EMPLOYMENT TRIBUNALS

Claimant: Miss Hetti Price

Respondent: West Midlands Fire & Rescue Authority

Heard at: Birmingham
On: 13 February – 10 March 2023

Before: Employment Judge Meichen, Mr M Khan, Mr R Virdee

Appearances
For the claimant: Ms Snocken, counsel
For the respondent: Mr Gidney, counsel

JUDGMENT was sent to the parties dated 13 March 2023. As requested by the parties oral reasons were given at the end of hearing. Submissions were concluded on 7 March. A full reasoned decision was given on Friday 10 March which took nearly the whole day to deliver and was recorded by a number of professional representatives on both sides. On 22 March the respondent made an application for reconsideration and a request for written reasons. The status of that request/application was unclear because it was not made by the solicitor who had conducted the case for the respondent or the Legal Services Department of Birmingham City Council who were representing the respondent. It was made by an internal member of staff at the respondent; a Monitoring Officer. The tribunal said that the reconsideration application appeared to identify no appropriate basis to reconsider and the matters raised could be discussed further at the preliminary hearing scheduled for 24 April 2023, when it was assumed that the respondent would be legally represented. At the preliminary hearing new counsel instructed on behalf of the respondent clarified that the reconsideration request was likely to be withdrawn (and it subsequently was) but the written reasons were requested. As the parties had previously been informed the Tribunal then needed to take extra time to prepare the written reasons. In view of the length of the oral judgment and the speed at which it had been prepared a number of points of detail needed to be checked and agreed using the extensive paperwork generated in this case. As a result of this slightly unusual series of events and some personal matters these written reasons are being provided slightly later than I, the Employment Judge, would have liked. The following reasons are now provided and are based on the reasons given orally on 10 March 2023.

REASONS

Issues

1. There was an agreed list of issues. Like a number of the documents produced for this case the original list of issues was rather lengthy and unfocused. It ran to 16 pages. We encouraged the parties to collaborate on producing a more refined list and made some suggestions to try and achieve that. This resulted in a revised list running to 11 pages. The agreed issues for us to determine are now as follows:

Time Limits

1. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
        1.1.1. For the 1st Claim was the date 11 March 2020?
        1.1.2. For the 2nd Claim, what is the relevant date? Is it 29 March 2021?
        1.1.3. For the 3rd Claim, what is the relevant date? Is it 25 June 2021?

    1.2. If not, was there conduct extending over a period?

    1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

    1.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
        1.4.1. Why were the complaints not made to the Tribunal in time?
        1.4.2. In any event, is it just and equitable in all the circumstances to extend time?

Unfair Dismissal

2. What was the reason or principal reason for dismissal? The respondent says the reason was capability.

3. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

    3.1. The Tribunal will usually decide, in particular, whether:
        3.1.1. The respondent genuinely believed the claimant was no longer capable of performing their duties;
        3.1.2. The respondent adequately consulted the claimant;
        3.1.3. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
        3.1.4. Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
        3.1.5. Dismissal was within the range of reasonable responses.

Disability

A. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 ("EqA") at the time of the events the claim is about? The following are potentially disputed:

    a. Post-traumatic stress disorder (PTSD) (*The material time period for claims relating to this condition is February 2021 to 29 June 2021*). Denied by the Respondent: The Tribunal will determine whether the Claimant suffered PTSD prior to March 2021 and, for the entirety of the material time, whether that condition satisfied the requirements of section 6 EqA.
    b. Workplace stress (*The material time period for claims relating to this condition is 17 February 2021 to 29 June 2021*). Denied by the Respondent: The Tribunal will determine whether the Claimant suffered workplace stress at the material time and whether that condition satisfied the requirements of section 6 EqA.

B. For those which are disputed, the Tribunal will decide:
    a. Did she have a physical or mental impairment?
    b. Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
    c. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
    d. Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
    e. Were the effects of the impairment long-term? The Tribunal will decide:
        i. Did they last at least 12 months, or were they likely to last at least 12 months?
        ii. If not, were they likely to recur?

Direct disability discrimination (Equality Act 2010 section 13)

4. Did the Respondent do the following things?

    4.1. Between 3 July 2019 and 16 July 2019, the Claimant's manager, Steve Whitworth, refused to allow the Claimant to snack whenever she wanted to.
    4.2. Between 17 July 2019 and 30 August 2019, the Respondent refused to allow the Claimant to snack whenever she wanted to unless she asked permission from the duty Watch Manager.
    4.3. The Respondent required the Claimant to complete strenuous and intense exercises as opposed to mild to moderate physical work whilst on her Return-to-Work Programme, for example the RTC exercise on 15 July 2019, the Oldbury High Rise exercise on 30 August 2019 and the Hot House exercise on 30 August 2019 and indicating on 30 August 2019 that on the following week the Claimant would be required to complete a training exercise involving walking up and down a 15-storey high rise carrying full equipment and breathing apparatus.

5. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.
   If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

   The claimant says she was treated worse than a hypothetical comparator

6. If so, was it because of Anorexia Nervosa

7. Did the incidents as set out in 4.1 to 4.3 amount to a detriment?

8. In deciding whether there has been direct discrimination, the Tribunal will consider, under s136 EqA 2010, if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent contravened s13, and, if so, will hold that the contravention occurred, unless the Respondent is able to show that it did not contravene the provision.

Discrimination arising from disability (Equality Act 2010 section 15)

9. The respondent accepts that it did:

   9.1. Put the Claimant onto a Development Plan whilst in the Fire Control role on 19th April 2020.

   9.2. On 4 December 2020 the Respondent notified the Claimant that she would be being placed on Capability and informed her she would be taken straight to a final resolution hearing;

   9.3. On several occasions between 4 February 2021 and 11 February 2021, the Claimant's line manager Watch Manager Laraine Duggan refused to give her line manager approval to apply for roles as an internal applicant, in particular a CCdr OLPD [Occupational Learning and People Development] role;

   9.4. From 17 February 2021 to 29 June 2021 (when she was dismissed) the Respondent did not give the Claimant a CCdr Development Plan;

   9.5. The Respondent dismissed the Claimant;

   9.6. The Claimant was paid in lieu of notice rather than being allowed to work out her notice;

10. Did the Respondent do the following things (all disputed by the Respondent):

   10.1. Putting the Claimant through a Capability Procedure as a condition of her moving to the fire control role and requiring her to stay on it once she had started work as a trainee in the fire control team? If so, on what date? (The Claimant asserts the original condition was in place in September-October 2019 and she was then kept on the capability procedure from October 2019 and continuing past August 2020)

11. Did the matters in paragraphs 9.1-9.6 amount to unfavourable treatment? If 10.1 occurred as the Claimant asserts, did it amount to unfavourable treatment?

12. Did the following things arise in consequence of the claimant's disability (which disability is indicated in brackets):

    12.1. For act 9.1: Social communication difficulties *(Autism)*

    12.2. For act 10.1: Not being able to complete the Return-to-Work Programme, as implemented by the Respondent (which in turn led to the Capability Procedure being applied) *(Anorexia Nervosa)*

    12.3. For acts 9.2: the Claimant having been deemed medically unfit to perform her contracted role of Fire Control *(Dyslexia)*

    12.4. For act 9.3: she could not fulfil the 22 days 'resilience' element of the essential criteria *(Dyslexia)*

    12.5. For acts 9.3 & 9.4: the Claimant had not demonstrated the competencies of the Fire Operator role *(Dyslexia)*

    12.6. For act 9.5: The Claimant's inability to carry out her role in Fire Control because of her dyslexia and/or because of the length of her absence/supernumerary due to dyslexia, anorexia, workplace stress, PTSD and/or anxiety and depression and/or it being thought to be in the interests of the Claimant's health for her to be dismissed arose out of potentially all of her disabilities (*Dyslexia, Autism, Anorexia, and/or mental health disability)*;

    12.7. For act 9.6: It being thought by the Respondent to be in the interests of the Claimant's health for her to be paid in lieu of notice rather than being allowed to work out her notice arose out of potentially all of her disabilities (*Dyslexia, Autism, Anorexia, and/or mental health disability)*;

13. Was the unfavourable treatment because of any of those things?

14. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

    14.1. For acts 9.1 &10.1: Improving the performance of its staff.

    14.2. For acts 9.2:

        14.2.1. Ensuring 999 calls could be answered efficiently, accurately and safely as to avoid or reduce the risk of life or injury to members of the public.

        14.2.2. Ensuring that employees are encouraged back into work that they can safely perform.

    14.3. For acts 9.3 & 9.4:

14.3.1. Ensuring candidates for posts meet the essential criteria for roles; (disputed by C as being a legitimate aim if means *all*)

14.3.2. Appointing candidates to roles that meet the essential criteria. (disputed by C as being a legitimate aim if means *all*)

14.4. For act 9.5: Managing the absence of long term absent employees.

14.5. For act 9.6: Having a concern for the Claimant's health.

15. The Tribunal will decide in particular:

15.1. Do the stated aims amount to "legitimate" aims;

15.2. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

15.3. Could something less discriminatory have been done instead;

15.4. How should the needs of the claimant and the respondent be balanced?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

16. The respondent had the following PCPs:

16.1. Requiring firefighters on a Return-to-Work Programme to work 5 consecutive days under a 9-day fortnight shift pattern;

16.2. Putting workers perceived to have social communication difficulties onto a Development Plan;

16.3. Requiring all fire control operatives to answer 999 calls;

16.4. Sending out emails of redeployment vacancies without further assistance in identifying what roles were available that may be suitable for a particular employee;

16.5. Regarding employees as having been offered sufficient opportunity for redeployment (or redeployment being adequately explored) by virtue of emails containing redeployment vacancies being sent regardless of whether the employee was well enough to look at and/or adequately act on them

16.6. Applying its Attendance Management Procedure, and/or the application thereof, and/or the Final Resolution Meeting process potentially leading to dismissal;

17. Also had:

17.1. Dismissing employees with immediate effect with payment in lieu of notice rather than allowing employees the option of remaining employed during their notice period.

18. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability? The disadvantage alleged by the Claimant are (with the relevant disability in brackets):

    18.1. For PCP 16.1: Feeling exhausted and drained after having worked 5 days in a week *(Autism and/or Anorexia Nervosa)*

    18.2. For PCP 16.2: As a symptom of autism, having social communication difficulties and therefore being more likely to be placed on a Development Plan *(Autism)*

    18.3. For PCP 16.3: As a symptom of dyslexia having difficulties with working memory, and a good working memory is required in order to be able to successfully take 999 calls, thereby making it more difficult to fulfil the fire control operative role that involved answering 999 calls *(Dyslexia)*

    18.4. For PCP 16.4: Due to her autism spectrum disorder and/or mental health disabilities, she found it more difficult to identify such roles from the emailed vacancies, or furthermore or in the alternative, the Claimant was more likely to be on the redeployment list in the first place than someone who was not disabled *(Autism and/or mental health disability)*;

    18.5. For PCP 16.5: she was too unwell to look at and/or adequately act upon the redeployment list emails from 11 March 2021 onwards due to her atypical anorexia, anxiety, PTSD, workplace stress and depression, but was regarded when she was dismissed as having had sufficient opportunity to apply for redeployment which was not the case *(Anorexia and/or mental health disability)*;

    18.6. For PCP 16.6: she was unable to participate in such procedures and/or processes from 11 March 2021 onwards by reason of her being too unwell to do so and/or having received advice not to think about work matters whilst she recovered, *(Anorexia and/or mental health disability)*;
    30.7 For PCP 17.1: she was more adversely affected by the sudden change of status of employment without the period of actual notice than a person without autistic spectrum disorder would be *(Autism)*

19. Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

20. What steps could have been taken to avoid the disadvantage? The claimant suggests:

    20.1. For PCP 16.1: To allow the Claimant to work a ‘4 on, 4 off’ shift pattern with extended day shifts and no night shifts. Or in the alternative, using her leave to take 1 day off per fortnight.

20.2. For PCP 16.2: Allowing the Claimant to improve her communication by different means, namely CBT or Access to Work social communication training.

20.3. For PCP 16.3:

20.3.1 Allowing the Claimant to use the Scratchpad Strategy properly, in the way it was intended;
20.3.2 Placing the Claimant on the redeployment list between 12 November 2020 and 16 February 2021;
20.3.3 As of 21 September 2020 onwards, (when she was declared medically unfit to carry out the Fire Control role) finding the Claimant a suitable alternative role;
20.3.4 Adjusting the application criteria when the Claimant was on the redeployment list (between 17 February 2021 and 29 June 2021 (when she was dismissed)) for example,

20.3.4.1 by expecting her to match only 45-70% of the essential criteria, not expecting her to do formal presentations,
20.3.4.2 not having professional discussions scored, not expecting her to answer formal interview questions;
20.3.4.3 not having 2 managers and a member of PSS present for an 'informal chat';
20.3.4.4 or not being expected to have all the skills and experience necessary to begin with, but to offer training and support;

20.3.5 From 22 January 2021 to 29 June 2021 (when she was dismissed) giving the Claimant a CCdr Development Plan;
20.3.6 From 4 February 2021 to 29 June 2021 (when she was dismissed) giving the Claimant line manager approval to apply for roles internally.

20.4 For PCP 16.4:

20.4.1 Obtaining information as to the Claimant's experiences, skills and preferences for alternative work and pro-actively seeking to identify suitable vacancies with the aim of discussing either with the Claimant and/or her advocate;
20.4.2 Taking this into account when deciding whether to dismiss or whether to grant further opportunity for a suitable alternative role to be found for the Claimant;
20.4.3 Considering roles that were available but not on the redeployment vacancy list;
20.4.4 Involving the Claimant's advocate and trade union in identifying suitable vacancies and communicating them to the Claimant.

20.5 For PCP 16.5:

20.5.1 Disregarding the period of time when the Claimant was too unwell to look at and/or adequately act upon the emails of lists when it came to considering the Claimant's dismissal;
20.5.2 Extending the time that the Claimant was on the redeployment list before dismissing her (providing either she was well enough and/or it was combined with greater assistance);

20.5.3 Seeking the Claimant's agreement to send the emails to her advocate and/or her FBU representative so that her advocate/FBU representative could be involved in identifying any suitable vacancies and communicating them to the Claimant;

20.5.4 Obtaining information as to the Claimant's experiences, skills and preferences for alternative work and pro-actively seeking to identify suitable vacancies with the aim of discussing either with the Claimant when she became well enough (or at least considering whether it was possible to wait for that to happen) or with the Claimant's advocate;

20.6 For PCP 16.6:

20.6.1 Delaying the Final Resolution Meeting until the Claimant was well enough to participate;

20.6.2 Obtaining medical evidence to help inform how long that process was likely to take;

20.6.3 Providing a clear period of time where the process was explicitly paused to allow the Claimant time without thinking about work matters to assist with her recovery;

20.7 For PCP 17.1: providing the Claimant with the option of remaining employed through her period of notice.

21 Was it reasonable for the respondent to have to take those steps [and when]?

22 Did the respondent fail to take those steps?

Harassment related to disability (Equality Act 2010 Section 26)

23 The respondent accepts that it did the following things:

23.3 Placed the Claimant on a Development Plan on 19th April 2020;

23.4 Told the Claimant in a letter dated 15 January 2020 that she had to pass the Safe to Operate test within a maximum of 20 shifts;

23.5 From 4 December 2020 subjecting the Claimant to the Capability Procedure;

23.6 On 12 November 2020, by letter from Area Commander Simon Barry, informed the Claimant that if she did not go back to the Fire Fighter role the only other option available to her was to leave the organisation;

23.7 On 4 December 2020 notified the Claimant that she was being put on the capability procedure and that she would be taken straight to a Final Resolution Hearing;

23.8 On 17 December 2020, by letter from Area Commander Simon Barry, informed the Claimant that no other reasonable adjustments would be provided beyond offering her 'suitable alternative employment' as a Fire Fighter

24 Did the Respondent do the following things (all disputed by the Respondent):

24.1 Emma Garner publicly calling the claimant out for having been put on a development plan in front of a full room of colleagues? If so what date? The Claimant says it was on 22 April 2020

24.2 Requiring the Claimant to go through a capability procedure as a condition of moving her to Fire Control? If so, on what date? (The Claimant says this took place in September-October 2019)

24.3 Requiring the Claimant to remain in a capability procedure once she had started work as a trainee in fire control? If so, on what date? (The Claimant says this took place from October 2019 and was ongoing when the first claim was presented in August 2020);

24.4 On or around 22 January 2020 putting the claimant on a monitoring of work system that was more excessive than other newly graduated fire control officers

25 For such conduct that is admitted or established by the Tribunal, was that unwanted conduct?

26 Did it relate to the disability of:
26.1 For Acts 23.1 & 24.1: Autism
26.2 For Acts 23.2, 24.2, 24.3 & 24.4: Anorexia Nervosa
26.3 For Acts 23.3, 23.4, 23.5 and 23.6: Dyslexia?

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

28 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation (Equality Act 2010 section 27)

29 The claimant did the following protected acts:

29.1 She presented her first employment tribunal claim on 19 August 2020 in which she complained of multiple breaches of the EqA by the Respondent.
29.2 She made allegations in her grievances on 6 May 2020 (revised on 18 November 2020), 14 April 2021 and/or 22 April 2021.
29.3 (Through her advocate) By email on 15 February 2021, raising disability discrimination concerns about Station Commander Kelly Whitmore in relation to refusing a reasonable adjustment of a CCdr Development Plan.

30 Did the respondent believe that the ·claimant had done or might do a protected act, in that:

30.1 The Respondent believed (and in particular, though not limited to, ACdr Barry's belief) that the Claimant may continue with her first employment tribunal claim and/or present further claims?
30.2 The Respondent believed (and in particular, though not limited to, ACdr Barry's belief) that she may make further formal grievances alleging breaches of the Equality Act 2010?

