employed in its operational group, to which the grey book applied.

27.The respondent operates 102 fire stations and one river station across its locality. Each station varies in establishment from 7 to 22 staff per watch. Each fire station has at least one fire appliance, crewed, when mobilised, by four or five firefighters.

28.An appliance crew would normally be managed by a leading firefighter (formerly a crew manager) and depending on the size of the station, the watch would be led by either a sub officer ("sub o"), formerly known as a watch manager A, or a station officer ("stn o"), formerly known as a watch manager B. In order to maintain 24-hour cover, the respondent utilised a shift system of four staffed watches (white, red, green and blue) at fire stations operating consecutively on a fixed rota pattern (2 days, 2 nights and 4 days off) throughout the year.

29.Given the time critical nature of operational work, the demands made upon firefighting staff, and the need to protect their safety and that of the public, there was a requirement that operational staff were fit to perform a full range of duties.

30.It is appropriate, at this stage, to briefly mention a number of respondent's policies that feature in the tribunal's judgement.

Sick pay.

31.The claimant was entitled, subject to satisfying certain requirements of the respondent's contractual sickness policy to 6 months full pay and six months half pay if absent due to sickness (88/92).It was not disputed that the claimant was paid this element of his contractual entitlement.

32.However if an absence was due to a work-related injury known as "due to service"("DTS") an employee was entitled to full pay for 12 months and half pay for a further six months . Entitlement to contractual sick pay did not count against entitlement for DTS. Thus an employee who had a DTS injury received an extended period of contractual sick pay.

33.A further advantage of DTS was that it delayed an employee going into a "no pay" situation which in turn had benefits for the employees' pensionable service.

34.DTS is subject to a detailed and somewhat complex policy (131 to 140) to which the tribunal had full regard.

Ill health and the respondent's policies.

35.The respondent operated sickness and managing attendance policies (106/130, 141 to 164) which the tribunal fully noted. Of particular significance, for the purpose of this judgement, the tribunal identified the following matters.

35.1 The policies had been negotiated following consultation with the recognised trade unions.

35.2 Absences were divided into either short or long term.

35.3 Long-term absence was defined as a period of 28 days or more. (As will be seen it was common ground that the claimant's absences due to ill-health fell within the definition of long-term).

35.4 Under the long-term absent aspect of the policy it was envisaged that there would be a stage I capability meeting after a period of six months continuous absence, then a stage II capability meeting if the absence continued for nine months and finally a stage III capability meeting if it continued for 12 months. At stage III a meeting termination of the employee's employment was a possible option.

35.5 Thus for long-term sickness it was anticipated that the three-stage procedure would be completed after approximately 12 months. The time periods were indicative.

35.6 Light or alternative duties were defined in the policy as being meaningful and justifiable and were not meant as a long-term solution for an employee who could not fulfil a full range of contractual duties

35.7 Light duties were not envisaged, normally, to last for more than six months.

35.8 Light or alternative duties were stepping stones to full operational effectiveness.

36.The fact that light or alternative duties were not envisaged to last for more than six months without express HR and managerial approval persuaded the tribunal that whilst there might be occasional cases when the time period was exceeded, they were unusual and a specific business case had to be prepared to justify the extension of the time limit.

37.The policies required the respondent to give consideration to reasonable adjustments where an employee was disabled and also, whether or not the employee was disabled, to the possibility of redeployment, prior to dismissal

38.In addition and, again prior to dismissal, the policies made provision for consideration of ill-health early retirement where an employee, because an underlying health condition or due to an inability to fulfil the full range of duties, were unable to provide efficient service and attend work on a regular basis.

39.Finally an appeal mechanism was available to a dissatisfied employee who was dismissed as a result of incapability

40.At this stage the tribunal considered it helpful to amplify a little upon how the issue of light duties operated in practice as they formed a significant element of the factual matrix.

Light duties.

41.At the material time there were four light duty hubs operated by the respondent, the north east hub based in Stratford, the north west hub based at Wembley, the south-west hub based at Hammersmith and the south-east hub based at Lewisham.

42.The respondent operated light duty hubs because there was very limited opportunities for meaningful light duties that could be performed at an employee's fire station, sufficient to occupy an employee for a full working shift. That is not to say that light duties were never available at a fire station. If a specific project had to be undertaken at a fire station that might be suitable for light duties but needed to be approved at Deputy Assistant Commissioner level, which the tribunal considered indicated that such opportunities were exceptional. To the extent there was any opportunity for light duties at a fire station it was project work which was undertaken by senior officers, not firefighters

43.The only other light duties at a fire station were where, an officer returning from ill-health, had to undertake induction and training and such light duties were to bring him or her up to full operational effectiveness. Such duties were very strictly time limited.

44.Light duties that the respondent could provide principally consisted of home fire visits, normally undertaken by two officers in order to comply with the respondent's lone working policy. This was a further factor as to why an employee was not able to undertake light duties from their own station.

45.The conclusion of the tribunal was the respondent had a justifiable business reason for operating light duty hubs in the manner that it did, and in practice there was virtually no light duty options to a firefighter at their own station if it was to last for more than a brief induction or training following a period of ill-health.

Ill-health early retirement.

46.The respondent operates a generous pension scheme which makes provision for the early release of benefits where an employee is permanently unable to fulfil their contractual duties.

47.To access ill-health early retirement an application must be made to what is known as the Independent Qualified Medical Practitioner ("IQMP")

48.The IQMP is wholly independent of the respondent. The respondent is bound by the decision of the IQMP unless that decision is successfully appealed.

49.An appeal lies to Fire and Rescue Service Medical Appeal Board. Again the decision of appeal board is binding on the respondent. The respondent has no

involvement in the functioning of the board, which is undertaken by a separate contractor.

50.An employee cannot make repeated requests to the IQMP.

51.The tribunal considered it significant to note that ill-health early retirement was entirely separate and distinct from DTS.

52.Moving away from the relevant policies is appropriate the tribunal now addresses the trigger which led to the claimant's dissatisfaction with the respondent, which can be traced back to an incident on 26 January 2017.

26 January 2017.

53.On 26 January 2017 the claimant was injured whilst on duty. Put succinctly the claimant and his watch were mobilised to a car fire. Whilst putting on his personal protective equipment the fire tender came to a sudden stop whilst attempting to leave the station. The claimant hit his head on a metal bulkhead. The agreed reason for the sudden stop was a fault with a charging cable which should have automatically detached from the tender when the ignition was turned on but did not. This led the tender driver to suddenly brake. According to the respondent's documentation, the failure of the charging cable to detach was a known fault

54.The claimant was not wearing a seatbelt.

