EMPLOYMENT TRIBUNALS

Claimant: Mr R Moss

Respondent: Staffordshire Fire and Rescue Service

Heard at: Midlands West

On: 20, 21, 22, 23, 24, 27 February 2023
and (in chambers) 28 February and 17 April 2023

Before: Employment Judge Faulkner
Mrs S Bannister
Mr S Woodall

Representation: **Claimant** - Miss S Johnson (counsel)
Respondent - Ms H Winstone (counsel)

JUDGMENT

1. The Respondent did not make unauthorised deductions from the Claimant's wages. The complaint of unauthorised deductions from wages is accordingly not well-founded.

2. The Respondent did not contravene section 39 of the Equality Act 2010 by:

2.1. Discriminating against the Claimant because of something arising in consequence of disability.

2.2. Indirectly discriminating against the Claimant.

2.3. Failing to make reasonable adjustments.

3. The Claimant's complaints of discrimination are dismissed accordingly.

4. The reason or principal reason for the Claimant's dismissal was not that he had taken part in the activities of an independent trade union at an appropriate time. The Claimant was dismissed for the fair reason of capability.

5. His dismissal for that reason was unfair. His complaint of unfair dismissal is therefore well-founded.

6. The remedy for unfair dismissal will be considered at a further Hearing.

REASONS

1. The Final Hearing of this matter was listed for seven days as above. It was not possible for the Tribunal to complete its deliberations on 28 February and therefore not possible to deliver oral judgment within the Hearing window. The Reasons below are provided in response to a request from the Claimant made orally towards the end of the Hearing, in which he made clear that he wanted written Reasons regardless of the outcome of the case.

Complaints

2. This Hearing was concerned with the complaints set out in the Claimant's Claim Forms presented on 15 May 2020 ("Claim 1") and 3 June 2021 ("Claim 2") respectively. Taking the two Claims together, he complained of unauthorised deductions from wages and unfair dismissal contrary to the Employment Rights Act 1996 ("ERA") and discrimination arising from disability, indirect disability discrimination and failures to make reasonable adjustments contrary to the Equality Act 2010 ("the Act").

Issues

3. The parties agreed a List of Issues ("the List") which is appended to these Reasons. The following refinements of the List were agreed on Day 1 of the Hearing:

3.1. The alleged unfavourable treatment at paragraph 3.1.1 was said to have been from 18 December 2019 onwards.

3.2. The alleged unfavourable treatment at paragraph 3.1.2 was agreed to be simply, "Reducing the Claimant's pay to half occupational sick pay" and it was agreed that this was from 26 February 2020 onwards.

3.3. The alleged unfavourable treatment at paragraph 3.1.3 was agreed to be simply, "Commencing a capability process".

3.4. The alleged unfavourable treatment at paragraph 3.1.4 was agreed to be simply, "Dismissing the Claimant on 19 January 2021".

3.5. The Respondent accepted that what is stated within the relevant parts of paragraph 3.1 constituted the reasons for the alleged unfavourable treatment but did not accept that these things arose in consequence of the Claimant's disability.

3.6. The Respondent accepted that it had knowledge of the Claimant's disability from September 2020 but not before.

3.7. The Claimant did not object to the Respondent relying on the additional legitimate aim set out at paragraph 3.3.2 for the purposes of both the section 15 and section 19 complaints.

3.8. The Respondent was said to have applied the provision, criterion or practice ("PCP") at paragraph 4.1.1 from 9 June 2019 to the effective date of termination of the Claimant's employment (the "EDT"), the PCP at paragraph 4.1.2 from December 2019 to the EDT, and the PCPs at paragraphs 4.1.3, 4.1.4 and 4.1.5 from October 2019 to the EDT, though the Claimant also said that the Respondent's Physical Fitness Policy and the requirement that he be fit for the role were applied from when the Policy was issued until the EDT.

3.9. The same PCPs were relied upon for the purposes of the complaints of failure to make reasonable adjustments (paragraph 5.2 of the List).

3.10. The Respondent accepted that the PCPs were PCPs in law and were applied both to the Claimant and to persons who did not share his particular disability. See further our Analysis below.

3.11. The Claimant says that he carried out the union activities at paragraph 7.2.1 from October 2019 to the EDT and those at paragraph 7.2.2 from July to December 2020.

3.12. The Respondent accepted that all but the Internal Dispute Resolution Procedure ("IDRP") pension disputes at paragraph 7.2.1 and the activities at paragraph 7.2.5 were instances of the Claimant taking part in the activities of an independent trade union at an appropriate time.