31 Did the Respondent (all disputed):

31.1 Threaten to utilise 5 different reasons to dismiss the Claimant between 12 November 2020 and 25 February 2021;
31.2 On 17 December 2020 the Respondent linked a threat to dismiss by SOSR with the Claimant's submission of multiple disability discrimination grievances;
31.3 Between 2 November 2020 and 29 June 2021 (when she was dismissed) didn't follow policies and procedures (Capability, Attendance Management, Re-organisation, Redeployment and Redundancy);
31.4 Didn't discuss or address the health and safety and discrimination concerns the Claimant raised about returning to Firefighting in her letter of the 27 November 2020;
31.5 From 17 December 2020 to 15 February 2021 claimed firefighting was 'suitable alternative employment', despite the Claimant raising serious health and safety concerns, and despite the job role being completely different to her contracted role;
31.6 From 12 November 2020 unfairly and unreasonably speeding up the dismissal process;
31.7 On 25 February 2021, just a week after starting to be managed under the Attendance Management Policy and being put on the Redeployment list (17 February 2021), ACdr Barry changed the forthcoming meeting titled 'next steps' meeting to a final resolution meeting (to be convened on either the 12 March 2021 or the 19 March 2021). This followed the claimant raising disability discrimination concerns concerning SCdr Kelly Whitmore. The earliest final resolution hearing date meaning that the claimant would only have been on the redeployment list for 3 weeks, and the second for 4 weeks.

32 The respondent did do the following things:

32.1 Refused to allow the Claimant access to the Redeployment list between 12 November 2020 and 16 February 2021;
32.2 On the 12 March 2021 arranging for a final resolution hearing to take place (on either 21 or 22 April 2021) before the end of an allowed time period on the redeployment list (up to 21 May 2021).

33 By doing so, did it subject the claimant to detriment?

34 If so, was it because the claimant did a protected act?

35 Was it because the respondent believed the claimant had done, or might do, a protected act?

Questions to be determined relevant to remedy for unfair dismissal, discrimination or victimisation to be decided at liability hearing:

36 Is there a chance that the claimant's employment would have ended in any event? Should any of their compensation be reduced as a result?

37 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

38 Did the respondent unreasonably fail to comply with it? The Claimant asserts that the Respondent breached the following provisions of the code: §4, §33, §40, §42.

Law

Time limits

2. Section 123 EqA states:

> *123 Time limits*
> *(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*
> *. . .*
> *(3) For the purposes of this section—*
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

3. If any allegation made under the EqA is out of time and not part of conduct extending over a period bringing it in time, then we only have jurisdiction to hear it if it was brought within such other period as we think just and equitable. We remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor. We should consider the balance of prejudice. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. The tribunal has a wide discretion but there is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings - see

Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050 CA.

4. Relevant factors which may be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

5. Having referred to Keeble however the important point to bear in mind is that the Tribunal has a very broad general discretion and therefore we should assess all the factors which are relevant to whether it is just and equitable to extend time without necessarily rigidly adhering to a checklist. The factors which are almost always likely to be relevant are the length of and reasons for the delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). This was explained by Lord Justice Underhill in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

6. In Miller v Ministry of Justice UKEAT/0003/15 (15 March 2016, unreported), Laing J observed that there are two types of prejudice which a respondent may suffer if the limitation period is extended: firstly, the obvious prejudice of having to defend the claim which would otherwise have been defeated by a limitation period; and secondly the "forensic prejudice" caused by fading memories, loss of documents, and losing touch with witnesses. Forensic prejudice is "crucially relevant" in the exercise of discretion and may well be decisive. However, the converse does not follow: if there is no forensic prejudice to the respondent that is not decisive in favour of an extension.

7. The EAT has recently explained the extent to which the potential merits of a proposed complaint can be taken into account when considering whether it is just and equitable to extend time, in Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132. The EAT held that the potential merits are not necessarily an irrelevant consideration even if the proposed complaint is not plainly so weak that it would fall to be struck out. However, the EAT advocated a careful approach. It said:

> *"It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it [the tribunal] does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should*

also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.

So, the tribunal needs to consider the matter with care, identify if there are readily apparent features that point to potential weakness or obstacles, and consider whether it can safely regard them as having some bearing on the merits. If the tribunal is not in a position to do that, then it should not count an assessment of the merits as weighing against the claimant. But if it is, and even though it may not be a position to say there is no reasonable prospect of success, it may put its assessment of the merits in the scales. In such a case the appellate court will not interfere unless the tribunal's approach to assessing the merits, or to the weight attached to them, is, in the legal sense, perverse."

The burden of proof

8. Section 136 EqA sets out the burden of proof provisions which apply to any of the claims under the EqA which we have jurisdiction to hear. Section 136(2) states: "*if there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred".* Section 136(3) then states: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

9. These provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination.

10. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and it was reaffirmed in Efobi v Royal Mail Group Limited [2019] IRLR 352

11. It is well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. This principle is most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

12. The Supreme Court has emphasised that it is for the Claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: "The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be *proved*, and it is for the claimant to discharge that burden". The claimant must prove facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred (see South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23).

13. Before the burden can shift there must be something to suggest that the treatment was discriminatory (see B and C v A [2010] IRLR 400). Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular Bahl v The Law Society and others [2004] IRLR 799). Therefore, inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status and/or incompetence is not sufficient to infer unlawful discrimination (Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen, Madarassy).

14. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16 it was held that an employment tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances and internal appeal against the rejection of those grievances. The EAT memorably observed: *'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'*

15. The statutory burden of proof provisions only have a role to play where there is doubt as to the facts necessary to establish discrimination. Where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against they have no relevance. This was confirmed by Lord Hope in Hewage and is consistent with the views expressed in Laing v Manchester City Council and anor 2006 ICR 1519, EAT.

Direct discrimination

16. Section 13 EqA provides that: *"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".* Section 23 EqA provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

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

18. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 Lord Nicholls said *'… employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*

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

19. As was confirmed in Martin v Devonshire's Solicitors [2011] ICR 352 since Shamoon, the recommended approach from the higher courts has generally been to address both stages of the statutory test by considering the single 'reason why' question: was the treatment on the proscribed ground, or was it for some other reason? Considering the hypothetical or actual treatment of comparators may be of evidential value in that exercise.

Harassment

20. Section 26 EqA states as follows:

> (1) *A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B*
> *. . .*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*

21. In GMB v Henderson [2017] IRLR 340, the Court of Appeal suggested that deciding whether the unwanted conduct "relates to" the protected characteristic will require a "consideration of the mental processes of the putative harasser".

22. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely because she thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the tribunal is obliged to take the complainant's perception into account in making that assessment.

23. A number of important authorities have given guidance as to how to interpret the test under Section 26:

    a. *"… not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very*

important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase." Richmond Pharmacology v Dhaliwal [2009] IRLR 336.

b. *"The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."* Betsi Cadwaladr University Health Board v Hughes [2014] UKEAT/0179/13.

c. *"When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable ... Tribunals must not cheapen the significance of these words ["violating dignity", "intimidating, hostile, degrading, humiliating, offensive"]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."* Grant v HM Land Registry [2011] IRLR 748 *CA.*

Reasonable adjustments

24. The duty to make reasonable adjustments is in section 20 Equality Act 2010. The relevant duty in this case is at subsection (3):

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

25. The claimant's case is that the respondents discriminated against her by failing to comply with that requirement.

26. It should be noted that the duty requires positive action by employers to avoid substantial disadvantage caused to disabled people. To that extent it can require an employer to treat a disabled person more favourably than others are treated (Archibald v Fife Council [2004] ICR 954). It should also be noted that "the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce" (O'Hanlon v HM Revenue and Customs UKEAT/0109/06).

27. The correct approach to reasonable adjustments complaints was set out by the EAT in Environment Agency v Rowan [2008] ICR 218:

a. What is the provision, criterion or practice ("PCP") relied upon?

b. How does that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

28. In reasonable adjustment claims, the burden of proof is on the claimant to establish the existence of the provision, criterion or practice and to show that it placed them at a substantial disadvantage. In this case the respondent accepts that it had the PCPs alleged by the claimant but the substantial disadvantages are disputed. The claimant has identified potential reasonable adjustments, which the respondent says are not reasonable. If the duty to make reasonable adjustments has been engaged (and as the claimant has identified one or more potential reasonable adjustments) the burden of proof is reversed so that the respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved.

29. As to substantial disadvantage section 212 Equality Act 2010 defines "substantial" as meaning "more than minor or trivial". It must also be a disadvantage which is linked to the disability. That is the purpose of the comparison required by section 20. Simler P said in Sheikholeslami v University of Edinburgh UKEATS/0014/17/JW that:

"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question. For this reason, also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.

…. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

30. The Tribunal is required to have regard to the Equality and Human Rights Commission's statutory Code of Practice on Employment when considering

disability discrimination claims. Paragraph 6.28 of the Code sets out the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- The practicability of the step;
- The financial and other costs of making the adjustment and the extent of any disruption caused;
- The extent of the employer's financial or other resources;
- The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- The size and type of employer.

31. An important consideration is the extent to which the step will prevent the disadvantage. We must consider whether a particular adjustment would or could have removed the disadvantage: Romec Ltd v Rudham [2007] All ER(D) (206) (Jul), EAT.

32. In Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 the Court of Appeal said: *"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."*

33. Accordingly, it is unlikely to be reasonable for an employer to have to make an adjustment that involves little or no benefit to the disabled person in terms of ameliorating the disadvantage to which he or she has been subjected by the PCP, physical feature or lack of auxiliary aid. We have to consider whether on the evidence there would have been a chance of the disadvantage being alleviated. Our focus should be on whether the adjustment would, or might, be effective in removing or reducing the disadvantage that the claimant is experiencing as a result of his or her disability and not whether it would, or might, advantage the claimant generally.

Victimisation

34. Section 27 EqA states as follows:

> (1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*
> *(2) Each of the following is a protected act—*
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*

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

35. In this case it is accepted that the claimant did protected acts.

36. In MOD v Jeremiah [1979] IRLR 436, [1980] ICR 13 the Court of Appeal found that a detriment exists *"if a reasonable worker would take the view that the treatment was to his detriment".* A detriment must be capable of being objectively regarded as such; an unjustified sense of grievance cannot amount to 'detriment' (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11). It is not necessary to demonstrate some physical or economic consequence for something to amount to a detriment, as Lord Nicholls said in Shamoon: *"while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so".* In Deer v University of Oxford[2015] EWCA Civ 52 it was held that the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

37. In terms of causation the protected act must be more than simply causative of the treatment (in the "but for" sense). It must be a real reason: *"the real reason, the core reason, for the treatment must be identified"* (Woods v Pasab Ltd (t/a Jones Pharmacy) [2012] EWCA Civ 1578). Where there is more than one motive in play, all that is needed is that the discriminatory reason should be of sufficient weight (O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615).

Unfair dismissal

38. Regarding the claimant's claim for unfair dismissal the relevant parts of the ERA state:

94 The right
(1) An employee has the right not to be unfairly dismissed by his employer.
. . .
98 General
(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) The capability of the employee for performing work of the kind which he was employed to do
. . .

> *(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.*

39. It is for the respondent to show that the reason for dismissal was potentially fair. The potentially fair reasons for dismissal include capability which is the reason relied on in this case.

40. As with dismissals for other potentially fair reasons in a capability dismissal (which in this case is argued to be on account of ill-health absence) the tribunal must determine whether dismissal for such reason falls within the range of reasonable responses open to an employer. In these types of cases, the essential framework for the Tribunal to consider was set out by the EAT in Monmouthshire County Council v Harris EAT 0332/14. Her Honour Judge Eady observed: '*Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice'*.

41. The need to consult and the need for an employer to establish the genuine medical position is crucial. This has been emphasised since the important case of East Lindsey District Council v Daubney 1977 ICR 566. In that case Mr Justice Phillips stated: *'in one way or another steps should be taken by the employer to discover the true medical position'* prior to any dismissal. In most cases this will involve consultation with medics.

42. Ultimately, we must consider whether dismissal fell within the range of reasonable responses open to a reasonable employer. We remind ourselves that it is not for us to substitute our own view for that of the respondent.

43. The range of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.

44. As part of our decision making the tribunal will consider whether there were any procedural flaws which cause unfairness.

45. Guidance on that part of the exercise was given by the Court of Appeal in the case of OCS v Taylor [2006] ICR 1602, which clarified that the proper approach is for the tribunal consider the fairness of the whole of the process. The court stated that our purpose is to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the

open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage.

46. The Court went on further to say that the tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.

Discrimination arising from disability

47. Regarding the claim of discrimination arising from disability section 15 EqA states as follows:

> *(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.*

48. The unfavourable treatment must be shown by the claimant to be "because of something arising in consequence of [her] disability". The tribunal must therefore ask what the reason for the alleged treatment was. If this is not obvious then the tribunal must enquire about mental processes - conscious or subconscious - of the alleged discriminator see R (on the application of El v Governing Body of JFS and The Admissions Appeal Panel of JFS and Ors [2010] IRLR, 136, SC).

49. In Pnaiser v NHS England [2016] IRLR 170 the EAT set out the following guidance:

    a. A tribunal must first identify whether there was unfavourable treatment and by whom.

    b. The tribunal must determine the reason for or cause of the impugned treatment. This will require an examination of the conscious or unconscious thought processes of the putative discriminator. 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 amount to an effective reason for or because of it. Motive is irrelevant.

    c. The focus of this part of the enquiry is on the reason for or cause of the impugned treatment.

    d. The tribunal must determine whether the reason or cause is something arising in consequence of the claimant's disability. The causal link between the something that causes the unfavourable treatment, and the disability may include more than one link. The more links in the chain the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of

the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

50. The 'because of' enquiry therefore involves two stages: firstly, A's explanation for the treatment (and conscious or unconscious reasons for it) and secondly, whether (as a matter of fact rather than belief) the "something" was a consequence of the disability. It does not matter precisely in which order these questions are addressed.

51. The employer will escape liability if it is able to objectively justify the unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and must represent a real, and objective consideration. As to proportionality, the EHRC Code on Employment notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (4.31).

Findings of fact

52. The claimant was appointed by the respondent as a trainee firefighter in January 2018 when she was in her early 30s. This was a striking variation in the claimant's career path. Prior to joining the fire service the claimant had been working as a professional musician. She was a classical cellist and was also working towards a PhD. We understand the claimant has a degree from the Birmingham conservatoire and is an accomplished chamber musician. The claimant's move into firefighting was therefore a significant change.

53. We have no doubt that the claimant made that change because it was her dream to become a firefighter. We also have no doubt that she was extremely dedicated and worked hard towards realising that dream. However, there can equally be no doubt that working for the fire service was a sea change compared to what the claimant had been doing previously and she found it very challenging. The claimant's health made it very difficult indeed for her to achieve her dream.

54. We found that the claimant was supported by a number of individuals within the fire service to try and help her overcome the challenges, to become a firefighter and later to remain employed in the fire service. On any fair view a number of people at the respondent spent a great deal of time trying to assist and support the claimant. We think that the claimant has unfortunately lost sight of that fact. Although we don't think the respondent got absolutely everything right, we did not feel it was accurate for the claimant to portray those who were in fact attempting to assist her in such a negative light. A clear example of this was David Bromley. Mr Bromley was the claimant's Station Commander and line manager at the time she returned to work around May 2019. We think he did his best to support the claimant and there was evidence that the claimant appreciated that at that time. However, the claimant is now extremely critical of Mr Bromley.

55. The challenges for the claimant started early in her firefighting career. The claimant sustained a wrist injury early in her training and by May 2018 she was

already beginning to experience substantial anxiety and workplace stress. Nevertheless, the claimant graduated the initial stage of firefighting training in July 2018. She then moved into the second stage of her firefighter training.

56. In October 2018 the claimant had some sickness absence related to anxiety and was assessed by occupational health. She also attended hospital for her eating disorder and commenced CBT.

57. On 6 November 2018 the claimant was hospitalised due to her anorexia, and she remained off work until 5 June 2019.

58. In March 2019 the claimant was diagnosed with autism.

59. The claimant was assessed by occupational health during her absence. An occupational health conference took place on 14 May 2019 and was attended by the claimant and her union representative. A return-to-work programme was agreed between the claimant and David Bromley. This programme involved a carefully graduated phased return and a build-up in the claimant's activities in order to build her strength and get her back on course to become a firefighter.

60. On 30 August 2019 the claimant took part in two training exercises known as the high-rise exercise and the hothouse exercise. The claimant was unable to complete these activities. Following that the claimant informed Mr Bromley that she would like to transfer to a fire control officer role.

61. At this juncture we should note that the respondent's employees are divided into two categories - operational and non-operational staff. Operational staff were firefighters and fire control. Fire control was essentially answering 999 calls. Non-operational staff covered a wide variety of other roles such as administrative roles.

62. The claimant's ambition upon entering the fire service was to work in emergency response and so she was focused on an operational role. The move to fire control meant that the claimant could fulfil her ambition to work in emergency response without the physical requirements associated with firefighting, which the claimant had found particularly challenging especially following her hospitalisation and lengthy absence as a result of anorexia.

63. The claimant applied to join fire control in September 2019. She was further assessed by occupational health at this time and there was a further occupational health case conference. This was again attended both by the claimant and her union representative. The occupational health view at that stage was that although there was no medical reason why the claimant could not do firefighting, she would need at least 12 weeks to achieve the physical well-being necessary to undertake that work and working in fire control may well be a better fit for her. The claimant was placed onto the capability procedure and also put on the redeployment register.