55.The incident was subsequently entered into the respondent's accident book and a few days later the claimant visited his GP to report a head injury. He was not aware of any other apparent injury at that stage. As will be seen,, however the claimant was eventually diagnosed with damage to his back which he attributed to the incident on 26 January 2017, although the respondent had never accepted that causal link.

56.Much evidence was placed before the tribunal as to the adequacy of the recording of the incident on 26 January 2017, the statements that were prepared in respect of the accident, whether a seatbelt needed to be worn and whether there was a causal link between the claimant's disability and the incident .

57.The accident and the subsequent alleged health consequences suffered by the claimant are subject to separate personal injury proceedings in the County Court under claim reference Go8Y1802. The tribunal emphasised to the parties it was not its function to adjudicate and make detailed findings on what essentially is a personal

injury claim. It was only required to apply the factual matrix as it found it, to the agreed issues.

58.Moving forward in the chronology it was approximately four months later, on 10 May 2017 that the claimant commenced his first period of sickness. A GP fit note dated 15 May 2017 recorded the reason for absence as *"Back pain? Cause, currently being investigated",* and the claimant was signed off for two weeks (417). At the time the claimant attributed his pain to some form of kidney complaint and thereafter he was subject to extensive examinations and testing at hospital to try and ascertain the nature of his ill-health.

59.It would appear that it was only on 23 January 2018, for the first time, that it was suggested by the claimant's treating doctors that his condition was one that would require investigation by an orthopaedic specialist.

60.By 06 April 2018 the claimant's consultant reported (542) that the claimant had a disc tear at the L4/5 segment which was non-compressive, and to a lesser degree discopathy at the adjacent segment. Surgical treatment was not advisable and physiotherapy, together with a lifestyle adjustment was recommended, although referral to a pain clinic was also considered a possibility. The consultant recommended the claimant discuss his long-term future and ability to work with the respondent's occupational health department

61.During this first period of sickness the claimant was referred on a regular basis to the respondent's occupational health department for advice. There was also regular contact between the claimant and the respondent and also fit notes were provided by the claimant's GP.

62.The claimant started what was planned to be 12 weeks physiotherapy in May 2018 in order to try and improve his underlying health condition as he remained unfit for work. Unfortunately it was not a success. The claimant only completed two sessions as he found the same too painful.

63.The claimant's entitlement to contractual sick pay expired (after the respondent had extended the same for a further period of six weeks to see whether physiotherapy assisted the claimant) in early June and this led the claimant in the same month to make an application for DTS.

Application for DTS.

64.The earliest evidence, that the tribunal was taken, as to the claimant considering an application for DTS was contained in an email dated 26 April 2018 (551), some 15 months after the incident.

65.Ultimately in June 2018 the claimant applied for his absence from 10 May 2017, which he attributed to the incident of 26 January 2017, to be categorised as "DTS".

66.The application was unsuccessful as notified to the claimant by a letter dated 21 June 2018 (599/600). Put simply the respondent relied upon two grounds to reject the application, firstly the claimant was not, and it said should have, been, wearing a seatbelt when the fire tender moved off and secondly that the claimant had failed to show a causal connection between his back condition and the incident on 26 January 2017.

67.The claimant appealed that decision by means of letter dated 25 June 2018 (601). The claimant contended the primary reason for the accident was the respondent's defective equipment, that is the charging cable did not disconnect leading the driver of the tender to brake sharply. He alleged that he was not warned the tender was about to set off so did not need to have his seatbelt fastened, and alleged that statements had been prepared in respect of the incident by some crew members were untrue.

68.The appeal commenced on 18 July 2018 and concluded on 30 August 2018. The appeal was rejected by Deputy Assistant Commissioner Hearn and his decision confirmed in a letter dated 04 September 2018 (670/671).

69.The tribunal noted that the hearing had been adjourned by Deputy Assistant Commissioner Hearn to give the claimant every opportunity to produce evidence to support his claim, for example his assertion as regards inaccuracies in the witness statements.

70.Whilst the claimant did present a medical report which stated *"I am theorising that it may be feasible that an accident in January may in theory have caused a small tear in Mr Cooke's back"* [tribunal's underlining] the tribunal concluded that it was reasonable for Deputy Assistant Commissioner Hearn to determine that the claimant's evidence fell well short of showing causation between the claimant's

current health challenges and the accident, causation being a relevant element of the test to qualify for DTS. Similarly the fact the claimant had repeated to a medical expert what he considered to be the cause of the injury, that was then repeated in a medical report was not evidence of causation, and again Deputy Assistant Commissioner Hearn was not acting unreasonably in rejecting that information when reaching his decision .

71.The claimant conceded in cross examination that at the appeal his points were considered and Deputy Assistant Commissioner Hearn had evidence that could support his conclusion although he considered some of the evidence put before the decision maker was wrong.

72.The tribunal concluded on the wording of the policy that Deputy Assistant Commissioner Hearn was entitled to reach the conclusion he did on the basis of the evidence. He did not have a closed mind, evidenced by the fact he adjourned matters to allow the claimant to submit further evidence.

73.Returning to the chronology there were a number of contacts between the claimant and Ms Barker (who was monitoring the claimant's ill-health), whilst the DTS application was being processed, the most significant being set out below.

First light duties request.

74.The claimant originally approached Ms Baker by email on 15 May 2018 (550) and asked whether he could undertake light duties from Hainault fire station on the basis that it was closer to his home than the Stratford light duties hub. The tribunal found as a fact that the distance between the claimant's home and Hainault was approximately the same although accepted the travel time could vary dependant on traffic conditions.

75.Ms Baker declined the request by an email dated 15 May 2018 (549) because at the time the claimant was unfit for work and there was no firm medical recommendation for light duties and, as already noted, community fire safety work was not carried out from operational fire stations but from one of the hubs.

76.As it transpired the claimant then received a further fit note from his doctor and continued to be signed off so, thus, the question of light duties was academic. In any

event there was no evidence before the tribunal that there were any meaningful light duties the claimant could have carried out at Hainault fire station.

Second request light duties.

77.At a meeting held on 02 July 2018 developments in the claimant's health and treatment were noted and it was agreed that since the last occupational health dated 11 April 2018 it would be appropriate for an updated report to be obtained.

78.There was a further short discussion as regards light duties. The claimant indicated he could not carry out home fire safety visits, which were the principal light duties. No other light duties were identified. The tribunal found that the respondent was entitled in those circumstances not to investigate the issue of light duties further.

79.Whilst further investigation into the claimant's health was ongoing the respondent convened a stage I sickness meeting. Whilst the tribunal noted that there was a delay in accordance with the respondent's procedures in arranging the meeting it did not find this caused the claimant prejudice.

The Stage I meeting, 27 July 2018.

80.The claimant and Ms Barker discussed the claimant's health situation at the stage I meeting and a further occupational health report (that had been obtained prior to the meeting) which indicated that the claimant remained unfit for work.

81.The claimant was now attending NHS fitness classes in place of physiotherapy but found those classes painful. The claimant continued to take painkillers and anti-inflammatory drugs. The claimant remained signed off by his GP.

82.The claimant could not give any indication when he considered he might be able to return to work.

83.A target was set for the claimant to return to full operational duties within three months. The claimant was advised that in the absence of any improvement the matter would proceed to a stage II meeting.

84.The discussion was confirmed in writing on 06 August 2018 (622/623). Unfortunately the claimant was unable to achieve the stage I target ,which ultimately led to a stage II meeting being convened.

Stage II meeting, 16 November 2018.

85.A stage II meeting ,chaired by Borough Commander Prasad took place with the claimant on 16 November 2018. The claimant remained signed off as unfit for work. There was no, sadly, improvement in his condition. A target was set for the claimant to return to full operational duties over the following period of three months.

86.Borough Commander Prasad indicated that in the absence of a return to work an appointment would be arranged with Ms Bayley to discuss possible redeployment and any reasonable adjustments.

87.The outcome of the meeting was confirmed in a letter dated 23 November 2018 (680/681).

88.As the claimant did not display any improvement in his health, such that he was likely to return to work in the target period, and further occupational health advice stated the claimant was unfit for work, this led the respondent to arrange a redeployment meeting.

Redeployment and reasonable adjustments investigation, 26 February 2019.

89.The claimant was invited to attend a meeting scheduled for 26 February 2019 with Ms Bayley, to discuss reasonable adjustments and, if they could not be accommodated, then redeployment opportunities. The invitation letter made it clear that the claimant could not be forced to accept redeployment and he was entitled to waive his right to be considered for redeployment if he so wished (707).

90.The respondent was not able to identify any redeployment opportunities.

91.The claimant declined to attend the meeting by means of an e-mail dated 25 February 2019 (723) and intimated that no adjustments could be made to his role and expressly waived his right to redeployment.

92.The claimant reiterated in evidence that were no reasonable adjustments that have made to his substantive duties.

93.The tribunal accepted that some operational staff found, as did the claimant, redeployment an unattractive option and is for this reason that the respondent had devised documentation which allowed an employee the option of waiving their right to redeployment.

94.The tribunal was satisfied that the claimant fully understood the effect of his waiver.. As he said in his own witness statement he considered redeployment would mean sitting in an office for long periods which he did not consider would assist his recovery and also he would be required to move onto a new contract which was likely to result in lower pay.

95.The claimant in his email of 25 February 2019 asked that referral be made to the IQMP.

96.On 05 March 2019 the claimant signed a document entitled "*redeployment waiver form: request to refer cases to IMQP"* (719). The form reminded the claimant that if he was not found to be permanently unfit his employment could ultimately be terminated on the grounds of incapability.

97.In view of the claimant's application to the IQMP the respondent paused its management of absence procedure

98.The claimant's application was considered by the IMQP on 22 May 2019 and a decision communicated to the claimant on 30 May 2019**.** The decision of the IMQP, was that the claimant was not totally incapacitated from the performance of his duties as a firefighter because treatment options for his degenerative condition of his lumbar spine remained untried and untested. Thus his application for ill health early retirement was rejected.

99.The claimant subsequently appealed that decision on 19 June 2019**.** The appeal was considered on 21 January 2020 by the Fire and Rescue Service Medical Appeal Board which consisted of two consultant occupational health physicians and a consultant orthopaedic consultant. The claimant attended the hearing along with his trade union official and made representations The unanimous decision of the Board was the claimant was not permanently disabled from his role as a firefighter.

100.Thus by the end of January 2020 both the claimant and the respondent knew that ill-health early retirement, with a release of the associated pension benefits was not a viable option.

101.However whilst the ill health early retirement application was being explored there were a number of further matters that occurred in the interim which the tribunal should briefly make reference to.

Meeting 27 June 2019.

102.An absence review meeting took place between Ms Barker and the claimant on 27 June 2019. There was no notable improvement in the claimant's health. It was noted the claimants IMQP application had been rejected but was subject to appeal.

103.Arrangements were made for a further occupational health report to be obtained and a discussion took place as regards the possibility of light duties at the respondent's North East hub based at Stratford. It should be recorded that the claimant had not been recommended as fit for light duties at this stage by either his GP or occupational health.

The meeting was confirmed in writing (787/788).

Meeting 26 July 2019.

104.The claimant attended a further meeting on 26 July 2019 by which stage occupational health had advised the claimant remained unfit for operational duties but now recommended light duties could be considered on a phased basis. This was supported by the claimant's GP.

105.As a result, the claimant and Ms Baker met to discuss the new medical evidence.

106.The claimant was told light duties were available at the Stratford hub. The claimant was allocated to Stratford because it was the closest hub to his substantive fire station.

107.Whilst the distance between the claimant's home and Hainault was about the same as between the claimant's home and Stratford the tribunal was prepared to accept in real world driving conditions the journey to Stratford may have taken longer

108.At the Stratford hub, at any one time there usually around 12 employees who'd been placed on light duties.

109.The claimant asked if he could choose another hub because he was thinking of moving in with his partner, who lived in Guildford in Surrey.

110.Ms Barker indicated that she would be prepared to make enquiries as to whether opportunities existed at either the Hammersmith or Lewisham hub. The claimant considered Hammersmith might be a better location but the tribunal found

the meeting ended on the basis that he would consider his position and let Ms Barker know if he was interested in a post at a different hub. Ms Baker needed to speak to Deputy Assistant Commissioner Perez to seek approval if the claimant wished to work out of a different hub.

111.As it transpired the claimant did not explore the option of working out of a different hub.

112.The claimant initially started light duties on 20 September 2019 working three days a week until 18 October 2019 when his hours were increased to full-time, effective from 28 October 2019. The claimant remained in work until April 2020 when he started his second and last period of absence.

113.Whilst the claimant was undertaking light duties the respondent remained in touch with him and it is appropriate to mention one such meeting.

28 October 2019.

114.On 28 October 2019 Ms Baker met the claimant for a sickness review meeting. The claimant indicated that he was managing reasonably well although bending aggravated his back condition. The claimant mentioned the commute was aggravating pain in his back. An adjustment to start and finish hours were suggested to reduce time spent in traffic. The claimant did not explore the option further. The claimant was advised that stage III of the capability policy would be invoked and this was confirmed in writing on 29 October 2019 (809/810) although for a variety of reasons this was delayed until July the following year.

In the interim, pending the stage III meeting the country experienced a the covid pandemic

Covid 19.

115.The claimant continued undertaking light duties at Stratford until March 2020 when a national lockdown took place due to covid 19.