64. We should note at this stage that we have not found the respondent's procedures and the application of them to be easy to understand. At various stages it was

suggested that the claimant's case was being dealt with under the capability procedure, the attendance management procedure or what was known as the 3R's procedure. The applicability and interplay between those three procedures has not always been clear to us and we don't think it was clear to either the respondent or the claimant at the time either. This lack of clarity is we think one of the factors which has contributed to this case ending up being before us.

65. One of the difficulties we have with the respondent's procedures is that the capability procedure is apparently not necessarily used just for cases of capability. At this stage - September 2019 - the claimant was not assessed as being medically incapable to do her firefighting role; she just required a period of time to rebuild her strength following her absence for anorexia. However, the respondent's practice in this type of situation was to apply the capability procedure. This is somewhat counterintuitive, but we accepted that was the respondent's usual way of doing things.

66. In respect of redeployment, it was advantageous for the claimant (or any other employee in a similar position to the claimant) to be on the redeployment register. Being on the register meant that the claimant was sent vacancies directly and she could apply without necessarily having to show that she had all of the essential criteria and without necessarily going through a formal application process but instead having an informal discussion.

67. The claimant started on the redeployment register on 11 September 2019, and she also attended a formal capability meeting on that day. It was agreed that the claimant would progress with her application to fire control as a redeployment opportunity.

68. The claimant was informed on 25 September 2019 that her application to fire control had been successful. She remained on the redeployment list.

69. On 7 October 2019 the claimant was provided with a new contract confirming that her role was now within fire control. It is unclear how this came about but unfortunately and despite the provision of the new contract neither the claimant nor the respondent realised that the claimant's contractual role was from that date in fire control rather than firefighting and this was not realised until over a year later. We think this is a further unfortunate factor which led to the situation becoming overly complicated and contributed to the case coming before us.

70. The claimant started her training in fire control on 25 October 2019 and she continued with her capability meetings. The claimant also had access to work assessments which resulted in her being approved for various pieces of equipment and training including disability awareness training and coping strategies.

71. The claimant completed the initial stage of the fire control training on 23 December 2019. She began the second stage of her training in January 2020. She was initially given a period of time observing others as an adjustment.

72. The claimant attended a formal capability review meeting on 15 January 2020. At that meeting the next stage of the claimant's training in fire control was discussed. The next stage was that the claimant had to work towards what is known as "safe to operate" status. As the name suggests safe to operate meant that the employee could be left to work on their own. The way that was achieved was through a period of the employee working under a mentor. Their call handling was monitored and assessed by the mentor.

73. Normally the respondent expects an employee to progress to safe to operate within eight shifts of mentoring. It was agreed that for the claimant would be expected to progress to safe to operate within 20 mentored shifts. Plainly then it was recognised through the capability process that the claimant would need extra time and support as a result of her difficulties.

74. It is notable that even by this stage the claimant had concerns about whether she would be successful within fire control. In the meeting on 15 January she confirmed her determination to stay within fire control, but she asked what the process would be if she wished to apply for another position within the fire service. We think this was a realistic acknowledgement by the claimant that she was finding the role difficult. To her credit however, and we think characteristically, the claimant was not giving up easily.

75. It was made clear to the claimant that she could apply for any role offered via redeployment. The capability process was extended which was said to be in order to continue support to be given to help the claimant to be successful within fire control and to allow her to apply for positions through redeployment. However, if the claimant successfully achieved safe to operate status that would bring the capability process to an end and the claimant would progress in fire control.

76. Unfortunately, the claimant continued to find the work in fire control challenging. Management within fire control identified errors in the claimant's call handling and these seem to have arisen as a result of the claimant's dyslexia in that she was not able to transfer the necessary data from a call to emergency response. Plainly this was highly concerning as in order to work safely emergency response needed to have the relevant data that came in on the 999 calls. There were also issues identified with the claimant's conduct when she was viewed to be confrontational towards colleagues. These issues were of course also taken seriously because fire control is a safety critical environment, and the focus needs to be very much on responding quickly and effectively to 999 calls.

77. The respondent initially attempted to address the concerns through the mentoring system and informal discussions with the claimant.

78. On 19 April 2020 the claimant was informed that she would be put on a development plan which was designed to address what was viewed as her confrontational behaviour.

79. A particular technique to assist the claimant with her call handing was identified through the claimant's coping strategy training. This was what was known as the scratchpad strategy. It was designed to assist the claimant in coping with the

effects of her dyslexia when answering 999 calls. It involved notes being made by the claimant to identify data which needed to be recorded and passed on to the response teams. The claimant was permitted to use this strategy whilst on shift, but it was not successful and errors continued to be made in the claimant's call handling.

80. Ultimately the station manager, Kelly Whitmore, made a decision on 27 April 2022 to take the claimant off live 999 calls as she could not be deemed safe to operate.

81. On the same date the claimant was invited to a final resolution meeting within the capability process. That meeting was initially arranged for 14 May 2020, but it did not take place.

82. On 1 May 2020 the claimant commenced a period of sickness absence which lasted until 24 June 2020. In this period the claimant was signed off with stress.

83. On 6 May 2020 the claimant submitted a grievance. The claimant raised allegations of disability discrimination. There were seven main areas to the claimant's grievance and six appendices to the claimant's grievance letter. The grievance was lengthy and detailed. The claimant later added more to her grievance. The claimant subsequently raised two more grievances which were also lengthy and detailed. The claimant at various stages indicated or agreed to stop or pause the grievances dependent on the outcome of different processes.

84. There was at one stage an attempt by the claimant to streamline her grievances but nevertheless the claimant's approach to raising grievances was such that Mr Gidney described her in his submissions as having weaponised the grievance process. Whilst we would not quite go that far we do acknowledge that the grievances were to say the least unwieldy and we formed the impression that the respondent was overwhelmed and unsure of how best to proceed with them.

85. The approach which the respondent adopted for the first grievance was to agree to deal with parts of it as a grievance process and siphon off parts to be dealt with as part of the capability process. Although we think this was originally done with the best of intentions the unfortunate reality was that the parts of the grievance which were siphoned off to be dealt with in the capability process were not in the end heard.

86. The claimant attended a grievance hearing on 22 June 2020. That was only in respect of a specific part of her grievance which it had been agreed would be dealt with at that stage. An outcome was provided to the claimant on 10 July 2020.

87. When she returned to work on 25 June 2020 the claimant returned in a supernumerary position in the fire control support team. This involved doing non-operational administrative type activities.

88. In around July 2020 Simon Barry became significantly involved in the claimant's case. Mr Barry was a senior figure within the respondent. He was at the relevant time the Area Commander. Mr Barry was initially appointed to chair the final

resolution hearing which had been due to take place on 14 May 2020. However, Mr Barry was concerned about how matters were progressing. He wanted to take a step back and see if it was really appropriate to progress to the final resolution hearing. He delayed the process rather than rearranging the final hearing for when the claimant was well enough to attend following her return to work. He wrote to the claimant on 17 July asking her to take some time to pause and reflect. He recommended that an independent advocate be appointed for the claimant to represent her, and he provided details of three organisations which could provide an advocate which the respondent would be happy to pay for. Mr Barry also reassured the claimant that he had an open mind as to the outcome of the capability process and that the outcome was in no sense predetermined.

89. In our view the course adopted by Mr Barry was from the outset constructive and pragmatic. The offer of an independent advocate was a clear example of that, and it shows that Mr Barry was attempting to be proactive and consider ways of supporting the claimant. We consider this was a fair representation of Mr Barry's approach overall. It does not fit with the claimant's view of him now as someone who fast tracked her dismissal and blocked her from remaining in the organisation.

90. The claimant selected as her advocate her mother, Mrs Price. Although we are not critical of anybody in relation to this decision, we must say we think it would have been better for everybody if the claimant had been able to select an advocate who was independent. We don't criticise Mrs Price for her involvement, but it was inevitable that she was emotionally invested by virtue of the fact that she is the claimant's mother. We think it would have been better if the claimant had access to an advocate who was more detached and independent from the situation.

91. Mr Barry decided not to proceed with the planned final resolution meeting, and he instead offered to meet the claimant informally to discuss the situation. Again, our view is that this is not consistent with any suggestion that Mr Barry was seeking to rush to dismissal or block the claimant from remaining in the organisation.

92. The claimant has heavily criticised Mr Barry as a result of his involvement in her case. Initially however the claimant appears to have viewed Mr Barry as somebody who was trying to support her and who was being helpful. We have analysed Mr Barry's involvement carefully. We consider that the criticism of him by the claimant is largely unjustified. We do not think Mr Barry got absolutely everything right and there were certainly some correspondence from him which we think could have been better written. However, it is clear he did not need to get involved in the claimant's case to the extent that he did, and he became so involved in order to try and work out a practical solution, including a solution which would mean the claimant remaining in the organisation. He did not need to do that. He could simply have proceeded straight to the final hearing, as had been the intention in May 2020, and had he done that then the claimant's employment may have ended much sooner than it did.

93. We do not consider that the process was rushed through by Mr Barry as alleged by the claimant and nor did we see any evidence of Mr Barry attempting to as the claimant described it block her from remaining in the organisation. We were satisfied that Mr Barry only re-initiated formal processes once it became clear that his attempts to resolve things pragmatically with the claimant and Mrs Price were not going to be successful. On any fair view he spent a great deal of time and effort attempting to resolve the situation with the claimant.

94. In broad summary Mr Barry's discussions with the claimant and Mrs Price were focused around two possibilities. The first option was a managed exit. We are not aware of the detail of these conversations but the fact of them was referred to in documents which were presented to us in the agreed bundle, and which were not suggested by either side to be without prejudice. The second option was a return to firefighting.

95. The claimant has subsequently criticised Mr Barry for his focus on getting her back into firefighting however we consider that this was a reasonable and realistic approach on the basis of the information that was known at the time. At the time and in fact as has now been agreed by the claimant there were no further reasonable adjustments that could be made to enable her to continue in the fire control role. On the other hand, the medical advice at that time was that the claimant was capable of performing the role in firefighting. That was the role the claimant had wanted; it was what she applied to the fire service to do. Furthermore, as Mr Barry fairly identified the claimant reiterated to him her desire to work in an operational role. This was made clear in particular in a personal statement which the claimant wrote to Mr Barry. In light of the claimant's inability to perform the role in fire control the operational role which was available to her was firefighting.

96. We acknowledge the claimant had concerns about a return to firefighting, but the tribunal considers that Mr Barry did his level best to assuage those. He made it clear to the claimant that her disabilities would be taken into account and adjustments would be made and he further made it clear that support would be offered in particular by way of a six-month plan to gradually build the claimant up to a level where she could be reintegrated back into firefighting.

97. The claimant has been critical of Mr Barry for not providing the full detail of this plan but again we consider that criticism to be misplaced. Mr Barry was we emphasise a senior officer within the respondent who was not responsible for the detail of how things would work on a day-to-day basis. He made it clear that that appropriate support would be provided to the claimant, and we think that reassurance was significant given Mr Barry's seniority. The claimant had no proper basis to doubt it.

98. Mr Barry wrote to the claimant on 12 November 2020 summarising the background and explaining two options that he had identified to move forward. The first option was to return to the role of firefighter with a six-month workup programme. Mr Barry made it clear that the detail of the programme would be shared with the claimant and supported by occupational health. It would take into account reasonable adjustments and would include management support,

monitoring of progress and adjustments including a workplace needs assessment. The second option was that the claimant's employment would terminate either through a managed exit or a dismissal for some other substantial reason. Mr Barry made it clear that he did not wish for the claimant's employment to terminate.

99. Mr Barry also said that if the claimant did not wish to return to firefighting, then no role existed which was suitable for her. We consider this part of Mr Barry's letter was poorly communicated. As he made clear in his evidence Mr Barry meant that no other operational role had been identified for the claimant and he was focused only on operational roles because he knew that's what the claimant wanted to do. The tribunal accepted this evidence, but it should have been spelt out within the letter that that was what Mr Barry meant. That error aside however the tribunal was satisfied that Mr Barry's letter of 12 November 2020 was a reasonable and realistic appraisal of the options which were available at that time.

100. It is salient that the occupational health advice which arose from the consultation they carried out with the claimant on 21 September 2020 was that the claimant was not likely to be successful in fire control because of her dyslexia but the firefighter role would be a better option that the claimant could undertake once she had built up her physical fitness. The respondent was plainly willing to support the claimant in building up her fitness to the level where she could become a firefighter (by way of the 6 month plan) and so that was in our view a realistic and reasonable option.

101. On 17 November 2020 Mr Barry took the claimant off the redeployment list. The reason why Mr Barry did that was because he was aware that the options for the claimant were as identified in his letter of 12 November. He was operating - as was the claimant at this time - under the mistaken belief that the claimant's contracted role was as a firefighter. As the claimant was medically assessed to be capable of performing that role and he was working towards getting the claimant back into it there was in Mr Barry's mind no reason for her to remain on the redeployment list. Although the tribunal understands the claimant's point of view that it would have been better if she remained on the redeployment list, we also acknowledge the clear logic behind Mr Barry's position.

102. Furthermore, it has to be recognised that the claimant had by this stage already been on the redeployment list for well over a year and she had applied for very few positions. The claimant's position at the hearing before us was in summary that she had not been able to fully take advantage of being on the redeployment list because she was in the position in fire control. We disagree. We acknowledge that the claimant would not realistically have been looking for other jobs at the point in time when she moved to fire control but the reality was that it had become obvious early in 2020 that the claimant was finding the role in fire control extremely challenging and this ultimately led to the claimant being removed from that role in April 2020. Therefore, in our view the claimant should have been taking full advantage of being on the redeployment list from early 2020 onwards.

103. The claimant responded to Mr Barry's letter of 12 November 2020 on 27 November. This was another lengthy letter complaining about the respondent's approach. In summary the claimant said that neither option she was presented with was reasonable and she made it clear she did not want to return to firefighting.

104. Mr Barry then wrote to the claimant on 4 December 2020. As a result of matters identified within the claimant's letter of 27 November Mr Barry now realised that the claimant was employed under a fire control contract. Because the claimant was assessed as not medically capable to do that role Mr Barry indicated that he would manage the next steps under the capability process and would be looking to convene a final resolution hearing at the earliest opportunity. Mr Barry also indicated that he would be considering whether the employment relationship between the claimant and the respondent had fundamentally broken down i.e. whether there were grounds for some other substantial reason to dismiss the claimant. Again, we consider that Mr Barry's approach was a realistic and reasonable assessment in light of the facts which were known at that time and the failure to reach an agreed way forward since July.

105. The claimant responded to Mr Barry's letter on 7 December essentially objecting to the way forward identified by Mr Barry and suggesting alternatives.

106. Mr Barry then responded to the claimant on 17 December clarifying his position. He said that the respondent considered the opportunity of the claimant returning to firefighting as a suitable alternative to her contracted role in fire control. He pointed out that the medical evidence was that there was no medical reason why the claimant would not be able to undertake that role. He reiterated that the respondent would address the claimant's concerns about returning to that role and was willing to provide a reasonable timeframe for her to work up her strength and fitness. Taking into account the long period which the claimant had already spent under the redeployment process Mr Barry confirmed his decision to move to a final resolution meeting.

107. In respect of the some other substantial reason element to the case Mr Barry clarified that he was concerned about the claimant's submission of multiple grievances which had been paused and restarted. He made it clear that he believed that to be an inappropriate use of the grievance policy and that was what may lead to the finding of a relationship breakdown and possibly some other substantial reason to dismiss the claimant.

108. The claimant was assessed by occupational health again on 23 December. The report from that consultation was released in January 2021. The report concluded that the claimant was not fit to return to the role of firefighter at present and it identified a recent deterioration in her mental health.

109. The claimant was diagnosed with PTSD on 7 January 2021. The claimant's psychologist has suggested that the claimant's PTSD is related to the time when she was on the firefighter return to work programme in 2019.

110. The claimant was seen by occupational health again on 8 February 2021 and they produced a report dated 11 February 2021. This was the most recent report that the respondent had available to them at the time they dismissed the claimant. The occupational health advice at that stage was that the claimant was unfit for any operational role and she would be unlikely to be able to offer meaningful and effective service in operational roles. However, the occupational health doctor opined that the claimant would be fit for non-operational roles, and he suggested that the claimant could remain in her current supernumerary position or consider redeployment to another non-operational role. The claimant was described by the occupational health doctor as thriving in her current position. That reflected the fact that despite the difficulties that she was experiencing with her mental health the claimant was at this stage in work and was performing her supernumerary role very well.

111. On 15 February 2021 there was another occupational health case conference which was attended by the claimant. As result of the conclusion that the claimant was unfit for operational roles she was once again placed on the redeployment list with effect from 16 February 2021. The claimant was from this juncture managed under the Attendance Management policy rather than the capability policy reflecting the fact that the claimant was now deemed medically unfit for any operational role. Following the meeting Mr Barry emailed the claimant to tell her that he would again look to progress the case to a final resolution meeting.

112. On 11 March 2021 the claimant commenced a period of sickness absence due to stress from which she did not return prior to her dismissal. The claimant was in fact signed off sick until at least August 2021.

113. On 12 March 2021 the claimant was invited to a final resolution hearing by Simon Barry to take place on 21 or 22 April. Mr Barry noted that the claimant had been on the redeployment list since 17 February and he said he intended for her to remain on the list for a reasonable time which he suggested would be three months, until 21 May 2021.

114. In April 2021 Mrs Price asked Mr Barry to postpone the final resolution hearing and extend the claimant's time on redeployment. She also queried whether Mr Barry was sufficiently independent to be the final resolution hearing manager. A further detailed grievance was submitted - this time specifically against Mr Barry.