116.Whilst the travelling may have been onerous the claimant had maintained attendance at Stratford without any further sickness. Indeed the claimant said in an email of 18 March 2020 (1034) that he thought there was some *"slight improvement"* and even enquired whether redeployment could be reconsidered, to which he was advised to discuss that at the subsequent stage III meeting.

117.On 19 March 2020 staff were advised on light duties that they would no longer be carrying out standard home fire safety visits but those on light duties would assist with updating the respondents operational risk database.

118.On 21 March 2020 claimant asked whether he could return to full operational duties at Hainault and also queried whether he could be excused duties because of concerns as regards his partners mother's health.

119.The claimant was advised that an occupational health report would be required to determine if the claimant was fit for operational duties and the claimant could not be excused attendance from light duties.

120.A national lockdown took place on 23 March 2020**.** The claimant indicated that he did not regard light duties as essential work on the advice of his trade union and would not be attending work (1056)

121.The claimant was advised on 24 March 2020 that he should still report to work for light duties based at Ilford . Ilford was slightly closer to the claimant's home address than Stratford. All those working at the hubs were moved.

122.As it transpired the claimant did not return to work because as from 06 April 2020 the claimant commenced a further period of sickness leave and was signed off as unfit for work in any capacity.

123.The claimant was never able to return to either substantive or light duties after this date.

124.An occupational report dated 06 April 2020 found the claimant was unfit for either operational or light duties and would not be fit for operational duties in the foreseeable future (1080/1081).

125.Eventually the long-awaited stage III capability meeting was arranged. In fairness to the respondent both parties had at various stages sought adjournments for valid reasons.. The tribunal found that nothing turned on any delay and it did not cause the claimant unfairness.

Stage III capability meeting, 31 July 2020.

126.The claimant attended the stage iii meeting supported by his trade union representative, Mr Mc Laren. The meeting was chaired by Deputy Assistant Commissioner Rickard, supported by Ms Bayley

127.It is proper to record that the management pack was not full and complete and did not include the occupational health reports of 06 April 2020, 27 April and 01 July 2020. However Deputy Assistant Commissioner Rickard he did see them at the hearing as is clear firstly from the outcome letter as he noted that occupational health made reference to an independent report which was mentioned for the first time in the report of 06 April 2020 and secondly the e-mail from Ms Bayley sending the missing documents on the morning of the hearing (1352).

128.Deputy Assistant Commissioner Rickard rejected the suggestion of an independent report , as he considered it would add nothing useful and he already had significant medical evidence before him.. The tribunal considered that was a conclusion a reasonable employer was entitled to reach. The medical evidence before him was clear that the claimant was unfit for all duties and had been signed off for three months. The claimant himself accepted he was unfit for work.

129.The management pack also did not include the appeal board documents of January 2020 but the tribunal accepted that they were irrelevant to the issues that Deputy Assistant Commissioner Ricard had to address and therefore their exclusion was not unfair. If the tribunal was wrong at that point the matter was remedied by the appeal hearing when such document was before the decision-maker.

130.Deputy Assistant Commissioner Ricard noted that the normal support procedures of the respondent had been actioned.

131.Deputy Assistant Commissioner Ricard decided to dismiss the claimant with notice. He took into account the claimant's period absence commenced in May 2017 and, save for a period of approximately six months between September 2019 and March 2020 had been continuous, the occupational health evidence and the fact there was no clear indication when the claimant would be fit to carry out his substantive duties. He considered that the claimant had in excess of the time specified in the respondents managing attendance policy to demonstrate improvement and that continued absence could not be sustained have a regard for the needs of the service.

132.He noted neither occupational health nor the claimant could not suggest any reasonable adjustments, redeployment had been declined and early retirement rejected

133.The decision was communicated to the claimant by means of letter dated 03 August 2020 (1145/1147). Ultimately the agreed effective date of termination was 30 October 2020. The claimant was reminded of his right of appeal, which he subsequently exercised.

The appeal.

134.The claimant appealed his dismissal on 11 August 2020 (1175).

135.An appeal meeting was eventually arranged for 14 December 2020.

136.The claimant indicated on 11 December 2020 that he would not be attending in person but would rely upon representations made by his trade union official, Mr Mc Laren.

137.The appeal was chaired by Assistant Commissioner (now former) Jennings.

138.The appeal was conducted as a review rather than a rehearing. Notes were kept of the hearing (1346 /1351) and they were not challenged. The tribunal regarded them as a reasonable summary of the matters discussed

139.Deputy Assistant Commissioner Rickard presented the management statement of case. A Mr Amis provided HR support.

140.Assistant Commissioner Jennings had additional information before himself including an occupational health report dated 01 July 2020 (1112/1113) in which the advice was the claimant was not fit to return to operational duties in the forceable future and that a referral to an independent specialist was unlikely to change the claimant's prognosis(something that had been opined in the report of 06 April 2020) and a letter from occupational health dated 15 September 2020 (1166) confirming that the position remained as per the report of 01 July 2020.

141.Assistant Commissioner Jennings also had the documents that were not in the management pack at the stage III meeting. Thus to the extent there was any unfairness to the claimant, this was remedied by the appeal hearing.

142.The grounds of appeal were in essence that firstly the respondents managing attendance policy not been here adhered to, secondly the decision to dismiss had been made without consideration of all the relevant evidence with dismissal being too severe and thirdly new medical evidence had come to light.

143.The case put forward on behalf of the claimant in respect of the policy breaches was principally that they had been delays at the various stages of the process, the claimant should have been given light duties and documents had not been in the stage III management pack.

144.Assistant Commissioner Jennings did not find any delay prejudiced the claimant and the tribunal considered that was a conclusion he was entitled to reasonably reach.

145.It was contended, correctly that various documents were missing from the stage III meeting bundle particularly the occupational health report dated 06 April 2020 (1080/1081) and the appeal board report (914/926). This however had been remedied by the date of the appeal and the report of 06 April had been discussed at the stage III meeting. Assistant Commissioner Jennings concluded any error in respect of the pack was remedied at the stage III hearing and the appeal board notes were irrelevant.

146.On the claimant's behalf it was said that he should have been given light duties at his substantive fire station . That was rejected as no such duties existed and the claimant was treated in the same manner as other officers on light duties in that he was required to work out of one of the four hubs. The tribunal considered that was a reasonable conclusion Assistant Commissioner Jennings was entitled to reach.

147.Similarly the suggestion the claimant should have done light duties from home was rejected as no such meaningful and sustained light duties existed. The tribunal considered on the basis of the evidence before Assistant Commissioner Jennings it was reasonable for him to come to those conclusions.

148.Secondly the determining officer rejected the assertion that dismissal was too severe and noted that the claimant's own representative said that the claimant was unfit for operational duties.

149.Thirdly what was said to be new medical evidence was a report from an independent consultant Professor Ranganathan dated 04 November 2020

(1213/1216) which stated the claimant's back condition had not improved and indeed the claimant was likely to experience increasingly frequent episodes of back pain and constant persistent sciatica. It effectively reinforced the occupational health advice that the claimant was unfit for operational duties. Assistant Commissioner Jennings did not consider this detracted from the decision to dismiss, but rather supported the respondent's own evidence..

150.To the extent it was said the decision to refuse ill health early retirement was wrong Assistant Commissioner Jennings considered the evidence before him was that the IQMP was an independent practitioner possessing the appropriate expertise qualifications and knowledge to determine whether an employee met the criteria for ill-health retirement and an independent medical board had reached the same conclusion earlier that year. All internal avenues available to the claimant as regards appealing the refusal of ill-health retirement had been exhausted. The respondent had taken advice as to whether the claimant's new medical evidence was likely to impact upon ill-health early retirement in that it was sent to occupational health with a request as to whether it was likely to lead to the IQMP reaching a different decision and the advice from occupational health dated 25 November 2020 was that it did not meet the current criteria for determining that the claimant was permanently unfit (1271) and this information was related to the claimant on 04 November 2020 (1304). Assistant Commissioner Jennings was entitled to come to the decision he did in respect of ill-health early retirement

151.Assistant Commissioner Jennings declined to uphold hold the appeal and confirmed the decision to dismiss by a letter dated 13 January 2021. (1402/1408).

Subsequent events.

152.Following termination the claimant was able to obtain early release of deferred pension benefits following an application to the IQMP in June 2021. The benefits were backdated to 28 October 2020, before termination. There was no evidence before the tribunal to demonstrate how the IQMP reached its decision or why it was backdated to this date.. Such a release was only available where a person ceased to be an active member of the pension scheme and thus this was not an option available to the claimant, whilst employed by the respondent.

153.It is however appropriate to note that from the documentation placed before it, the tribunal concluded different tests were applied in respect of ill-health early retirement and the release of deferred benefits. Looking at the regulations placed before the tribunal and in particular regulation 65 and 67 the threshold for release of deferred benefits was lower.

154.Thius the fact the claimant subsequently received access to his pension did not negate the decision taken by Assistant Commissioner Jennings based on the information before him at the time.

Discussion and conclusions.

Unfair dismissal

155.The tribunal should briefly outline the relevant legal principles it applied in reaching its conclusion on this head of claim.

156.Section 98 of the Employment Rights Act 1996 ("ERA 96") provides as follows: –

"(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2).A reason falls within this subsection if it

(a) relates to the capability… of the employee for performing work of the kind which he was employed by the employer to do."

157.The tribunal is then directed by parliament to address fairness under section 98 ERA 96 which sets out the test in the following terms: –

"(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

158.It is for the respondent to establish an honest belief on reasonable grounds that the employee was incapable of performing their role, see **Taylor-v- Alidair Ltd [1978] ICR 445.**

159.The case law has established a number of factors that may, depending upon the factual matrix, be relevant to the decision of fairness and is appropriate the tribunal summarises those principles so the parties can be assured that they were applied.

160.Firstly before the dismissal is fair the employer must carry out a reasonable investigation to ascertain the current medical position, although ultimately the decision is a managerial rather than a medical one, see **D.B. Schenker Rail (UK) Ltd -v- Doolan (UKEATS/0053/09/BI**

161.Secondly having obtained that information a reasonable employer must consider the requirements of the business, the employees past sickness record (which may include the nature of the illness and the length of the various absences) and the possibility of alternative employment see **Spencer -v- Paragon Wallpapers Ltd [1977] ICR 301** (which is likely to include the implementation of any reasonable adjustments under the EQA 2010)

162.Thirdly dismissal is unlikely to be fair without consultation between the employer and employee before reaching a final decision, **East Lindsay District Council -v- Daubney [1977] ICR 566.**

163.Fourthly having undertaken the above steps the central question is usually whether a reasonable employer would have waited longer to dismiss and, if so, for how long. The key issue is whether the employer reasonably believed that it could not wait any longer and not simply that it is genuinely held that view, see, **Stevenson -v- Iceland Foods Ltd UKEAT/0309/19**

164.Other factors that may be relevant, dependent upon the circumstances of the case, include whether consideration has been given to ill-health early retirement prior

to dismissal, see **First West Yorkshire Ltd -v- Haigh [2008] IRLR 182,** compliance with an attendance management procedure and whether any entitlement to contractual sick pay has expired.

165.The fact that an employer may have been in some way responsible for the claimant's illness is not determinative of fairness, **London Fire and Civil Defence Authority -v- Betty [1994] IRLR 384** and conversely neither does the fact the employee is blameless for their illness

166.The tribunal applied the above legal principles.

167.The first question for the tribunal to determine was whether the respondent has demonstrated a potentially fair reason for dismissal namely capability.

168.The tribunal is so satisfied having regard to the oral evidence placed before it and the substantial documentation.

169.It's reasoning for that conclusion can be summarised as follows

169.1.The documentation showed that the claimant was dealt with under the respondent's management of absence process and the central concern was the claimant's health, evidenced by the frequent referral to occupational health, the documentation from the claimant's GP and the various meetings, all of which were consistent with managing long-term sickness.

169.2.There was no cogent evidence before the tribunal that it was anything other than the claimant's capability that was the principal reason for his dismissal. Indeed it was the claimant's case throughout that he was unfit, the principal issue from his perspective being that he considered he should have been granted ill-health early retirement.

169.3.Whilst it is true the claimant had intimated, via solicitors, a personal injury claim the claimant did not content this was the reason for dismissal and indeed the fact that the respondent took so long between the intimation of the claim and termination points away from it having any such influence.

169.4.The tribunal noted as part of the submissions on behalf of the claimant at the appeal it was said "*ideally the best position* [was] *to get pensioned out because he is never going to get better …. cannot continue as a firefighter*"

170.In such circumstances looking holistically at all the evidence the tribunal concluded the respondent had shown the principal reason for the claimant's termination was capability, namely that the claimant was incapable of carrying out his contractual duties

171.The next question for the tribunal to address was that required by section 98 (4) of ERA 1996.

172.The tribunal concluded the decision to dismiss was fair. It reached this conclusion for the following reasons.

173..As at the conclusion of the internal proceedings the respondents had taken reasonable steps to ascertain the claimant's health evidenced by the occupational health reports of 06 April 2020, 01 July 2020, letter 15 September 2020 a further report 18 September 2020 and the claimant's own submitted medical evidence dated 04 November 2020.

174.Throughout the stage III hearing and appeal the claimant remained signed off as unfit for any work by his own GP.

175.The claimant was consulted at all stages prior to any decision being made to terminate his employment and was granted representation of both the stage III hearing and appeal.