115. This claimant's grievance against Mr Barry was designated her second grievance and there was then a third grievance submitted shortly afterwards. There was a further grievance hearing on 27 May 2021, the second and third grievances were discussed but it was clear that further investigation was necessary.

116. Following the submission of the grievances against him Mr Barry stepped away from the process. The conduct of the final resolution meeting was taken over by Jason Campbell. We think this was unfortunate as Mr Campbell did not

have the extensive knowledge of the claimant or the case which Mr Barry had and he seems to have been very much guided by HR.

117. In the period when she was signed off from March matters were largely dealt with on behalf of the claimant by Mrs Price. Mrs Price informed Mr Campbell that the claimant been advised by her psychologist not to do anything that was work-related and that she was too unwell to apply for posts through redeployment or to take part in the final resolution hearing.

118. The clear deterioration in the claimant's health - in particular her being signed off on 11 March and the information received from Mrs Price that she was now too unwell to do anything work-related - did not prompt Mr Campbell to obtain further occupational health advice even though the last advice predated these significant developments.

119. The final resolution hearing took place over two days in June 2021. The claimant did not attend. The claimant's case was presented by Mrs Price, and it included a detailed PowerPoint presentation. In addition, there were written question and answers between the two hearing dates. Mrs Price also sent in written submissions.

120. The claimant was dismissed by letter dated 29 June 2021 with pay in lieu of notice.

121. Following the claimant's dismissal, the respondent heard the claimant's appeal from the partial decision in relation to grievance one. The majority of grievance was not heard and there was no outcome provided. In relation to grievances two and three these were closed by the respondent following the rejection by Mrs Price of the respondent's proposal to appoint an independent investigator. The result was that despite it being recognised following the meeting in May that investigations were required no investigation was done. This decision was taken even though Mrs Price made it clear that the claimant wished to continue with the grievances - she just did not want to have them dealt with by an external investigator.

122. The claimant appealed the decision to dismiss her. The appeal was heard over two days in August 2021, and it was ultimately dismissed.

Conclusions

Jurisdiction

123. By the time of closing submissions the parties had largely agreed which parts of the claim were prima facie out of time – i.e. out of time subject to any continuing act or just and equitable argument.

.

124. It was agreed that the unfair dismissal claim was in time.

125. It was agreed that the following allegations made under the Equality Act were in time: issues 9.1, 20.2, 23.1, 24.1, 31.6, 20.5.1 – 4, 20.6.1 – 4, 20.4.1 – 20.4.4, 9.5, 9.6, 20.7.

126. There was disagreement over whether the following allegations made under the Equality Act were in time:

134.1 Issues 10.1 and 24.3. These allegations relate to the claimant being required to go through a capability procedure as a condition of moving her to fire control and then requiring her to stay on it whilst she was a trainee in fire control. Plainly the initial decision to place the claimant on fire control when she moved to fire control took place in October 2019 and so it is out of time (we understand this was agreed in any event). However, the claimant says there were then further decisions for her to remain on the capability procedure and the last of these took place in a meeting on 11 March 2020 which is in time.

134.2 Issue 20.3.1 as the claimant says she was not allowed to use the scratchpad strategy properly from 20 April 2020. This relates to a proposed reasonable adjustment.

134.3 Issue 20.3.3 as the claimant says the relevant end date for not finding her a suitable alternative role would be after 29 March 2021. This relates to another proposed reasonable adjustment.

134.4 Issue 31.3 as the claimant says the respondent failed to follow policy and procedures until at least 7 May 2021.

134.5 Issue 20.3.6. This relates to a proposed reasonable adjustment. The claimant says she should have been given line manager approval to apply for roles internally up until 29 June 2021 when she was dismissed.

134.6 Issue 9.4. The claimant says the failure to put her on a crew commander development plan was ongoing past 29 March 2021 until the time of her dismissal.

134.7 Issue 20.3.5. This relates to a proposed reasonable adjustment to put the claimant on a crew commander development plan which she says should have been done between 22 January 2021 and 29 June 2021.

134.8 Issue 20.3.4.1 – 3. These again relate to proposed reasonable adjustments. The adjustments in this section relate to adjustments contended for when the claimant was on the redeployment list. The claimant says the failure to make the adjustments contended for continued past 29 March 2021.

127. We accept the claimant's arguments summarised above to the effect that these allegations are in time. Even with this decision in the claimant's favour however it still means that large parts of the claimant's Equality Act claims are prima facie out of time. It was agreed that the entire direct disability discrimination

claim is prima facie out of time (allegations 4.1 to 4.3). It was also agreed that the following allegations are prima facie out of time: 20.1, 10.1, 24.2, 23.2, 24.4, 23.4, 31.1, 20.3.2, 32.1, 31.4, 23.3, 9.2, 23.5, 23.6, 31.2, 31.5, 9.3, 31.7.

128. As we shall explain we upheld one allegation of discrimination arising from disability (the dismissal – issue 9.5) and one allegation of harassment (the comments made by Emma Garner – issue 24.1). These were both agreed to be in time. We found they were stand-alone acts; they were not part of any continuing act. We did not find any discriminatory conduct extending over a period. In making this decision we applied s. 123 Equality Act 2010 and considered the decision of the Court of Appeal in Hendricks v Metropolitan Police Commissioner [2003] IRLR 96. The burden was on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of conduct extending over a period. The claimant did not discharge that burden.

129. We found that it would not be just and equitable to extend time to hear any out of time allegation. Our reasons for that were as follows:

134.1 We did not consider that the claimant had any good reason for not presenting her claims in time and some of the periods of delay were substantial. We took into account the claimant's health and her disabilities, but the claimant is plainly intelligent and articulate and is capable of presenting her complaints very effectively and indeed extensively, as can be seen by her written documents in this case. There was no cogent reason presented why she could not have investigated time limits herself and ensured her claims were brought in time.

134.2 Furthermore, the claimant was not acting alone. She has been very significantly supported throughout the relevant period by her trade union and she therefore had access to professional advice. On top of that the claimant had very significant support from her mother, Mrs Price, who is plainly an intelligent and articulate individual with knowledge relating to discrimination law and procedure. This reinforced our view that the claimant did not have any good reason for not presenting her claims in time.

134.3 As Mr Gidney in our view correctly pointed out it is quite plain that from an early stage in her employment with the respondent the claimant was aware of the potential to bring a tribunal claim and she had a reasonably sophisticated understanding of the tribunal's jurisdiction – for example she referenced at an early stage the possibility of a continuing act.

134.4 In these circumstances we did not consider that there was any significant prejudice to the claimant in applying the well-known rules on time limits.

134.5 On the other hand, we considered that there was significant prejudice to the respondent if we extended time. Firstly, there was the general prejudice of a claim being accepted against the respondent when it had been presented out of time for no good reason.

134.6 Secondly there was evidence in this case of forensic prejudice. The witnesses - some of whom have retired and/or moved on to different things - were asked to recall events from years ago and there were numerous points in the evidence when it was clear that the witnesses were struggling to recollect the detail of what had taken place.

134.7 Our sense of forensic prejudice was heightened in this case because the claimant was relying on contemporaneous documents such as her diary and lengthy grievance documentation which appear to us to have been written with an eye on this litigation.

134.8 There is a public interest in the enforcement of time limits in employment tribunals (this was described as "unexceptionable" in Adedeji).

134.9 We considered the claimant's claim in its entirety in any event, and we found all of the out of time allegations would fail.

130. We will explain our reasoning in respect of all of the allegations which the claimant brought so that the parties can understand what our conclusions would be in any event.

Disability

131. It is agreed that the claimant was disabled by the following conditions: dyslexia, anorexia, autism and anxiety and depression.

132. It was "potentially" disputed (according to the updated list of issues) whether the claimant was also disabled by post-traumatic stress disorder ("PTSD") and workplace stress. We understood the parties initially agreed that it was not necessary to determine whether PTSD or workplace stress needed to be relied on separately as disabling conditions. The updated list of issues referred to the claimant's "mental health disability" which we understood referred to the disability caused by all the mental health conditions relied upon. However by the time of closing submissions there was some suggestion from Mr Gidney that we would need to determine whether the PTSD and workplace stress conditions also separately met the definition of disability. Ms Snocken disagreed with that suggestion.

133. We should note that the claimant was diagnosed with PTSD in January 2021, and she was signed off with stress during her employment with the respondent, in particular in May 2020 and in 2021. There was therefore no dispute that the claimant had these conditions. Further, the respondent accepted that they were informed of the claimant's PTSD diagnosis in January 2021 and they were aware of the reason why the claimant had been signed off work. There was therefore no dispute that the respondent had knowledge of these conditions at the material time.

134. In her opening skeleton argument Ms Snocken explained the claimant's position as follows: "*The Claimant's primary position is that neither of the disputed*

disabilities (PTSD or workplace stress) need to be relied upon separately from at least the other mental health disabilities that the Claimant suffered from… all these conditions can be looked at as a whole when considering those acts for which PTSD and workplace stress is relied upon by the Claimant in combination with at least some of her other disabilities and that the combination plainly amounts to a disability, especially in light of the Respondent's acceptance that the other conditions do amount to disabilities on their own."

135. Ms Snocken further submitted that the claimant's primary position was supported by paragraph B6 of the Guidance on the Definition of Disability and accords with the leading authorities of J v DLA Piper UK LLP [2010] ICR 1052 (§38-40) and Morgan Stanley International v Posavec UKEAT/0209/13/BA (§28).

136. We entirely agree with Ms Snocken's submissions on this matter. In our view Ms Snocken's summary of the claimant's primary position is the correct approach. It is consistent with the Guidance referred to and our reading of the leading authorities to which Ms Snocken referred. In particular we bear in mind that it is not necessary as a matter of law in every case to determine a particular condition, because the issue is impairment rather than the specific medical causes of it. Although the situation does depend upon the particular context and issues in each case in this case the respondent has already accepted that the claimant is disabled including by way of mental impairment which had a substantial and long-term adverse effect on her ability to do normal day to day activities. We see nothing in the issues that we have to determine to suggest that greater distinction between the effects of the conditions relied upon is necessary. Indeed, in the agreed list of issues for us to determine the claimant's mental impairment is simply referred to collectively as the "mental health disability" comprising all the conditions relied upon. We are entirely satisfied that the combination of all the mental health conditions relied upon by the claimant created a significant mental impairment that had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities as alleged by the claimant. We therefore think that the claimant's primary position is the right approach, and it is not necessary or appropriate to attempt to assess the difficult question of exactly how the various conditions might have caused or contributed to the impairment. In fact in the absence of expert medical evidence addressing this issue it would likely be an impossible task.

Unfair dismissal

137. We find that the reason for dismissal was capability. This was the reason that was in the mind of the decision maker, Mr Campbell. We find that in making that decision the respondent genuinely believed that the claimant was no longer capable of performing her duties.

138. We find that the respondent did not act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. In particular we find that the respondent failed to take a crucial step which we consider any reasonable employer would.

139. It is generally important in cases of medical capability that the employer is informed as to the true and up to date nature of the employee's medical position. We have had regard to the leading cases which we set out in our summary of the law above, in particular Daubney. Equally we have borne in mind that the sufficiency of the employer's belief in the grounds for dismissal is still governed by British Home Stores Ltd v Burchell 1980 ICR 303. Although Burchell concerned a conduct dismissal, it set down general principles of reasonableness that apply to other types of dismissal too. In particular, the employer must genuinely believe in its stated reason for dismissal, it must have conducted a reasonable investigation and it must have reasonable grounds for the decision to dismiss. The EAT in DB Schenker Rail (UK) Ltd v Doolan 0053/09 held that while Daubney requires an employer to establish the 'true medical position' before deciding to dismiss, that should not be read as requiring a higher standard of enquiry than required for a misconduct dismissal. The Burchell approach, requiring simply that a reasonable investigation into the matter be carried out, still applies.

140. Even taking that into account however it was in our view vitally important in the particular circumstances of this case for the respondent to obtain up to date medical evidence and that the failure to do so meant the investigation was not reasonable. Although the respondent had dutifully commissioned a number of occupational health reports earlier in the claimant's employment it was obvious that this was a changing situation and the most recent report which was available at the time of dismissal was the one dated 11 February 2021. That report was quite clearly out of date. It was out of date because subsequent to that report the claimant had been signed off sick and she remained off sick more than 3 months later at the point of dismissal. This can be contrasted with the situation which is described in the 11 February report where the occupational health doctor described the claimant as not only working but thriving in her non-operational role. The recommendation was therefore that the claimant be permanently redeployed into some form of non-operational role. The occupational health view was that the claimant would be fit for such roles "with continued management support and dialogue". There had very clearly been a significant development since that advice because there had been a marked deterioration in the claimant's health leading to her not only not thriving in work but being unable to work at all.

141. In addition to the claimant being signed off sick by her doctor since the 11 February report the respondent had, through Mrs Price, been informed that the claimant had deteriorated still further to the point where she could not do anything work related and could not participate in the final resolution hearing or the redeployment process. The apparent deterioration in the claimant's health was therefore highly significant, and disadvantageous to the claimant because it meant that she could not participate in the final hearing, and she could not take advantage of being on the redeployment list. The management support and dialogue which the occupational health doctor thought should continue so that the claimant could be fit for operational roles did not take place as direct contact between the claimant and the respondent effectively ceased. However not only did the respondent not have any up-to-date medical information about this

situation they were relying on information that came from Mrs Price rather than the claimant directly.

142. As far as we are aware Mrs Price does not have any medical qualifications and it was unclear in what respects and to what extent she was reporting her own views, the claimant's views or a specific medical opinion. We do not think it can be assumed that a medical opinion would simply have repeated the views expressed by Mrs Price. In our view it was important for the respondent to understand the medical reasons for why the claimant apparently felt unable to do anything work related in this period. Furthermore, a medical opinion of the type that we think was reasonably required at this stage could give information as to the claimant's prognosis and what adjustments may be required. That was information which Mrs Price could not know or communicate. In the past occupational health advice had been taken and then there was a case conference to decide a way forward. We think those are exactly the type of steps that should have been taken to understand the situation and move forward in an informed manner following the deterioration in the claimant's health in March 2021. In the absence of such steps the bottom line is that the respondent and in particular the decision maker Mr Campbell knew very little about the true medical position of the claimant at the time she was dismissed.

143. In these circumstances we think it would plainly be incumbent upon any reasonable employer to take steps to obtain up to date medical advice to understand the nature of the claimant's current illness and understand how that illness might affect her in terms of participating in the capability process, participating in the redeployment process and ultimately being able to remain employed within the fire service. From 11 March onward the respondent made no attempt for the claimant to meet with occupational health or obtain any medical information beyond the sick notes the claimant provided. We think any reasonable employer at this juncture would have sought medical advice as to how the processes may need to be adjusted so that the claimant could participate and potentially remain in employment. We think it was reasonably necessary for the respondent to obtain up to date medical advice as to when the claimant might be fit enough either to return to work or to at least participate in the process. We therefore think the respondent's failure to obtain up to date medical advice in the circumstances we have described fell outside of the range of reasonable responses.

144. We consider that the onus was on the respondent to take reasonable steps to obtain up-to-date medical advice about the claimant's condition and prognosis. This was a clear example of a case where the medical advice might have changed and the employer acted unreasonably by failing to get an up-to-date medical report before dismissing. The claimant's current state of her health and in particular her prognosis were unclear from the information which was provided by Mrs Price and Mrs Price was not suitably qualified to give an informed view in any event. In our judgement this was plainly a situation where further medical advice could clarify matters.

145. Our concern that the respondent had failed to obtain up to date medical advice was strengthened by the fact that Mr Campbell came to the case late and

we don't think he was able to get a firm understanding of the claimant, her medical situation or the issues which were relevant to his decision. An up-to-date medical opinion would really have assisted him to make a more informed and fair decision. Without it he was, we find, operating in the dark. This was apparent from his evidence to the tribunal which we found to be honest but vague and uncertain. His default response was to the effect that he had been guided by HR on what to do. A reasonable decision maker would in our view have been guided by up to date medical advice.

146. Since the respondent failed to find out about the up-to-date medical position, we find that the respondent failed to carry out a reasonable investigation. A crucial part of a reasonable investigation would, in our view, be to ascertain the up-to-date medical position. We also do not see how there could be adequate consultation when the respondent was not aware of the up-to-date medical position. In our view for consultation to be adequate and meaningful both parties would need to be informed of the up-to-date medical position. We also consider that the respondent failed to take reasonable steps to involve the claimant in consultation. In our view it was reasonably necessary to establish if the claimant was well enough to participate more directly in consultation (even if adjustments may need to be made) rather than simply consulting with Mrs Price, who was of course well-intentioned but was neither a professional advocate nor a medic. We find that the respondent could reasonably have been expected to wait longer before dismissing the claimant because they could have waited until they had an up-to-date medical report, and in our view any reasonable employer would have done so.

147. We therefore find that the respondent's failure to obtain up to date medical evidence meant that its decision to dismiss the claimant fell outside the range of reasonable responses. The respondent did not have all the relevant facts as to the claimant's health, her ability to participate and her prognosis at the time the decision was made. The respondent needed more detailed medical advice so that it could make a rational and informed decision. We therefore find that the claimant's dismissal was unfair.

148. We should note that we have taken into account all the arguments presented on the claimant's behalf as to unfairness but consistent with our findings of fact we do not think this was a case where there was an overall unfair process gong back months or even years. We have instead identified a specific unreasonable failure by the respondent which was in our view highly significant, and which led us to consider that the dismissal was unfair for the reasons we have explained.