176.In cross examination the claimant accepted that the dismissing officer at his stage III meeting was *"in a corner"* based on the evidence and, other than the claimant would have liked to have been granted early retirement, he accepted dismissal was the only other viable option.

172.5.The tribunal was satisfied that both decision-makers honestly applied their minds to the points raised by or on behalf of the claimant and came to reasoned conclusions for their respective decisions

177.At the date of dismissal the claimant had exhausted his right to contractual sick pay.

178.The respondent was entitled to take into account that at termination the claimant had been absent for approximately three years. The situation clearly could not continue indefinitely. There was no prospect of an early return.

179.Light duties have been tried but unfortunately the claimant had once again fallen ill, been totally unable to undertake any work from April 2020. The claimant suggested he should have been kept on light duties indefinitely. The respondent was in the tribunal's judgement entitled to reject that argument. Firstly under the respondent's policy, agreed with the recognised trade unions, light duties were normally limited for six months. Secondly the respondent was entitled to limit opportunities to light duties to those who are likely to be able to return to full operational duties and the claimant wasn't.

180.Before the tribunal it was suggested the claimant should have remained on light duties indefinitely and the claimant was able to point to another firefighter, firefighter E who suffer from a detached retina and was allocated light duties for in excess of three years.

181.The tribunal was mindful that how another employee was treated can be relevant both in respect of unfair dismissal and also in respect of discrimination, albeit the legal tests are different.

182..In terms of unfair dismissal there is only unfairness if the comparator was truly comparable.

183.The tribunal rejected the fact that firefighter E was on light duties for longer than the claimant as constituting any unfairness in the dismissal process.

184.It rejected the argument of unfairness for a number of reasons.

184.1.Firstly because the point was never put at either the stage III hearing or the appeal.

184.2.Secondly the tribunal not be satisfied the position of the claimant and firefighter E was truly comparable. The tribunal found that with the alleged comparator there was uncertainty as to the claimant's prognosis and he required a number of surgical interventions and experienced complications but it was anticipated that ultimately he would return to work. The tribunal noted that ultimately firefighter E was able to return to full duties by August 2021. It had never been anticipated, certainly by the stage III hearing and thereafter, that the claimant would ever return to full duties.

184.3.Thirdly, the claimant was not on light duties as at the date of dismissal and the medical evidence pointed to the fact the claimant would not be fit for either his substantive or light duties in the foreseeable future. The respondent could not reasonably have maintained the claimant on light duties when he was unfit for such work. Allied to this point the claimant had suggested it was unfair to require him to carry out light duties from the Stratford hub due to the travelling. Whilst the tribunal accepted that increased travel time did occur it was not satisfied this significantly impacted on the claimant's recovery given in his email of March 2020 he referred to experiencing a *"slight improvement"* and enquired about redeployment and even returning to operational duties(1047), although the tribunal accepts the latter was probably wishful thinking. As it was, at no stage was the claimant signed off as being fit to return to operational duties and has already been noted the claimant fell sick again in April 2020, never to return.

184.Reasonable adjustments and redeployment had been examined prior to any decision being made to terminate the claimant's employment. The claimant himself accepted that no reasonable adjustments could be made and made an informed decision as to why he was not prepared to consider redeployment.

185.Ill-health early retirement had been examined. It has been rejected by both the IQMP and the independent medical board. Whilst the tribunal has been alive to the fact the claimant was extremely critical of those conclusions it is not for this tribunal to determine whether ill-health early retirement should have been granted. What it had to decide was whether a reasonable employer in the light of those reports and in the light of the claimant's representations was acting unreasonably in refusing ill-health early retirement. The tribunal could not say the respondent was acting unreasonably and that another reasonable employer in similar circumstances would not have taken the same decision as it did..

186.The tribunal was alive to the fact this was a large employer and the claimant attributed his injury to an incident at work on 25 January 2017. However what the tribunal had to ask itself is whether a reasonable employer would have waited any longer. The tribunal decided it would not, in the light of the firm medical evidence and the claimant's own representations that he was unfit for work.

187.For all the above reasons it follows that the claim of unfair dismissal must be dismissed.

Unlawful deduction from wages

188.The tribunal is a creature of statute and its jurisdiction is governed by the powers given to it by Parliament.

189.Section 23(2) ERA 96 provides:-

"(2) Subject to subsection (4) an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with -

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made…"

Subparagraph (4) provides

"(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable".

190.Time in respect of a series of deductions runs from the last deduction or non-payment.

191.If a claim is presented out of time the tribunal has to determine whether it was not reasonably practicable to be presented within time and then and only then, it is was so satisfied, whether the claim was then presented within such further period as was reasonable.

192.The tribunal noted the judgement of the Court of Appeal in **Palmer -v- Southend-on-Sea Borough Council 1984 IRLR 115** which set out a useful review of the relevant authorities.

193.In essence the claimant's case was that he should have been awarded DTS. The failure, he said to award him DTS was unlawful deduction from wages because under the terms of the respondents scheme such money was properly payable.

194.In the tribunal's judgement when the claimant's contractual sick pay ended on 21 June 2018 time started to run in respect of any unlawful deduction in respect of DTS.

195.However if the tribunal was wrong on that point, at the very latest, the claimant knew his DTS was unsuccessful when his appeal against refusal was concluded on 13 August 2018 and notified to him in writing on 04 September 2018 (670/671).

196.The claimant did not present his claim until 01 December 2020, approximately 27 months after the rejection of his appeal. On any analysis the claimant's claim in this regard was lodged out of time.

197.The following additional findings are relevant in respect of the time issue.

198.The claimant immediately considered the decision to refuse DTS was wrong.

199.The claimant was a union member and had the support of the FBU throughout his employment with the and knew they could provide support

200.The claimant had, certainly from 2017, access to the Internet and was aware of the existence of employment tribunals. He therefore had the means to make enquiries as regards time limits. He also had an opportunity to make express enquiries via his trade union.

201.The claimant contended it was not recently practicable to present the claim at an earlier stage because he was worried as to his health.

202.The tribunal rejected that argument.

203.The claimant was perfectly able to issue instructions to solicitors in September 2018, despite his health, as is evidenced by the fact that he had instructed Thompson's solicitors in respect of the incident on 25 January 2017, and they had written a detailed letter before action to the respondents on 10 September 2018.

204.As the claimant was able to give instructions to his solicitors as regards a personal injury claim he was, in the tribunal's judgement, equally able to obtain advice in respect of an alleged unlawful deduction from pay.

205.Whilst the tribunal accepted the claimant may well have been worried as to his health it did not accept that it was so severe that he could not rationally give

instructions to either his union or his solicitors, or carry out appropriate online searches so he himself could pursue matters via employment tribunal.