Direct disability discrimination

149. We will deal with allegations 4.1 and 4.2 together since they both concerned snacking. We find that these allegations fail on the facts. We find that Mr Whitworth did not refuse to allow the claimant to snack whenever she wanted to, and the respondent did not refuse to allow the claimant to snack whenever she wanted to unless she asked permission from the duty Watch Manager.

150. The claimant's evidence on snacking was unclear to the point of being confusing. In our judgement matters became clear in relation to these allegations once we had heard from the relevant respondent witnesses, Mr Whitworth and Mr Bromley. We were impressed with their evidence, which struck us as cogent and credible. We accepted their evidence on this matter.

151. We found that the claimant was asked not to snack inappropriately and that was as a result of her being seen to eat crisps in a lecture and cereal over a computer. She was not denied permission to snack whenever she wanted to. If she needed to take some time to have a snack the claimant was asked to inform her manager of what she was doing. She did not have to ask for permission. We consider these instructions do not amount to a detriment.

152. We find that the claimant has misunderstood or misinterpreted what she was told in relation to snacking. We consider this was clear from the evidence given by Mr Whitworth and Mr Bromley which we accepted to be truthful and an accurate representation of what had actually taken place.

153. We also find that allegation 4.3 fails on the facts. The substance of the allegation is that the claimant was required to complete strenuous and intense exercises as opposed to mild to moderate physical work on her return-to-work programme. Again, we accepted the evidence of Mr Bromley on this matter as being truthful and accurate. The claimant was not required to complete strenuous and intense exercise rather she was working on mild to moderate physical work as per her return-to-work programme. We accepted Mr Bromley's evidence to the effect that it was not the respondent requiring the claimant to move towards more strenuous exercises but rather it was the claimant who was keen to push herself so as to get back to firefighting. This struck us as characteristic of the claimant; typical of her character and her strong desire to succeed in firefighting despite the serious challenges she faced.

154. We therefore find that the claimant was not required to complete strenuous and intense exercises on the RTC exercise on 15 July 2019, the Oldbury High Rise exercise on 30 August 2019 and the Hot House exercise on 30 August 2019. We do not accept that on 30 August 2019 the respondent indicated that on the following week the claimant would be required to complete a training exercise involving walking up and down a 15-storey high rise carrying full equipment and breathing apparatus. We accepted Mr Bromley's evidence that the claimant was not required to walk up and down 15 flights of stairs; rather she was required to climb 5 flights with an instructor and then walk down. Since the respondent only required the claimant to do mild to moderate physical work which had been agreed as part of her return-to-work programme which was designed to build the claimant back up into firefighting we do not accept that the treatment of the claimant amounted to a detriment.

155. We further consider that the claimant was not treated less favourably than a hypothetical comparator in respect of these allegations. A hypothetical comparator would have been subjected to the same expectations as regards snacking and would have been required to meet the same standards as part of a return-to-work programme.

156. There was in our view no evidence that the reason for the claimant's treatment was disability, in particular Anorexia Nervosa. The guidance the claimant was given around snacking was because of the times when she had snacked inappropriately i.e. by eating crisps in a lecture theatre or cereal over a computer and the need for her manager to know what the claimant was doing if she needed to take some time for a snack. The reason for the return-to-work programme was to build the claimant up to the standard required for a firefighter.

157. The claimant did not prove facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened s13 EqA.

158. For these reasons the direct disability discrimination claim would fail.

Discrimination arising from disability

159. It was agreed that the respondent did the things set out at 9.1 to 9.6 of the agreed list of issues. The first issue for us to consider was whether those things amounted to unfavourable treatment. The second issue was whether they were done because of something arising in consequence of disability. The third issue was whether the treatment was a proportionate means of achieving a legitimate aim.

160. In respect of allegation 9.1 we do not consider that putting the claimant onto a development plan on 19 April 2020 was unfavourable treatment in context. We acknowledge that development plans can be seen by employees as negative, but in the specific circumstances of this case we do not think it can be said to be unfavourable. It was a very low-level intervention to identify that the claimant's conduct was inappropriate and not in line with the respondent's values. It was not a disciplinary sanction. It was not in any sense punitive. The purpose of this intervention was to identify that the claimant's behaviour had been inappropriate and support her so as to avoid any disciplinary process in the future. We think that cannot be said to be unfavourable.

161. The move to a development plan was only implemented after a number of informal interventions. At the start of the development plan the Watch Manager, Mr McCann, got involved to reassure the claimant that it was not a precursor to any kind of formal disciplinary action. The claimant was not actually required to do anything under the plan other than evidence a change in her behaviour which was to be shown through discussions with her manager. In the tribunal's view this was a constructive intervention to try and identify where the claimant's behaviour was deemed unacceptable and prevent it from happening again. In essence the development plan was a way of attempting to support the claimant to improve so that formal disciplinary action would not be necessary. These factors strengthen our view that the development plan was not unfavourable treatment.

162. If we were wrong about that and there was unfavourable treatment, we would have to consider whether the treatment was done because of something arising in consequence of the claimant's disability. The claimant says that the confrontational behaviour which led to her being placed on the development plan

arose in consequence of her social communication difficulties due to her autism and it was therefore done because of something arising in consequence of the claimant's disability. We accept that.

163. However, we would find that the treatment was a proportionate means of achieving a legitimate aim. The respondent had a legitimate aim which was improving the performance of its staff which we think is wide enough to encompass adhering to core values within the context of a safety critical environment. We agree with the respondent's position that in an emergency response centre achieving a calm environment, free of hostility and confrontation, is essential and that demonstrates that the aim here is legitimate. We consider that the respondent acted proportionately because of the factors we have summarised above, in particular that this was a very low-level intervention which was designed to be constructive, and which was only implemented after attempts at resolving things informally. We were satisfied that the treatment was an appropriate and reasonably necessary way to achieve the aim relied upon by the respondent, that something less discriminatory could not realistically have been done instead and that the needs of the claimant and the respondent had been appropriately balanced.

164. In relation to allegation 9.2 we are not satisfied that Mr Barry's letter of 4 December 2020 was in context unfavourable treatment. The claimant was informed that she was to be placed on capability but clearly there was a capability issue because the claimant was at that stage assessed as being medically incapable of the role that she was contracted to do (i.e. the role within fire control).

165. Furthermore, although the claimant was informed that she would be taken to a final resolution hearing this was only after Mr Barry had been attempting to resolve the matter informally since around July 2020. This was after the postponement of the original final hearing which had been scheduled to take place in May 2020 and it was after the claimant had already had a long period on the redeployment register. It is therefore rather misleading for this allegation to assert that the letter informed the claimant she would be taken "straight to" a final hearing. In fact, it was clear that there had been a long process leading up to that point and that the final hearing had previously been postponed so that alternatives could be explored further.

166. We should also point out that the final resolution hearing was by no means simply a vehicle to dismiss the claimant. Dismissal was not the inevitable outcome of such a meeting. The capability procedure makes it clear that redeployment must be considered at a final resolution hearing, and it seems to us that would have been an important part of any final resolution hearing had one taken place at that stage. Realistically it would have been the best outcome for the claimant at that point since she was clearly unable to perform the role in fire control and she was working in supernumerary role which could not last forever. In these circumstances it seems to us clear that it was necessary and in everyone's interests for the matter to be concluded one way or another at the final hearing. It was not in our view unfavourable in the particular context we have described for matters to be brought to a head as Mr Barry did in the letter of 4 December 2020.

167. If we were wrong about that and there was unfavourable treatment, we would have to consider whether the treatment was done because of something arising in consequence of the claimant's disability. The claimant says it was done because of her having been deemed medically unfit to perform her contracted role in Fire Control and this was something arising in consequence of her dyslexia. We would agree with the claimant's position here. We found that Mr Barry's actions at this stage were informed by the fact that the claimant was at that stage assessed as being medically incapable of the role that she was contracted to do (i.e. the role within fire control) and that was something arising in consequence of the claimant's dyslexia.

168. However we would consider that the respondent's treatment of the claimant was again plainly a proportionate means of achieving a legitimate aim. The respondent relied on two legitimate aims:

a. Ensuring 999 calls could be answered efficiently, accurately and safely as to avoid or reduce the risk of life or injury to members of the public.
b. Ensuring that employees are encouraged back into work that they can safely perform.

169. We accept that the two aims relied upon were legitimate. It is clearly legitimate for the respondent to have the aims of ensuring that employees were able to safely perform the work they were contracted to do and ensuring that employees went into work that they could safely perform. This is particularly important and legitimate in the safety critical work environment of the fire service and fire control in particular. At this stage the claimant was assessed to be not medically capable of doing the role in fire control that she was contracted to do. The decision to move to a final resolution hearing was only taken after the extensive efforts that Mr Barry had been involved with to try and work out a solution informally and only after the extensive time which the claimant had already had on the redeployment list. We were satisfied that the treatment was an appropriate and reasonably necessary way to achieve the aims relied upon by the respondent, that something less discriminatory could not realistically have been done instead and that the needs of the claimant and the respondent had been appropriately balanced. We therefore consider that the respondent acted proportionately.

170. Allegation 9.3 was that between 4 February and 11 February 2021 the claimant's line manager, Laraine Duggan, refused to give the claimant approval to apply for roles as an internal applicant in particular a crew commander role.

171. The period complained of here is only one week. The process was that the claimant's line manager could not give her approval because the claimant was not at that stage deemed competent in her contracted role and she could not demonstrate "resilience" in that role. However the matter was quickly escalated to Mr Barry, and he promptly waived the requirement for line manager approval. In doing so he made it clear that the claimant could apply retrospectively if she needed to do so. We are satisfied this meant that the claimant was not disadvantaged in any way and in particular it meant the claimant could still apply

for the relevant roles. In those circumstances we do not think there was in reality any unfavourable treatment.

172. If we were wrong about that and this was unfavourable treatment, we would agree that it was done because of something arising in consequence of the claimant's disability, because her inability to demonstrate competence and resilience in her contracted role in fire control was because of her dyslexia.

173. However we again consider that the treatment was a proportionate means of achieving a legitimate aim. We find that the respondent had the two aims relied upon of ensuring candidates for posts meet the essential criteria for roles and appointing candidates to roles that meet the essential criteria, and these were legitimate aims. It was legitimate for the respondent to aim to ensure that those applying and obtaining roles could demonstrate sufficient competence and resilience for the roles they were moving into and that they could meet the essential criteria for the roles. We consider that the respondent acted proportionately by promptly waiving the requirement for line manager approval once it became clear that the claimant was at risk of being held back. We were satisfied that the treatment was an appropriate and reasonably necessary way to achieve the aim relied upon by the respondent, that something less discriminatory could not realistically have been done instead (taking into account that Ms Duggan's hands were effectively tied and so the matter needed to be escalated) and that the needs of the claimant and the respondent had been appropriately balanced.

174. Allegation 9.4 related to the claimant not being given a crew commander development plan between 17 February and 29 June 2021. For the majority of this period the claimant was not only signed off sick, but the respondent was informed by Mrs Price that she was unable to do anything work related. It therefore seems to us to be difficult to see how the claimant could possibly have participated in constructing or adhering to a crew commander development plan at that time. However we recognise that at the beginning of this period the respondent did not agree to give the claimant a crew commander development plan prior to her going off sick on 11 March. We accept that this was unfavourable treatment.

175. The decision not to give the claimant a crew commander development plan was taken because the claimant could not demonstrate competence in an operational role, and we accept that this was something arising in consequence of her disabilities. In particular the claimant had not demonstrated competency in her role in fire control, and this arose in consequence of her dyslexia. However we once again consider that the respondent's treatment with the claimant was quite clearly justified. We have already found that the respondent had the two aims relied upon of ensuring candidates for posts meet the essential criteria for roles and appointing candidates to roles that meet the essential criteria, and these were legitimate aims. These legitimate aims are linked to the respondent needing to ensure that those applying could demonstrate sufficient competence and resilience for the roles they were proposing to move into. Again the legitimacy of these aims is in our judgement clear from the fact that this was a safety critical

environment and it was necessary for the respondent to ensure that applicants could safely perform the role.

176. The tribunal considered that the treatment of not giving the claimant a crew commander development plan was proportionate. On this matter we took into account in particular Kelly Whitmore's evidence. We found Ms Whitmore's evidence to be cogent and credible and we accepted it. As she explained because the claimant was not in a position to demonstrate competence in an operational role it was unrealistic that she would be able to adhere to a development plan to aspire to a crew commander role without the basics related to operational competence in place. Without those basics it was not realistic to think that the claimant could work towards a crew commander role. In short it was quite obviously a step too far for the claimant at that particular time and she needed to set her sights on something that was more realistically achievable. In light of the claimant's recent difficulties the respondent could not be assured at that point in time that the claimant could safely perform the crew commander role. We were therefore satisfied that the treatment was an appropriate and reasonably necessary way to achieve the aims relied upon by the respondent, that something less discriminatory could not realistically have been done instead and that the needs of the claimant and the respondent had been appropriately balanced.

177. Regarding allegation 9.5 the dismissal of the claimant was unfavourable treatment. The decision maker was Mr Campbell. We find the claimant was dismissed because of things arising in consequence of her disability. We agree with the claimant that she was dismissed because of her inability to carry out her role in fire control because of her dyslexia and because of the length of her absence/time spent in supernumerary and the consequent belief that she was not capable of doing her role which was because of her dyslexia, anorexia and mental health disability.

178. We disagree with Mr Gidney's suggestion that the dismissal was simply in consequence of the claimant's period of absence since March 2021 and that absence was not disability related. Firstly in our view the claimant's absence was disability related because it arose in consequence of her mental health disability. Secondly it is quite clear in our judgement both from the wording of Mr Campbell's decision letter and his evidence to the tribunal that a very significant factor in his decision to dismiss the claimant was the fact that he thought she was not competent to perform her contracted role or indeed any operational role and this was evidenced by her inability to perform the role in fire control, the difficulties she had experienced in firefighting, her history of absence and the period of time spent in supernumerary. These are all things that plainly arose in consequence of disability.

179. In relation to this allegation we consider that the respondent has not shown that the treatment was a proportionate means of achieving a legitimate aim. We accept that the respondent had a legitimate aim of managing long term absence (and ultimately ensuring it has a capable workforce). However we do not consider that the respondent acted proportionately. Dismissing the claimant was not an appropriate or reasonably necessary way to achieve the respondent's legitimate

aim. We have found that the respondent took the decision to dismiss in the absence of an up-to-date medical report clarifying the nature of her current state of health, her likely return to work date and any adjustments which could be made to enable the claimant to potentially participate in the consultation/dismissal process, apply for redeployment and remain employed. We found that Mr Campbell effectively took his decision in the dark as to the crucial issue of the claimant's medical state and her prognosis. We refer to our findings on unfair dismissal set out above. We do not think that can be said to be a proportionate response.

180. We found that dismissal in the absence of up-to-date medical information was not appropriate or reasonably necessary. In our view something less discriminatory could, and should, have been done instead. Namely properly investigating the up-to-date medical position by way of obtaining further medical evidence before taking any decision to dismiss.

181. When we balance the needs of the claimant and the respondent, we find that insufficient regard was had to the needs of the claimant which were to ensure that any decision was taken with full knowledge of the up-to-date medical position, the prognosis and the possible adjustments that could be made to enable the claimant to participate in the process, to apply for redeployment and remain employed.

182. Regarding allegation 9.6 we do not consider that paying the claimant in lieu of notice ("PILON") rather than allowing her to "work out" her notice was unfavourable treatment. At the time of dismissal the claimant was not well enough to work, she was reported by Mrs Price to be not well enough to attend any hearings, deal with any correspondence, apply for any redeployment opportunities or do anything work related. In those circumstances there is no meaningful sense in which the claimant could have worked out her notice. We therefore do not see how it could be unfavourable not to provide a period of notice rather than PILON.

183. We have taken into account the argument that because it was a sudden change it affected the claimant negatively however we don't accept that point. The claimant had clearly been aware for a very long time that dismissal was on the cards, and she must have been anticipating it in the circumstances which we have described. The claimant would clearly have been aware of what was likely to happen from discussions with her union and her mother. It cannot be said to have been a sudden or unexpected change in these circumstances. It was wholly unrealistic for the claimant to suggest that she did not realise what was coming or was taken by surprise by it.

184. If we were wrong about that and there was unfavourable treatment, we would have to consider whether it was done because of something arising in consequence of disability. The claimant's position was that it was done because it was thought by the respondent to be in the interests of the claimant's health for her to be paid in lieu of notice rather than being allowed to work out her notice and this arose out of her disability. It seems to us that the decision to award PILON was done because of the circumstances which existed at the time – i.e.

the claimant being unable to work out a notice period in any meaningful sense and as a result of that the respondent took the view that it would be better for everyone to draw a line rather than have the claimant go through a notice period. We accept this is essentially the claimant's case and the decision was therefore taken because of something arising in consequence of disability.

185. Nevertheless, we would find that the treatment of the claimant was a proportionate means of achieving a legitimate aim. In the circumstances that were known at the time it seems to us that there was a legitimate aim related to a concern for the claimant's health. As we have observed Mrs Price had reported to the respondent that the claimant could not do anything at all that was related to the respondent. In those circumstances it seems to us that it was legitimate for the respondent to be concerned for the claimant's health and specifically to consider that dragging her employment on was not in her best interests once the decision had been taken to dismiss. It seems to us it was appropriate and reasonably necessary for the respondent to dismiss with pay in lieu of notice on the basis of the circumstances which were known at the time. We were satisfied that the treatment was an appropriate and reasonably necessary way to achieve the aim relied upon by the respondent, that something less discriminatory could not realistically have been done instead and that the needs of the claimant and the respondent had been appropriately balanced.