206.The tribunal noted that prior to the presentation of the claim there was a period from September 2019 when the claimant was working, undertaking light duties and regularly travelling to and from his girlfriend's house. His light duties involved visiting members of the public and liaising and engaging with them. There was no reason therefore why despite any health challenges,, even at this late stage, the claimant could not have issued a claim.

207.The claimant has not persuaded the tribunal, and the burden was on him, that it was not reasonably practicable to present his claim within time.

208.Even if the tribunal was wrong on that point the tribunal was not satisfied the claimant then presented his claim within such further period as was reasonable. Given that the claimant was working from September 2019 there was no impediment preventing presentation, yet the claimant still waited a further 15 months.

209.In all the circumstances the tribunal must dismiss the claim for an unlawful deduction from wages because it does not have jurisdiction to entertain the merits or otherwise of the complaint.

Law - Direct discrimination.

210.The tribunal should briefly outline the relevant legal principles it applied in reaching its conclusion on this head of claim.

211.The burden of proof is set out in section 136 of the EQA10. It does not change the requirement on a claimant that in a discrimination case that it is for the claimant to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the tribunal could infer an unlawful act of discrimination, see **Royal Mail Group Ltd -v-Efobi 2021 UKSC 33**

212.Direct discrimination is defined in section 13 (1) EQA 10 as follows: –

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

213.The legislative test is therefore broken down into two elements namely less favourable treatment and the reason for that treatment. In some cases, however, it

may be appropriate to ask the latter question first, see, **Shamoon -v-The Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** as explained in **Stockton-on-Tees Borough Council -v-Aylott [2010] IRLR 994** where it was suggested that it would often be appropriate to start by identifying the reasons for the treatment the complainant complained of. If the answer was that the reason was a protected characteristic then the finding of less favourable treatment was likely to follow as a matter of inevitability. This may be particularly appropriate in cases hypothetical comparators: **Laing -v- Manchester City Council [2006] IRLR 748.**

214.The test of what amounts to less favourable treatment is an objective one. The fact that a complainant believes they have been treated less favourably than a comparator does not of itself establish that there has been less favourable treatment: **Burrett v West Birmingham Health Authority [1994] IRLR 7.**

215.Direct discrimination is concerned with less favourable, rather than unfavourable, treatment. It is the equality rather than the quality of the treatment that matters. Unreasonable treatment is not less favourable treatment, see **Glasgow City Council-v- Zahar [1998] ICR 120** and unreasonable behaviour cannot found an inference of discrimination, although a lack of explanation for the unreasonable treatment (as opposed to the unreasonableness of the treatment) might found such an inference: **Bahl -v- Law Society [2004] IRLR 799**.

216.As the statutory definition requires less favourable treatment that in turn requires a comparison to be made..

217.Section 23 EQA10 states :

"(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.

218.Where the protected characteristic is disability, as here, section 23(2) EQA 10 requires that the circumstances must not materially differ between the complainant and comparator, specifically includes a person's disabilities. In other words the complainant and comparator must have the same abilities and this may mean that the appropriate comparator is also a disabled person.

219.Whether the comparator is appropriate is one of fact and degree and the complainant and comparator do not need to be identical in every respect: **Hewage -v-Grampian Health Board [2012] UKSC 37**.

220.The second element is the treatment must be because of the protected characteristic. The courts have divided cases of direct discrimination into two categories, the first whether treatment in issue is discriminatory on its face and the second where the treatment is not objectively discriminatory but the tribunal has to know something about the respondent's reasons for their actions in order to know whether the less favourable treatment could be said to be because of the protected characteristic.

221.In the first category motive is irrelevant although motivation is not. That said motive or intention will plainly be compelling evidence pointing to a finding of unlawful discrimination: **Nagarajan -v- London Regional Transport [2000] 1 AC 501.**

222.In the second category it is not sufficient for a complainant to show they been treated less favourably than their chosen comparator. It is only if the protected characteristic is a substantial or operative reason, though not necessarily the sole or intended reason, for the less favourable treatment that liability is established. The tribunal is concerned with what consciously or was unconsciously was the alleged discriminators reasons for the behaviour.

223.The tribunal then applied those principles to its findings of fact.

Dismissal

224.The tribunal started with the issue of dismissal.

225.What was the reason for the claimant dismissed? The tribunal was satisfied that the claimant was dismissed because the respondent considered, for the reasons already given, that the claimant was incapable of carrying out his contractual duties.

226.The claimant has been unable to demonstrate to the tribunal that another firefighter incapable of carrying out his or her contractual duties would not have been dealt with in an identical manner. In the claimant's own evidence he agreed that dismissal was only viable option and in the circumstances the tribunal is not persuaded that he can now argue that a comparator would not be dismissed in the same circumstances.

227.Whilst in the list of issues the claimant indicated he relied upon a hypothetical comparator in the course of evidence he made reference to firefighter E. The tribunal

had insufficient evidence as to whether firefighter E was disabled but even if he was that did not prevent a comparison been undertaken.

228.Whilst it is true the claimant was treated less favourably than firefighter E the reason for that treatment had nothing whatsoever to do with the claimant's disability. Firefighter E was treated differently because the medical evidence was that he was likely to return to full duties and in the interim was undertaking light duties. Unfortunately complications arose in his treatment which delayed a return to full operational duties.. As has already been noted firefighter E did ultimately return to full operational duties. Contrasted with the claimant the claimant was not able to continue undertaking light duties and there was no indication that he would be fit to return to full operational duties. The claimant and firefighter E were not truly comparable as there were material differences in their circumstances.

229.It follows therefore the complaint of direct discrimination on this ground must fail.

Not paying DTS

230.The tribunal is not satisfied that it was an act of direct discrimination to fail to pay the claimant DTS.

231.The fact he was disabled had nothing to do with the refusal.

232.The reason the claimant's application for DTS was refused was because in the respondent's opinion he failed to satisfy the requirements of its policy.

233.Firstly that he had failed to comply with the respondent's procedure as regards the wearing of a seatbelt and secondly there was insufficient evidence to show a causal connection between the accident and the medical condition subsequently relied upon by the claimant namely damage to his back.

234.It is not the role of the tribunal to determine whether or not the respondent's judgement was right. What it has to consider is whether the claimant's disability was the cause or a substantial influence on the refusal of the claim.

235.There is no evidence before the tribunal, let alone evidence to reverse the burden of proof that a person in similar circumstances would not equally have had their claim rejected. It follows therefore this complaint must be dismissed.

Refusal to allow the claimant to be stationed closer to his home.

236.The claimant has not led sufficient evidence to show that a hypothetical comparator would have been treated more favourably.

237.The respondent had established four light duty hubs. The principal light duties were home fire visits and, for good reason the respondent considered that such duties should be undertaken by at least two firefighters.

238.There was no evidence before the tribunal that a hypothetical comparator who became unfit to fulfil their contractual duties would not have been transferred to a light duties' hub. The weight of the evidence pointed to firefighters who were unfit for full duties worked out of the hubs

239.The tribunal was satisfied that there was no evidence that light duties existed at the claimant's Hainault station, when the claimant had been certified as being fit for light duties, which fell within the respondent's definition namely that they were meaningful and would occupy the claimant for his contractual hours.

240.The refusal therefore had nothing to do with the claimant's disability. It was not an act of direct discrimination as a comparator would have been treated in a similar manner.

Discrimination arising from disability.

241.The tribunal applied the following legal principles in reaching its determination.

242.Section 15 EQA 2010 provides: –

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

243.The Claimant only need establish unfavourable treatment, not less favourable treatment. As it is not necessary to establish less favourable treatment no comparator is required.

244.The concept of unfavourable treatment is *"… measured against an objective sense of that which is adverse as compared with that which is beneficial"* and *" the sense of placing a hurdle in front of, or creating a particular difficulty or, or disadvantaging a person .."* so said the EAT in **Trustees of Swansea University Pension and Assurance Scheme -v- Williams UKEAT 0415/1** approved by the Court of Appeal at **2017 EWCA 1008**

245.Section 15(1) (a) contains a double causation test. Firstly the unfavourable treatment must be "because of" the relevant *"something"* and secondly that *"something"* must itself be *"arising consequence"* of the disability, see **Basildon and Thurrock NHS Foundation Trust -v- Weerasinghe [2016] ICR 305.** The same case stressed it was not simply a question of whether the claimant was treated less favourably because of their disability.

246.Starting with the first element namely the *"because of "* issue the focus is on the alleged discriminators reasons for the action and therefore the tribunal must consider the decision-makers conscious and subconscious thought process, see **Robinson -v- Department for Work and Pensions [2020] IRLR 884.**

247.The *"something"* must more than trivially influence the treatment; but it does not have to be the sole or principal cause. There is no requirement that the alleged discriminator should have known that the relevant something arose from the claimant's disability, see **City of York Council -v- Grosset [2018] EWCA Civ 1105.**

248.The second element, the *"in consequence"* issue there is no need to look at what was in the mind of the alleged discriminator and it is a matter of objective fact decided in the light of all the evidence. There may be a number of links in the chain and more than one relevant consequence of the disability may require consideration.

249.The approach a tribunal is required to take was helpfully summarised in **Pnasier -v- NHS England [2016] IRLR170** in which the following steps were suggested: –

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An

examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so to, there may be more than one reason in a section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial influence on the unfavourable treatment), and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.

(d) The Tribunal must determine whether the reason/cause or, if more than one, a reason or cause is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regards to the legislative history of section 15 of the act…,the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it may be a question of fact arising robustly in each case where something can properly be said to arise in consequence of disability.

(e)…the more links in the chain there are between disability and the reason for the impugned treatment, the harder it is likely to establish the requisite connection as matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

…(i)…it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal may ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that causes the unfavourable treatment".

Justification.

250.The test is whether the unfavourable treatment is a proportionate means of achieving a legitimate aim.

251.To be proportionate the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so. In particular a tribunal must consider whether a lesser measure would be a proportionate means of achieving the employers' legitimate aim, see **Naeem –v- Secretary of State for Justice 2017 UKSC 27**

Dismissal.

252.The tribunal is satisfied that the claimant's dismissal was less favourable treatment. The reason the claimant was dismissed was due to his poor attendance record which in turn was as a result of his disability namely his back.

253.The issue therefore is whether the respondent can show the dismissal was a proportionate means of achieving a legitimate aim.

254.The tribunal had already found the capability dismissal unfair. Whilst acknowledging the test under section 15 was not identical it reminded itself of the Court of Appeal judgement in **O'Brien -v- Bolton St Catherine's Academy [2017] ICR 737** which had emphasised that it was undesirable, particularly in a capability dismissal and a claim under section 15 based on dismissal, for the range of reasonable responses test and the proportionality test to yield different results. To tribunal therefore has relied upon its reasoning in respect of the reasonable responses test to determine that the respondent has shown the dismissal was justified.

255.However for an abundance of caution even if the tribunal was not entitled to rely upon that reasoning in respect of the unfair dismissal claim it was satisfied that on the basis of the evidence put forward the respondent has discharged the evidential burden upon it.

256.The tribunal was satisfied respondent has shown that it cannot be expected to sustain long periods of employee absence particularly in its operational workforce. Absences impacted upon budgets because they required to be covered, either by over time or payment for additional hours.

257.A consistent approach to addressing ill-health in a manner agreed with the trade unions promoted good industrial relations and also sought to address the respondent's obligations to manage the health and welfare not only its own employees but also members of the public.

258.In addition the tribunal found that it was justifiable to dismiss the claimant for the legitimate aim of ensuring operational efficiency in a public funded organisation which was subject to tight budgetary constraints.

259.The tribunal noted that the claimant did not challenge the evidence of Assistant Commissioner Jennings in respect of the respondents' legitimate aims.

The tribunal is satisfied that in the particular circumstances of this case no less action could be taken by the respondent to achieve its legitimate aims.

Not paying DTS.

260.This point can be dealt with quite simply. Whilst the non-payment of DTS could in the tribunal's judgement amount to a detriment the reason for the non-payment did not arise out of the something but by the application of the respondent's policy in respect of eligibility for DTS. The respondent determined they were entitled to reject the claim both because the claimant was not wearing a seatbelt and because there were not satisfied that the injury relied upon was caused by the accident. The tribunal is satisfied that the respondents applied that policy. Whether they were right in their interpretation of the policy is irrelevant.

Working closer to home

261.The claimant was not subjected to unfavourable treatment by being required to work out of Stratford.

262.The claimant had only been certified as fit for light duties and the respondent was required to abide by that medical recommendation.

263.The nature and availability ability of light duties was such that they were carried out from one of the light duty hubs. As the tribunal has already found long-term light duties were not available for firefighters at their station and there were no light duties in the relevant period available at Hainault which satisfied the respondents definition of light duties. It is not therefore unfavourable treatment to refuse to transfer the claimant to Hainault when there are no light duties

265.In any event the reason the claimant was not offered work at Hainault was not because of the something but because there was no work available.

266.If the tribunal was wrong on that point it found that the application of the light duties policy had a legitimate aim and was justified and was proportionate. The purpose of the policy was to ensure that fire stations were properly staffed in order to provide an efficient and effective service and secondly to ensure their consistent treatment of employees who'd been allocated to light duties.

Conclusion.

267.In the circumstances, and not without some sympathy for the claimant, the Tribunal determined that the claimant's claims must be dismissed.

Employment Judge T.R.Smith

Date: 10 August 2022

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