186. It was disputed whether the respondent did the treatment identified in allegation 10.1. The treatment was putting the claimant through a capability procedure as a condition of her moving to the fire control role and requiring her to stay on it once she had started work as a trainee in the fire control team. The claimant asserts that the original condition was in place in September-October 2019, and she was then kept on the capability procedure from October 2019 and continuing past August 2020. We have found that the claimant was placed on a capability procedure around the time of her move to the fire control role in September 2019 and she remained on that until around August 2020 when it appears the process was paused by Mr Barry, until it was restarted by him later in 2020. To that extent we find that the factual basis of the allegation has been established.

187. In the particular context which existed at the relevant time we did not consider that this was unfavourable treatment. There were serious concerns about the claimant's capability. Despite the support provided she had not been able to perform the firefighter role and it was agreed by everyone that it would be best for the claimant to move to fire control. The capability procedure was the appropriate vehicle to exit the claimant from the firefighter role and move her into fire control, as she accepted in cross examination. The claimant then went on to experience serious difficulties in the fire control role, as we have described. We think was in everyone's interests to monitor and assess the claimant's ability to work in operational roles, to organise appropriate support and think about alternatives if the fire control position was not going to work for her. Remaining on the capability procedure was an effective way of doing that. As can be seen from the length of time which the claimant remained on the procedure it was not being used as a vehicle to dismiss the claimant but was instead used as a means

to check her progress, to try and assist her to progress further and to consider alternatives.

188. Furthermore, there was a specific and significant advantage to the claimant being on the capability procedure as it meant she maintained access to the redeployment list.

189. In these circumstances we don't see any unfavourable treatment of the claimant in placing her and keeping her on the capability procedure.

190. If we were wrong about that and this was unfavourable treatment, we would agree with the claimant that it was done because of something arising in consequence of disability, namely that the claimant had not been able to complete the return-to-work programme which was due to her anorexia (and later because she had not demonstrated the competencies required for the Fire Control role and this was because of her dyslexia).

191. Once again however we would have no doubt that the respondent's actions were a proportionate means of achieving a legitimate aim. We have found that the respondent had a legitimate aim which was improving the performance of its staff. We agreed with the respondent's position that in an emergency response centre or firefighting achieving and maintaining a satisfactory level of performance is essential and that demonstrates that the aim here is legitimate. We consider that it was appropriate and reasonably necessary for the respondent to monitor the claimant's capability through a formal process in light of the serious difficulties she had in demonstrating that she was capable. It was appropriate throughout that process to ensure that the claimant was offered support and access to redeployment so that she could consider other opportunities which might be more suitable for her. Being on the capability procedure was a means of achieving that and it seems to us that it was an entirely appropriate way of balancing the needs of both the claimant and the respondent. We were satisfied that the treatment was an appropriate and reasonably necessary way to achieve the aim relied upon by the respondent, that something less discriminatory could not realistically have been done instead and that the needs of the claimant and the respondent had been appropriately balanced.

192. For these reasons we found that the dismissal was discrimination arising from disability but the claimant's other allegations of discrimination arising from disability would fail.

Reasonable adjustments

193. It was agreed that the respondent had the PCPs relied upon by the claimant.

194. The first PCP (16.1) related to a requirement on a return-to-work programme to work five consecutive days in a 9-day fortnight shift pattern. This dated back to the claimant's return to work in firefighting in June 2019. It is said that this PCP caused a substantial disadvantage of the claimant feeling

exhausted and drained after having worked 5 days in a week due to her autism and/or anorexia nervosa.

195. We find that this PCP did not put the claimant at a substantial disadvantage compared to someone without her disability. The return-to-work programme had been agreed to by the claimant and had been designed in consultation with her. It included a careful and graduated phased return building up to working five consecutive days. It included gym sessions, physiotherapy and e-learning to support the claimant and build up her strength and ability to do the job she was employed to do. There is no cogent evidence that the progression in these circumstances to working 5 days a week made the claimant exhausted or drained. We do not accept that it did and we do not think that the PCP put the claimant at a substantial disadvantage compared to someone without her disability.

196. The working pattern involving working five consecutive days was known as the nine-day fortnight and it was the claimant who was initially keen to go on to that working pattern. Indeed it had only been agreed that the claimant would go on to a 9-day fortnight when it was confirmed that the claimant was sure that would be best for her. Essentially, the return-to-work programme had been designed to progress at the pace the claimant was most comfortable with. The claimant later raised concerns about the 9-day fortnight which were based around personal convenience in that she did not have sufficient time to do other tasks which she needed to (such as looking after pets) and were not related to her disability. These factors reinforce our conclusion that there was no substantial disadvantage linked to the claimant's disability in the application of this PCP.

197. Had we found the claimant was put at the claimed substantial disadvantage we would find that the respondent did not know and could not reasonably have been expected to know that the claimant was likely to be placed at the disadvantage. This is because the return-to-work programme had been agreed to by the claimant and had been designed in consultation with her, it was consistent with the medical advice available at time and even when the claimant later raised concerns about the 9-day fortnight these were based around personal convenience.

198. The reasonable adjustment proposed by the claimant in relation to this PCP is to allow the claimant to work a '4 on, 4 off' shift pattern with extended day shifts and no night shifts. However the claimant had previously said this shift pattern gave her too much time at home which caused her stress so we would not have considered that to be a reasonable adjustment.

199. The second PCP (16.2) related to the development plan in April 2020. The PCP was putting workers perceived to have social communication difficulties onto a development plan.

200. The claimed disadvantage is that the claimant was more likely to be placed on a development plan due to her autism. We accepted that the claimant had social communication difficulties and this was a symptom of autism which made it more likely that her behaviour could be seen as confrontational and therefore

she would be placed on a development plan. This was therefore linked to her disability.

201. However, we do not consider that being more likely to be placed on a development plan was a substantial disadvantage. As we have already noted the development plan was a very low-level intervention which was simply designed to identify the claimant's inappropriate behaviour and try and address it so as to avoid any need for formal disciplinary proceedings. It was made clear that it was not a precursor to a disciplinary sanction, and it was only done after a number of informal interventions. The development plan is most aptly seen as a support mechanism for the claimant to assist her to be aware of her inappropriate behaviour and stop it happening in the future so that formal disciplinary action could be avoided. This is not in our view disadvantageous to the claimant.

202. Had we found the claimant was put at the claimed substantial disadvantage we would find that the respondent did not know and could not reasonably have been expected to know that the claimant was likely to be placed at the disadvantage. There is no basis for any suggestion that respondent knew or ought to have known that being placed on a development plan which was designed to support the claimant would in fact cause the claimant a substantial disadvantage.

203. Furthermore, we would agree with the respondent's submission that the suggested adjustments namely allowing the claimant to improve her communication by way of CBT or access to work training would not be reasonable. Firstly, it is not known whether such steps could be effective in addressing the claimant's behaviour and secondly, we accept the point that in an emergency response environment it was necessary to take immediate steps to ensure harmonious working relationships. The respondent had already attempted to address the claimant's behaviour through informal discussion and could not reasonably be expected to wait to see if further training may change the claimant's behaviour.

204. The third PCP (16.3) related to a requirement for all fire control operatives to answer 999 calls. We note that this is essentially a fire control operative's job. The claimed substantial disadvantage is, in summary, that the claimant had difficulties with her memory due to her dyslexia and this made it more difficult for her to fulfil the role.

205. We accept that the PCP put the claimant at the claimed substantial disadvantage compared to someone without the claimant's disability and the respondent knew about that. However, the claimant accepted in cross examination that there were no reasonable adjustments that could be made to enable her to achieve safe to operate status and mobilise fire engines with the time and accuracy required to save lives. In short therefore the claimant conceded that there were no further reasonable adjustments that could be made to enable her to safely fulfil the role of fire control operative. In our view this was an entirely appropriate and realistic concession for the claimant to make. It was consistent with the medical advice that was obtained at the time and our impression of the reality of the situation.

206. We found that the respondent went through a sustained process of attempting reasonable adjustments that may have enabled the claimant to perform the fire control operative role. For example the scratch pad strategy and extending the claimant's period of mentoring. These were reasonable steps that were put in place to try and avoid the disadvantage caused by this particular PCP. We find there were no further adjustments that could reasonably be put in place to address the disadvantage caused by this PCP, as was effectively conceded by the claimant. We therefore find that the respondent did not fail to make reasonable adjustments.

207. The first claimed adjustment for this PCP was to allow the claimant to use the scratchpad strategy properly in the way in which it was intended. However we found that the claimant was permitted to use the scratchpad strategy properly in the way in which it was intended. The fact was that even after the claimant had been trained on how to use this strategy and had been given ample time to practice using it she still could not do the job safely.

208. In light of what was said about Mr McCann in submissions on behalf of the claimant we analysed this point carefully. The claimant's contention was that Mr McCann had not allowed her to use the scratchpad strategy properly because he had said she had to use the strategy on all calls rather than just when she needed it. It was said in Ms Snocken's closing submissions that Mr McCann's evidence on this point was confused. We have to say we found Mr McCann's evidenced to be anything but confused. In a similar vein to the evidence provided by Mr Whitworth and Mr Bromley it shed light on what for us had previously been a confusing picture. It was another example of where the claimant's evidence was unclear and confused and we again found that the claimant had not recollected or had misinterpreted what had in reality taken place.

209. Like Mr Bromley and Mr Whitworth, we found Mr McCann's evidence to be clear and cogent. He explained that he had not required the claimant to use the strategy on all calls but rather to use it on all calls where data needed to be transferred so that nothing was missed. This was the problem which the scratchpad strategy was designed to alleviate. Therefore, Mr McCann's instructions to the claimant were clearly a proper use of the strategy and furthermore were reasonable because had the claimant not used the strategy on all calls where data needs to be transferred the problem of the claimant missing data would have been more likely to continue.

210. The further adjustments contended for in relation to this PCP were in fact complaints about the respondent's approach to redeployment. They are complaints about steps the claimant says the respondent should have taken to have made it easier for her to obtain a suitable alternative role from September 2020 onwards. We have to bear in mind that we have to focus not on steps that might have assisted the claimant generally but steps that might have avoided the specific disadvantage caused by the PCP. These suggested adjustments do not address the disadvantage which is claimed in relation to this PCP. The claimed disadvantage specifically relates to the difficulty which claimant had in answering 999 calls. That was a disadvantage which the claimant experienced up until she

was removed from the fire control role in April 2020. It did not exist beyond that point because the claimant was no longer doing that work.

211. We would therefore agree with Mr Gidney that the contended adjustments set out in 20.3.2 to 20.3.6 are misconceived. We would have found that it would not be reasonable for the respondent to have to take those steps because these would not have removed the disadvantage the claimant's dyslexia posed to the PCP of answering 999 calls.

212. Further, we consider that in fact the respondent acted reasonably in its approach to redeployment including by reason of the two substantial periods on the redeployment list, the extensive efforts made by Mr Barry and the attempts to get the claimant back into firefighting.

213. The fourth PCP (16.4) concerned a practice of the respondent sending out emails of redeployment vacancies without further assistance in identifying what roles were available that may be suitable for a particular employee. The claimant says this PCP put her at a substantial disadvantage compared to someone with her disability in that due to her autism spectrum disorder and/or mental health disabilities, she found it more difficult to identify such roles from the emailed vacancies, or furthermore or in the alternative, the claimant was more likely to be on the redeployment list in the first place than someone who was not disabled.

214. We do not consider that this PCP put the claimant at the claimed substantial disadvantage compared to someone without her disability. Being more likely to be on the redeployment list was not a substantial disadvantage because being on the redeployment list was advantageous to the claimant as it made it easier for her to apply for roles within the respondent. This is not a disadvantage for somebody who was experiencing significant difficulty in doing the role she was employed to do and was in a capability process.

215. We also do not accept that the claimant found it more difficult to identify suitable roles from the emailed vacancies. In fact, the evidence shows that the claimant was able to identify and apply for appropriate roles - she did so on occasions up until the deterioration in her health in March 2021 (which is relevant to the next PCP). The claimant is intelligent and articulate and throughout the relevant period (up until March 2021) she was heavily engaged in the various processes and was able to critique the respondent's position and explain her position in detail both in writing and in meetings. The claimant could apply for positions she deemed suitable, complete applications forms and attend interviews. The evidence shows that she has in fact done those things during the period she has been disabled. There was no cogent basis for the suggestion that the claimant would find it difficult to identify suitable vacancies and we do not accept that she did. Furthermore, the claimant had access to both her advocate and her trade union to assist her in identifying suitable vacancies if she needed any assistance and this reinforces our conclusion that there was no substantial disadvantage to the claimant in relation to this PCP.

216. Had we found the claimant was put at the claimed substantial disadvantage we would find that the respondent did not know and could not

reasonably have been expected to know that the claimant was likely to be placed at the disadvantage. This is because the suggestion that the claimant found it more difficult to identify roles from emailed vacancies was not raised at the time and it was not consistent with the medical advice or how the claimant had actually conducted herself.

217. In any event we do not consider that it would be reasonable to expect the respondent to make the proposed reasonable adjustments. We agree with the respondent that it must be for the claimant to express which roles she may be interested in. It would not be a reasonable adjustment for the respondent to guess which roles the claimant might wish to consider. There is no suggestion that there were available roles that had been excluded from the redeployment list, and there is no evidence of any suitable role that the claimant was prevented from applying for. The respondent acted reasonably in allowing the claimant a lengthy period on the redeployment list before dismissing.

218. The fifth PCP (16.5) related to the respondent sending redeployment opportunities whilst the claimant was too unwell to look at them. The relevant period is from 11 March 2021 until dismissal. The PCP is described as follows: *"Regarding employees as having been offered sufficient opportunity for redeployment (or redeployment being adequately explored) by virtue of emails containing redeployment vacancies being sent regardless of whether the employee was well enough to look at and/or adequately act on them."* The PCP is therefore about the respondent regarding employees as having had sufficient opportunity for redeployment even though they may not have been well enough to look at or act upon redeployment vacancies.

219. The claimant says this PCP put her at a substantial disadvantage compared to someone without her disability in that she was too unwell to look at and/or adequately act upon the redeployment list emails from 11 March 2021 onwards due to her anorexia and/or mental health disability, but was regarded when she was dismissed as having had sufficient opportunity to apply for redeployment which was not the case.

220. The information that was available about the claimant's health from March 2021 came from Mrs Price. Mrs Price reported to the respondent that the claimant was too unwell to participate in any work-related activity and was too ill to consider any redeployment opportunities. Up until March 2021 the claimant had been well enough to participate in work related activities and had been well enough to identify and act upon redeployment opportunities. However from March 2021 we accept that she was unable to do so and this was linked to the claimant's disability, in particular her mental health disability. This PCP put the claimant at that substantial disadvantage compared to some without her disability. The respondent knew about it because they knew through Mrs Price that the claimant was too unwell to look at vacancies from 11 March.

221. However, we do not think it would be reasonable for the respondent to have to take the steps contended for by the claimant:

233.1 We do not think it was it would be reasonable for the respondent to have to disregard the period of time when the claimant was too unwell to even look at redeployment opportunities. That was a significant part of the relevant factual matrix at the time of the final hearing. Furthermore even if that period of time had been disregarded the claimant had already had sufficient time on the redeployment register so it is unclear how this step could have alleviated any disadvantage.

233.2 We do not think it would be reasonable for the respondent to extend the time that the claimant was on the redeployment list indefinitely given the substantial amount of time that the claimant had already been on the list. Furthermore, it is unclear what the claimant's prognosis was in terms of when she might be able to look at vacancies and it would not be reasonable for the respondent to delay the decision and extend the claimant's time on the list on an open ended basis or until some arbitrary point in time. Without information as to prognosis regarding when the claimant may be well enough to look at vacancies it is unclear how this proposed adjustment could have alleviated any disadvantage.

233.3 We don't see how the suggested adjustment of sending vacancies directly to the claimant's advocate or trade union would have avoided any disadvantage. The information was that the claimant was not well enough to do anything work related. The claimant's advocate or trade union could not select and apply for vacancies on her behalf. It would not be reasonable for the respondent to send vacancies to the claimant's advocate or union if the claimant was still unable to act on them. If in fact it was the case that the claimant could discuss work related matters with her union or her advocate then she could simply have done that and discussed the redeployment vacancies with them once she received them.

233.4 Similarly we do not see how the suggested adjustment of obtaining information as to the claimant's experiences, skills and preferences for alternative work and pro-actively seeking to identify suitable vacancies would have avoided any disadvantage when the information was that the claimant was not well enough to do anything work related. It would not be reasonable for the respondent to pro-actively identify vacancies if the claimant was still unable to act on them. We do not think it was reasonable to expect the respondent to wait on an open-ended basis for when it might be possible for the claimant to apply for vacancies.

222. When we analysed this allegation it reemphasised our view that the respondent had failed to take a reasonable step of obtaining up to date medical advice. As we have already made clear our view was that sauch advice should have included information as to why the claimant was unable to participate in the process including the redeployment process, the prognosis for how long that situation was likely to last and information as to any adjustments that could be implemented to enable the claimant to participate. As we explain in more detail below however arranging for a further health assessment is not in itself a reasonable adjustment and therefore the appropriate discrimination claim for that

failure was in our view under section 15 EqA and that is why we have upheld that claim.

223. The sixth PCP (16.6) was the respondent applying its attendance management procedure, the application of it and the final resolution meeting process potentially leading to dismissal. The substantial disadvantage claimed is that the claimant was unable to participate in such procedures and/or processes from 11 March 2021 onwards by reason of her being too unwell to do so and/or having received advice not to think about work matters whilst she recovered and this was related to the claimant's anorexia and/or her mental health disability.

224. Again, we think there is a disadvantage here which is linked to the claimant's disability. In particular the claimant was too unwell as a result of her disability to do anything work related and this meant the claimant was unable to participate directly in the process that was applied by the respondent. This PCP put the claimant at that substantial disadvantage compared to some without her disability. The respondent knew about that from Mrs Price. However the reasons for it, the claimant's particular medical situation at the time, the prognosis and whether the disadvantage could be overcome are all unclear because of the respondent's failure to obtain relevant medical evidence at the time.

225. The claimant proposes three adjustments that should been taken to avoid this disadvantage:

237.1 Firstly that the final resolution meeting should have been delayed until the claimant was well enough to participate.

237.2 Secondly that medical advice should have been obtained to inform how long that process was likely to take.

237.3 Thirdly that the respondent should have provided a clear period of time where the process was explicitly paused to allow the claimant time without thinking about work matters to assist with her recovery.

226. We think we can deal with the first and third proposed adjustments together. In essence they both amount to delaying or pausing the process and as we have already said we do not consider it would be reasonable to expect the respondent to pause or wait on an open-ended basis. It is notable that the proposed adjustments do not include any time scale for how long the process should be delayed for. This is because it is unknown when the claimant may have been well enough to participate. It would have been arbitrary and unreasonable to expect the respondent to wait for a specific period when there was no information suggesting that the claimant could have been well enough to participate within that period. Similarly it would not be reasonable to expect the respondent to delay the process indefinitely.

227. The second proposed adjustment was to obtain medical advice. We have already identified that the respondent should in our view have obtained further medical advice and such advice should have included when the claimant was likely to be able to return to work or to participate in the process and how the

process could be adjusted so that the claimant could participate. Once such advice had been obtained the respondent would have been in a position to consult with the claimant. The respondent's failure to take this crucial step has resulted in our findings of unfair dismissal and discrimination arising from disability.

228. However, when we analysed this failure in the context of a reasonable adjustments claim we had to bear in mind that consulting an employee or arranging for a further occupational health assessment is not in itself a reasonable adjustment because such steps do not remove any disadvantage: Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT. The only question is, objectively, whether the respondent has complied with its obligation to make reasonable adjustments. There is no separate and distinct duty on an employer to consult with a disabled worker or obtain up to date medical advice. The decision in Tarbuck has been followed in subsequent cases at EAT level and in Rider v Leeds City Council EAT 0243/11 the EAT held that the carrying out of an assessment as to what reasonable adjustments might be made in respect of a disabled employee was not, of itself, capable of amounting to a reasonable adjustment.

229. The claimant's proposed adjustment to obtain medical evidence to inform how long the process may take if the respondent were to wait until the claimant was well enough to participate is a step that would be likely to lead to the respondent being better informed, however it is not a proposal for practical action which could remove the disadvantage. We therefore concluded that the second proposed adjustment could well have identified appropriate adjustments, such an appropriate period of time to delay the process, but it is not a reasonable adjustment in itself because in itself it is not something that could have removed the disadvantage.

230. When we further analysed the situation to see if there were any other adjustments which could have removed the disadvantage we could not think of anything specific. We could only repeat our view that what the respondent got wrong was to fail to obtain up to date medical advice. We consider that the appropriate discrimination claim for that failure was under section 15 EqA and that is why we have upheld that claim. A separate claim for reasonable adjustments about this failure was for the reasons we have explained inapt.

231. The seventh PCP (17.1) was dismissing employees with pay in lieu of notice rather than allowing them the option of remaining employed during their notice. The claimed substantial disadvantage was that the claimant was more adversely affected by the sudden change of status of employment without the period of notice than a person without autism.

232. For reasons we have already explained we do not consider that in reality there was any substantial disadvantage here. It is simply not accurate to say that there was a sudden or unexpected change for the claimant. Dismissal had been on the cards for a very long time and the claimant must have realised it was coming, particularly as she was heavily supported both by her trade union and her advocate.

233. We don't consider that dismissing with pay in lieu of notice rather than on notice created a substantial disadvantage in circumstances when the claimant was not in work and was too ill to participate in any work-related activity. There was in our view no cogent evidence that the claimant was more adversely affected by being dismissed without a period of notice than a person without autism. We acknowledge the claimant was upset at having been dismissed but in our view it is quite clear that this arises from the fact of her dismissal rather than her having been dismissed with pay in lieu of notice.

234. Had we found the claimant was put at the claimed substantial disadvantage we would find that the respondent did not know and could not reasonably have been expected to know that the claimant was likely to be placed at the disadvantage. This is because there was no reason for the respondent to anticipate that paying PILON would have an adverse effect on the claimant and no reason to think that medical advice would have identified such a risk.

235. Furthermore, we do not think it would be reasonable to expect the respondent to provide the claimant with the option of remaining employed during her notice period in circumstances where there was no benefit to the claimant in remaining employed because of her inability to participate in any work-related activity. We do not think that the claimant staying at home during her notice period would have made the effect of dismissal on her any less adverse than being paid in lieu of notice. Therefore the proposed adjustment could not in our view have alleviated any substantial disadvantage.

236. For these reasons the claim of failure to make reasonable adjustments would fail.

Harassment

237. We will take things slightly out of order and deal with the disputed matters at paragraph 24 of the list of issues first.

238. Issue 24.1 was an allegation that Emma Garner publicly called the claimant out for having been put on the development plan in front of a roomful of colleagues on 22 April 2020. The claimant gave clear, cogent and credible evidence about this particular matter in her witness statement. She also made a contemporaneous complaint about it to her union representative at the time, it formed part of her grievance raised shortly afterwards and it was part of an in-time complaint to the employment tribunal. This amounted to a compelling body of evidence in support of this allegation.

239. In contrast the respondent did not call Emma Garner to give evidence and it did not explain why not. The only evidence Mr Gidney was able to point to was a grievance investigation carried out by Mr Shapland in relation to this allegation in which he recorded that he had interviewed Emma Garner and one other individual and had not been able to find any evidence to support the allegation.

240. We should note however that Mr Shapland made it clear in his grievance investigation outcome that he was not saying that the allegation did not take place. Also, he did not give any further details as to what investigation he had undertaken and he did not explain who else he had asked about it. Bearing in mind the substance of the allegation was that it was said in front of a roomful of colleagues it would have been important for any thorough investigation to attempt to speak to those who was allegedly present.

241. In these circumstances the evidence relied upon by the respondent in relation to this allegation was extremely thin. The claimant's account was in fact barely challenged. We concluded on the balance of probabilities that the claimant's account of what took place was accurate. The claimant's account was given at paragraph 422 – 426 of her witness statement as follows:

"On the 22 April 2020 I was working with my supervising manager WM Gordon taking calls. I was keen to ensure that I improved my social communication the best I could and asked her if she had any feedback for me as to how I was that day. She said there were no problems with my manner and that she could see I was making a big effort. My line manager, CM Garner, then called across the room, in front of everyone else, that she did not like how I was coming across. In front of everyone she made reference to the 19 April 2020 meeting and being put on a Development Plan for how I at times spoke to people and said that I needed to 'reflect on it before next tour' as she would be sat with me and 'would not stand for it'.

I had not been defensive, argumentative or anything else negative, in fact at the time I was laughing with my mentor, and yet instead of coming and talking to me and explaining politely and privately what she had a problem with, she believed it appropriate to call out across the whole room, in front of my colleagues half of whom knew I had a disability and half of whom had no idea about my disability. I found this humiliating and deeply distressing and upsetting.

As soon as I was sent for a break following this incident, I called my FBU union rep Adam Joyce and told him what had happened as I was very upset and felt humiliated by what CM Garner had said in front of everyone.

The issues of the meeting on the 19 April 2020 and my Development Plan were directly linked to my disability, and she should not have disclosed this disability related Development Plan to the rest of the watch, or in my view any Development Plan.

After this incident I spoke to WM McCann and SM Whitmore about help explaining to my watch about my Autism. I explained that I felt awkward about telling people I had Autism and I wasn't sure that I wanted to but at the same time an incident had happened where something was called across the room making it clear there were problems and I felt because of this I had no choice but to tell my colleagues about my disability so they didn't just think I was being put on a Development Plan for an attitude problem. I should not have been put in a position where I felt I had to disclose my disability to others on my Watch because of what my line manager had called out across the room in front of everyone.

The watch knew I was being taken out of the Fire Control room for big meetings, so I'm guessing a lot of them knew I was on capability. That's humiliating enough without my manager adding to the humiliation of people thinking I'm not capable of even behaving appropriately."

242. We accept the claimant's account as set out above. We also accept the claimant's explanation as to why this was related to her disability and how and why it had a humiliating effect upon her. We accept that the claimant was humiliated in the way she described above and we think it was reasonable for the conduct to have had that effect.

243. We find that Emma Garner's conduct in publicly calling the claimant out was unwanted. The claimant did not want the fact that she had been placed on a development plan to be public knowledge. The claimant plainly viewed it as a confidential matter and she wanted it kept private. This was understandable and it was reasonable in our judgement for the claimant to take that view.

244. We find that the comments made by Emma Garner were related to the claimant's disability because they were related to her behaviour caused by her disability which led to her being put on the development plan. As we have already found the claimant's autism caused her to have social communication difficulties which led to her behaviour being viewed as confrontational and her being placed on a development plan. As Ms Snocken correctly pointed out in her written closing submissions there were multiple references in the evidence before us to the claimant having social communication difficulties arising from autism and we consider it very likely those led to her behaviour being viewed as confrontational. Calling the claimant out for having been placed on the development plan was therefore directly related to her autism. As her line manager Emma Garner would have known of the claimant's disability and how it impacted her at the time. We find that when Emma Garner publicly called the claimant out in front of a roomful of colleagues that had the effect of creating a humiliating environment for the claimant. We accept that was the claimant's perception. There were relevant circumstances in that the claimant was struggling to cope with the demands of her fire control role due to her disability and that made it a difficult and stressful time for her, especially since she had already had to move from firefighting due to capability concerns. In that context we found it was reasonable for the conduct to have had the effect of creating a humiliating environment for the claimant.

245. We make it clear that our finding here is based not on the fact of the claimant being placed on a development plan but on the public calling out of the claimant for having been put on that plan. This was an entirely inappropriate way for Emma Garner to treat a disabled colleague and we consider it to have constituted disability related harassment for the reasons we have explained.

246. In contrast however, we do not uphold the claimant's allegation of harassment which relates merely to the fact of being put on the development plan (allegation 23.1). We would accept that this related to the claimant's disability as it was her social communication difficulties due to autism which is likely to have been the cause of her confrontational behaviour that led to her being put on the

plan. However we do not accept that it was unwanted when the purpose behind the plan was to identify the claimant's inappropriate behaviour and provide the claimant with support so that formal disciplinary action could be avoided. We think the claimant (probably like any other employee) would have wanted to avoid formal disciplinary action. Moreover we do not think putting the claimant on the plan came close to having the purpose or effect required to constitute harassment. We refer to our findings to the effect that it was a support mechanism for the claimant so as to avoid disciplinary action and it was plainly necessary for the respondent to take steps to immediately address and try and improve the claimant's behaviour, especially in the context of the safety critical enforcement of fire control. We also refer to the extract from the claimant's evidence we have cited above. The claimant's account of her discussion wit her supervising manager on 22 April indicates that the plan was working. The claimant was doing her best, her mentor identified there had not been any problems that day and the claimant was sable to discuss her progress with her in what seems to have been a light-hearted way. This reinforces our finding that being placed on the plan did not have the purpose or effect required to constitute harassment.

247. Allegations 24.2 and 24.3 related to the claimant being required to go through a capability procedure as a condition of moving to fire control in September to October 2019 and then being kept on that procedure once she had started in fire control from October 2019 onwards. We have already found that the claimant was required to go through a capability procedure and was then kept on that procedure. We therefore accept that the respondent did the matters identified in allegations 24.2 and 24.3.

248. Allegation 24.4 was that the claimant was put on a monitoring of work system that was more excessive than other newly graduated fire control officers. We find that this particular allegation fails on the facts.

249. We find that the claimant's work was not monitored excessively or to any greater extent than other newly graduated fire control officers. Again, we had particular reference to Mr McCann's evidence when considering this allegation and once again we found his evidence on this matter to be clear, cogent and credible and we accepted it.

250. Mr McCann explained that the claimant's work was not monitored to any greater extent, but he introduced a system of recording the claimant's progress which was novel. The system of recording did not hold the claimant to a higher standard or monitor her to a greater extent than anybody else – it was simply a way of recording the claimant's progress in a clear and accessible way. This was beneficial to both the claimant and the respondent. We do not see how the claimant can say that she did not want her progress to be recorded in a clear and accessible way. It cannot possibly be said to have had the purpose or effect required to constitute harassment. Furthermore, the system which Mr McCann introduced was rolled out to other trainees on different teams and so it was not related to the claimant's disability.

251. What we are left with under the heading of harassment related to disability are the claimant's allegations at 23.2 to 23.6 which the respondent has accepted

as a matter of fact took place, and 24.2 to 24.3 which we have found as a matter of fact took place. We now have to consider whether the conduct identified in those allegations was unwanted, whether it was related to disability and whether it had the purpose or effect required to constitute harassment.

252. We should observe that these allegations relate to the claimant's complaints about how the capability process was handled and how she was managed while she was under the capability process. We have found that the claimant's complaints about these matters do not have much substance. Although we found there was a few missteps along the way our overall perception of the process was that the respondent made serious and sustained efforts to support the claimant and try and get her back to work in some capacity. Our key finding has been that the respondent failed to take a crucial step of obtaining up to date medical evidence at the time of dismissal but that does not form part of the claimant's case on harassment. The claimant's case on harassment instead focused on what seem to us to be less significant procedural complaints about the capability process and her management which do not accord with our overall findings as to how the process was conducted.

253. We doubted whether it was realistic for the claimant to pursue her procedural complaints about the capability process as a claim of harassment. Perhaps sensing that this was not the strongest part of the claimant's case we were encouraged by Ms Snocken on behalf of the claimant to consider the cumulative effect of these allegations when considering whether it amounted to harassment related to disability. We have done so and been careful to consider the allegations both individually and cumulatively.

254. We would accept that the matters complained of were unwanted in the sense that the claimant would ideally not want to go through a capability process at the end of which she may lose her job. We would accept that the allegations related to the claimant's disability in the sense that they related to the claimant's lack of capability to do her job which we consider was caused by her disability. However whether looked at individually or cumulatively this was plainly not in our view conduct which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. This was not the respondent's purpose; the respondent's purpose was to address what was a clear capability issue with the claimant in order to ensure that it had a capable workforce. The claimant appears to have formed the perception at a late stage that the conduct had a harassing effect but we have no doubt that it was not reasonable for the conduct to have had that effect. The relevant circumstances include that it was clear that it was reasonably necessary for the claimant to be taken through a capability process. There was no stage within that process when the claimant was in any sense blocked from remaining in employment with the respondent. Redeployment was kept open as a possibility for a long period. It cannot be said that the process was at any stage sped up or forced through; on the contrary the process was delayed so as to give the claimant the best chance of remaining employed. The respondent approached the process with an open mind and made serious attempts to keep the claimant in work over a lengthy period.

255. We therefore would dismiss the harassment claim with the exception of the allegation concerning Emma Garner which we found succeeded.

Victimisation

256. It was accepted that the claimant did the following protected acts:

265.1 She presented her first employment tribunal claim on 19 August 2020 in which she complained of multiple breaches of the EqA by the Respondent.

265.2 She made allegations in her grievances on 6 May 2020 (revised on 18 November 2020), 14 April 2021 and/or 22 April 2021.

265.3 (Through her advocate) By email on 15 February 2021, raising disability discrimination concerns about Station Commander Kelly Whitmore in relation to refusing a reasonable adjustment of a CCdr Development Plan.

257. It was also alleged that the respondent believed that the claimant might do further protected acts, in that:

266.1 The respondent believed (and in particular, though not limited to, ACdr Barry's belief) that the claimant may continue with her first employment tribunal claim and/or present further claims.

266.2 The respondent believed (and in particular, though not limited to, ACdr Barry's belief) that she may make further formal grievances alleging breaches of the Equality Act 2010.

258. We accept that the respondent believed that the claimant might do further protected acts in the ways alleged above. We consider it's likely given the history of the case and the claimant's approach to raising grievances and making claims that the respondent, and in particular Mr Barry, in all likelihood believed that she may present further claims and grievances. However, we saw no evidence at all that that was a concern that caused Mr Barry or the respondent to act in a particular way. We did not consider that the claimant was subject to any detriment because the respondent, and in particular Mr Barry, believed that she might do further protected acts.

259. The victimisation element of the claimant's claim appears to have arisen from Mr Barry's indication that he was considering the dismissing the claimant for some other substantial reason ("SOSR") in around December 2020. Mr Barry identified that there may have been a breakdown in trust and confidence and he related that to the claimant's submission of multiple disability discrimination grievances. In our view this does not provide any foundation for the claimant's victimisation claim. Mr Barry made it quite clear at the time (and this was also explained in his oral evidence which we accept) that his concern was not the fact of the claimant having raised disability discrimination grievances but the way in which the claimant was utilising the grievance procedure. This was what Mr Gidney referred to as the claimant's "weaponization" of the grievance procedure.

260. Although we have said that we would not go quite as far as Mr Gidney we think there were reasonable grounds for Mr Barry to have the concerns that he did. As we have observed the claimants' grievances were lengthy and unwieldy. There was an excessive amount of information presented which was then added to in a way which was difficult to understand and digest. Our view was that the claimant was overwhelming the respondent with grievance issues, and it became unclear how best to deal with them. There were agreements reached to stop or pause various parts of the grievances but then further information was submitted and/or the grievance was restarted. In our view therefore Mr Barry was correct to identify that the claimant's use of the grievance procedure was inappropriate and that this may have caused a breakdown in trust and confidence.

261. There is clear authority that the anti-victimisation provisions provide no protection if the detriment is inflicted not because the employee has carried out a protected act but because of the manner in which they have carried it out (Re York Truck Equipment Ltd EAT 0109/88, for example). In Martin v Devonshires Solicitors 2011 ICR 352 the then President of the EAT Mr Justice Underhill endorsed an approach that distinguishes between a protected act and the manner of doing that act. In a later case in the Court of Appeal, Lord Justice Underhill made further observations as to the correct application of the principle; Page v NHS Trust Development Authority 2021 ICR 941.These judgments make it clear that there will be cases where the reason for the detriment was not the protected act but some feature of it which could properly be treated as separable — such as the manner in which the protected act was carried out.

262. In our view it is quite clear that Mr Barry's concern was the manner in which the claimant was using the grievance procedure rather than the protected acts themselves. We saw no evidence that Mr Barry was attempting to restrict or prevent the claimant from having properly raised grievances heard. His concern, which we consider was valid, was the claimant's improper use of the grievance procedure.

263. The claimant relied on 9 detriments. It was agreed that the respondent did the following (recorded at paragraph 32 of the list of issues):

a. Refused to allow the Claimant access to the redeployment list between 12 November 2020 and 16 February 2021.

b. On 12 March 2021 arranging for a final resolution hearing to take place (on either 21 or 22 April 2021) before the end of an allowed time period on the redeployment list (up to 21 May 2021).

264. We accept that the first of these was a detriment. As we mentioned in our findings we understand the claimant's point of view that it would have been better if she remained on the redeployment list. We think a reasonable worker would consider that being refused access to the list was a detriment. However we also found that the reason why Mr Barry took the claimant off the list was because he was aware that the options for the claimant were as identified in his letter of 12 November. He was operating - as was the claimant at this time - under the mistaken belief that the claimant's contracted role was as a firefighter. As the

claimant was in fact medically assessed to be capable of performing that role and he was working towards getting the claimant back into it there was in Mr Barry's mind no reason for her to remain on the redeployment list. We found that there was a clear logic behind Mr Barry's position and his decision was also influenced by the fact that the claimant had by this stage already been on the redeployment list for well over a year and she had applied for very few positions. Therefore this was not done because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act.

265. In relation to the second matter above we found that on 12 March 2021 the claimant was invited to a final resolution hearing by Mr Barry to take place on 21 or 22 April 2021 and she was informed that she would remain on the redeployment list for three months from 17 February until 21 May 2021. The substance of the claimant's complaint is that by Mr Barry proposing to have the final resolution meeting in April he was also cutting short the time he intended her to have on redeployment until May. We do not consider there was in reality any detriment here and a reasonable worker would not take the view that they had been subjected to a detriment. Mr Barry assured the claimant in the letter that she would remain on the redeployment list for a reasonable period (which he believed to be 3 months) and there was no reason for the claimant to doubt that assurance. The proposed meeting in April did not take place and the claimant's time on the redeployment register was not curtailed. At the relevant time the claimant's position, as expressed by Mrs Price, was that she was too unwell to look at any redeployment opportunities. Even if the meeting in April had taken place and a decision taken to dismiss the claimant this does not necessarily mean that her time on the redeployment register would be curtailed; the respondent could have postponed the termination date of the claimant's employment or allowed her to remain on the redeployment register during her notice period. In any event we find that Mr Barry acted in the way he did because the claimant had been deemed medically incapable of performing either of the roles she had been contracted to do, she had already been through a lengthy period on the redeployment list and Mr Barry's efforts to resolve the situation since around July 2020 had not succeeded. It was not done because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act.

266. The 7 remaining detriments relied on by the claimant (set out at paragraph 31 of the agreed list of issues) were all disputed. We will set out our findings on whether the respondent did the things alleged, whether by doing so it subjected the claimant to detriment and was it because of a protected act or because the respondent believed the claimant might do a protected act.

267. Allegation 31.1 was that the respondent threatened to utilise 5 different reasons to dismiss the Claimant between 12 November 2020 and 25 February 2021. We partially accept this allegation took place. Although the relevant correspondence could be better written we consider it was relatively clear that the respondent was communicating that the claimant may be dismissed for 2 different reasons: capability and SOSR (namely a breakdown in trust and confidence due to the claimant's inappropriate use of the grievance procedure). We accept that threatening dismissal was a detriment. However we find this was

done because of the claimant's lack of capability and the fact that Mr Barry viewed her use of grievance procedure as inappropriate leading to a concern that trust and confidence had broken down. As we have already explained we consider it was clear that Mr Barry's concern about trust and confidence was related to the manner of the claimant using the grievance procedure which was separable from the protected acts themselves. Therefore the threat of dismissal was not done because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act.

268. Allegation 31.2 was that the respondent the respondent linked a threat to dismiss by SOSR with the claimant's submission of multiple disability discrimination grievances on 17 December 2020. We accept this occurred but we have already set out our findings that Mr Barry was referring to the claimant's inappropriate use of the grievance procedure rather than the protected acts. We have accepted the threat of dismissal was a detriment but for the reasons we have explained it was done because of the manner in which the grievance procedure was being utilised. It was not done because of a protected act or because the respondent believed the claimant had done, or might do, a protected act.

269. Allegation 31.3 was that between 2 November 2020 and 29 June 2021 the respondent didn't follow policies and procedures (Capability, Attendance Management, Re-organisation, Redeployment and Redundancy). This allegation is extremely broad. It relates to the claimant's procedural complaints about how the respondent conducted the capability process, which are wide ranging. With the exception of the failure to obtain up to date medical evidence we have not found the claimant's complaints about the process to have much substance. We agree that it was unclear which procedure should have applied and this was unhelpful but overall we are satisfied the respondent acted reasonably in applying the policy which it considered to be most appropriate at each particular stage and responding to what was a developing situation. We have considered the specific procedural concerns which the claimant raised. We are not satisfied that the claimant was subject to any real detriment considering the meetings which took place and the extended time which the claimant spent on the capability and redeployment processes in which she was supported. In any event we do not consider that there was any basis at all for the suggestion that any procedural failings might be connected to any protected act. Any failures were most likely to be related to a lack of clarity in the respondent's procedures and were not done because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act.

270. Allegation 31.4 was that the respondent didn't discuss or address the health and safety and discrimination concerns the claimant raised about returning to firefighting in her letter of 27 November 2020. This allegation fails on the facts. We found that Mr Barry did make attempts to discuss and address the claimant's concerns but he made it clear that the detail of those would be discussed once the claimant returned to work in firefighting. As there was no return to firefighting the detail of the six-month plan was not in the end discussed but it is not accurate to say that the claimant's concerns were not discussed or addressed at all. The claimant was not subjected to any detriment here. The claimant was reassured

that the detail of her concerns would be discussed once she was in a position to move to firefighting. There was no reason for the claimant to doubt the assurance she was provided with by a senior member of the respondent. A reasonable worker would not consider there was a detriment here. We would therefore find that the allegation did not take place and there was no detriment. Furthermore if there was a detriment related to Mr Barry not sufficiently discussing or addressing the claimant's concerns there's no basis for any suggestion that it had anything to do with any protected act. This was done because Mr Barry was a senior figure in the respondent and he decided to leave the detail of the discussions until the claimant returned to firefighting so that they could be had with people the claimant would actually be working with. It was not done because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act.

271. Allegation 31.5 was that between 17 December 2020 to 15 February 2021 the respondent claimed firefighting was 'suitable alternative employment', despite the claimant raising serious health and safety concerns, and despite the job role being completely different to her contracted role. We find that the respondent did consider in this period that firefighting was, or at least could be, suitable alternative employment for the claimant. We also accept that the claimant raised concerns about it and it was different to her contracted role in fire control. However we did not consider there is any detriment here. The claimant was assured her concerns would be addressed. The view that firefighting was suitable alternative employment was consistent with the medical advice available at that time. By this stage it was clear that the claimant could not do the role in fire control and it was reasonable and to the claimant's advantage to explore alternatives. It was not detrimental to pursue firefighting as a suitable alternative since that was the role the claimant had originally applied to do the fire service to do and it was her dream to do it. A reasonable worker would no consider they had been subjected to a detriment in these circumstances. In any event we find that the reason why firefighting was considered suitable alternative employment was because that was the medical opinion up until February 2021 and the respondent knew it was what the claimant had originally wanted to do. Again, there's no basis for any suggestion that this had anything to do with a protected act. It was not done because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act.

272. Allegation 31.6 was that the respondent unfairly and unreasonably sped up the dismissal process from 12 November 2020. We did not find that the respondent did that. We refer to the findings we have already made and in particular that Mr Barry had been involved with the claimant's case since around mid-2020. He cancelled the final resolution hearing which had originally been scheduled to take place in May 2020 and it was only in November 2020 that he began to progress the case back to a conclusion once it became clear that matters were not going to be resolved informally. The final hearing did not then take place until June 2021 and against the lengthy background of the claimant struggling with capability that we have set out above we do not think the process can at any stage he said to have been unfairly sped up. We focused on the period from November and we saw no evidence of an unfair or unreasonable speeding up in that period. In our view matters needed at that stage to be brought to a

conclusion for everybody's benefit and it was fair and reasonable to do so. We therefore find that this allegation fails on the facts and there was no detriment to the claimant. Furthermore, even if there was a detriment to the claimant relating to the speed of the process from November 2020 there's no basis for any suggestion that this had anything to do with a protected act. It was done because the respondent (reasonably and correctly in our view) believed that the capability process needed to be brought to a conclusion. It was not done because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act.

273. Allegation 31.7 was that on 25 February 2021, just a week after starting to be managed under the Attendance Management Policy and being put on the redeployment list (17 February 2021), Mr Barry changed the forthcoming meeting titled 'next steps' meeting to a final resolution meeting (to be convened on either 12 March 2021 or 19 March 2021). The claimant points out that this followed her raising disability discrimination concerns concerning Kelly Whitmore and the earlier final resolution hearing date would mean that the claimant would only have been back on the redeployment list for 3 weeks, and the later one for 4 weeks.

274. We find that Mr Barry did write to Mrs Price on 25 February 2021. He cancelled a next steps meeting which was scheduled for 1 March and proposed a final resolution hearing on 12 or 19 March. We did not consider that in context Mr Barry's attempt to conclude the process by progressing to a final resolution hearing at around this time was a detriment. The recent occupational health advice was clear and suggested that a conclusion could be reached; the claimant was not fit for any operational role but she could be redeployed into a non operational role. Mr Barry had been attempting to resolve the matter since around July 2020 and he had postponed the original final hearing which had been scheduled to take place in May 2020. The claimant had already had a long period on the redeployment register. The final resolution hearing was not simply a vehicle to dismiss the claimant. Dismissal was not the inevitable outcome of such a meeting. The capability procedure makes it clear that redeployment must be considered at a final resolution hearing, and it seems to us that would have been an important part of any final resolution hearing had one taken place at that stage. In these circumstances it seems to us clear that it was necessary and in everyone's interests for the matter to be concluded one way or another at the final hearing.

275. Furthermore, Mr Barry gave his reason for his decision to progress to a final hearing in the letter he sent at the time; it was because it had become clear by that point that the claimant was medically unable to do either of the roles she had been contracted to do (firefighting or fire control). This is consistent with the evidence Mr Barry gave to the tribunal, in particular at paragraph 36 of his witness statement. We accept that evidence. Therefore allegation 31.7 was not done because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act.

276. Overall, we consider that there was no cogent evidence that the respondent subjected the claimant to any detriment because of a protected act

or because they believed the claimant might do further protected acts. We would therefore find that the victimisation claim should fail and be dismissed.

Polkey reduction

277. It was agreed that we should consider the amount of any Polkey reduction as part of this liability judgment. A Polkey reduction may be applied where there was a chance that the claimant would have been fairly dismissed anyway. In closing submissions both counsel acknowledged this is a case in which a Polkey reduction should be made if we found the dismissal to be unfair. Mr Gidney suggested that the reduction should be 80%. Ms Snocken suggested it should be 20%. Nobody suggested that the claimant's employment would have ended after a defined period. It was therefore agreed that there was a chance that the claimant would have been fairly dismissed anyway and a Polkey reduction should be made. The issue for us to determine was what the percentage chance of a fair dismissal was.

278. There is clearly a significant chance that the claimant could have been fairly dismissed for capability given that she was signed off from March to at least August 2021. This was against the lengthy background of absence and capability concerns that we have set out above. The claimant had been deemed medically unfit for any operational role in February 2021. Furthermore, the claimant had had two lengthy periods on the redeployment list without success and at the time of dismissal she was reported by Mrs Price to be too unwell to undertake any work-related activity whatsoever. There was no indication of a likely return to work date (albeit the respondent did not obtain medical opinion in order to ascertain whether an indication could be given).

279. As against that we consider that the failure to obtain up to date medical information was a very serious shortcoming. There is in our view an equally significant chance that had the respondent obtained proper medical evidence the claimant's concerns could have been addressed so that she could within a reasonable time scale have been able to engage in the process with a view to obtaining a non-operational role through redeployment. As the claimant's work in the supernumerary position showed she was recently capable of undertaking such work and according to the most recent medical report had been "thriving" in a non-operational role up until March 2021. Further, the occupational view was that the claimant needed a continuation of management support and dialogue in order to maintain her fitness to undertake non operational roles. We think operational health would have been well placed to advise on how such support and dialogue could be reestablished had a further report been commissioned and a case conference taken place. We think given the history of the case and the claimant's extensive engagement with management in the past there is a significant chance that dialogue could have been established if more had been done by way of medical advice to understand the deterioration in the claimant's health, the reasons for it and how support could be offered. A return to work date could then have been identified and the claimant could have been redeployed into a non operational role. We think that was a realistic possibility had the respondent acted reasonably.

280. Balancing these factors against each other and taking everything into account we think that the percentage chance of a fair dismissal is 50% and this should be the amount of the Polkey reduction. This is at the median point between the two percentages suggested by counsel and this reinforces our view that it's the appropriate figure in this case.

Acas code

281. It was agreed that we should consider the amount of any increase or decrease to the award as a result of a failure to follow the ACAS code as part of this liability judgment. The claimant raised formal grievances. The ACAS Code of Practice on Disciplinary and Grievance Procedures applied. This was not disputed. We find that the respondent unreasonably failed to comply with the code in the following ways:

287.1 In relation to grievance 1 the respondent failed to hold a formal meeting with the claimant to discuss the full grievance.

287.2 The respondent failed to carry out necessary grievance investigations to establish the facts of the case. There was a failure to investigate the majority of grievances 1, 2 and 3.

287.3 The respondent failed to communicate a decision on the claimant's grievances, in writing, without unreasonable delay, and where appropriate, setting out the action the respondent intended to take to resolve the grievances. There was no outcome provided for the majority of grievance 1. It was an unreasonable delay for Grievances 2 and 3 to wait until after the claimant had been dismissed. The respondent then refused to deal with the parts of grievances 2 and 3 that Mrs Price indicated the claimant did not wish to be dealt with by an external investigator. We think this was an unreasonable decision by the respondent as Mrs Price had made it clear the claimant still wished for the grievances to be dealt with in the normal way; she just did not want an external investigator. As Mrs Price explained to the respondent at the time the claimant had confidentiality concerns about an external investigator being used and she wished for the grievance to be dealt with under the respondent's usual policy which entailed an internal investigation. We think this was a reasonable standpoint for the claimant to take. The consequence of the respondent's decision was that grievances 2 and 3 were not properly investigated and there was no outcome communicated, other than the decision to close the grievances down.

287.4 The respondent failed to arrange for the claimant's grievance appeal to be heard without unreasonable delay. The claimant indicated that she wished to pursue an appeal against a partial grievance outcome on 17 November 2020 and it was unreasonable in our view for that not to be heard until 14 and 26 July 2021 and the result not delivered until 10 August 2021, especially since the claimant was dismissed in the interim.

287.5 There was no appeal granted against the decision to close down grievances 2 and 3. In our view this was an egregious failure as the claimant was not given a right of appeal against the significant decision not to hear her grievances, and we consider that a fresh pair of eyes could have reached a more balanced decision in view of the claimant's standpoint summarised above.

287.6 Overall we agree with the claimant's submission that there was a failure to dela with the grievances fairly, and in particular consistently.

282. These were significant failures, and we take into account the detrimental impact of the failures upon the claimant.

283. Balanced against that however we acknowledge the volume and detail of the claimant's grievances which as we have said we think the respondent found overwhelming and we further recognise that the claimant's use of the grievance procedure was excessive and unhelpful as we have described. We should also say that we do not think there was any malicious intent by the respondent to not deal with the claimant's grievances and there was at least a partial attempt to deal with them properly. We also agree with Mr Gidney that we should bear in mind proportionality.

284. Taking everything into account we have decided that it is just and equitable to increase the award payable to the claimant but not by the maximum proportion. We have determined in view of the factors summarised above that the appropriate level of uplift in this case is 10%.

Result

285. We confirm our decisions as follows:

237.1 The claimant was unfairly dismissed.

237.2 The claimant was subjected to discrimination arising from disability in respect of her dismissal.

237.3 The claimant was subjected to harassment related to disability in respect of the comments made by Emma Garner on 22 April 2020.

237.4 The other claims and allegations brought by the claimant fail and are dismissed.

237.5 We will apply a 50% Polkey reduction and a 10% uplift for failure to follow the ACAS code to our remedy decision.

286. That concludes the tribunal's judgment.

Employment Judge Meichen
01 August 2023