3.13. The complaint of unauthorised deductions from wages was said to cover the period 26 February to 30 June 2020.

3.14. All issues related to the Claimant's pay, as affected by the Respondent's Modified Duties Policy ("MDP"), concerned only his role as a wholetime firefighter, not his role as a retained firefighter.

Strike out application

4. The Claimant made an application on Day 1 of the Hearing to strike out the Respondent's Responses in their entirety, on the basis that its solicitors had sent a letter to his additional witness, Andrew Fox-Hewitt, on 15 February 2023 – thus shortly before this Hearing – reminding him of his obligations under a settlement agreement signed in August 2022, specifically a commitment not to make derogatory statements about the Respondent, indicating that his witness statement put him in breach of those obligations and indicating that he might be in further breach if he gave oral evidence. As a result of the letter, Mr Fox-Hewitt was reluctant to give oral evidence. The Claimant described this as "significant witness intimidation" and based his application on an assertion that the letter constituted scandalous, unreasonable or vexatious conduct of the proceedings.

5. In principle, whilst we would not necessarily encourage it as a common practice, there is nothing improper in a respondent reminding a witness of their obligations under a settlement agreement, thus protecting its position, provided of course the obligations in question are lawful and appropriate. Doing so however is something that requires considerable care.

6. We heard submissions from both parties and considered the letter very carefully. It was important for us not to trespass on any dispute as to whether what Mr Fox-Hewitt had written in his statement put him in breach of his settlement agreement. Our task was to determine whether writing the letter was scandalous, unreasonable or vexatious conduct by the Respondent, meriting a strike out. We considered that the Respondent could have more clearly spelt out which parts of the statement it was concerned about. It might even have invited Mr Fox-Hewitt to consider amending those parts of his statement and it might have carefully invited him to be sure not to make any statement in any oral evidence in breach of the agreement, as a way of assuaging its concerns. Although it is perhaps treading a difficult line, that is a far better approach than writing something which might be construed by a witness – and plainly had been so construed by Mr Fox-Hewitt – as dissuading them from giving evidence whatever they may say.

7. We made two observations about paragraphs 18 and 19 which Ms Winstone said were the parts of the statement the Respondent was concerned about:

7.1. First, we did not read them as saying that the dismissal appeal process or the appeal officer were corrupt, as Ms Winstone submitted was the case. Mr Fox-Hewitt essentially says no more than that there were contradictory responses given by the dismissing officer to questions asked of him by Mr Fox-Hewitt and that this in Mr Fox-Hewitt's view suggested a pre-determined outcome.

7.2. Secondly, what Mr Fox-Hewitt says seems on its face to be a non-sequitur. It plainly does not follow that the appeal officer pre-determined the appeal because the dismissing officer gave contradictory answers to questions (if indeed he did so).

8. We concluded therefore that the letter could have been better worded, including in the ways mentioned above. We did not think however that the content of the letter could be said to amount to scandalous, unreasonable or vexatious conduct on the Respondent's part. As we say, one party to an agreement is entitled to remind the other of their obligations, and to protect its position, and essentially that is what the letter did. We also make clear we saw nothing inappropriate with the relevant clause in the settlement agreement – it is, as Miss Johnson said, in standard form.

9. What was of more concern, and the focus of Miss Johnson's submissions, was the timing of the letter. We noted that the Respondent was aware of Mr Fox-Hewitt being a witness from April 2022, though it could not have sent any warning then of course because presumably it did not know he would sign a settlement agreement until August 2022. It could perhaps have sent a letter in August, but we do not think it can be fairly criticised for not doing so then either; it was perfectly entitled to see what he said before considering its position.

10. What was of concern was that the Respondent received the statement on 19 December 2022 and did not write to Mr Fox-Hewitt until the week before the Hearing. Even accounting for the Christmas and New Year break, we were not given an adequate, or any, explanation for that timing. Ms Winstone said this was the only criticism that could be levelled at the Respondent and we agreed that the Respondent's conduct in this regard merited criticism. We were satisfied

that on balance the timing of the letter did not put the Respondent on the wrong side of the line between what constitutes reasonable and unreasonable (or for that matter scandalous or vexatious) behaviour, but it was certainly regrettable and does not reflect favourably on it.

11. All of that said, even if the Respondent had behaved unreasonably (and we did not think the letter came near scandalous or vexatious conduct) either as to the content of the letter or its timing, it would have been plainly disproportionate to strike out the Responses as requested, because:

11.1. Mr Fox-Hewitt's statement was made only in support of the complaint of unfair dismissal – it says nothing about the discrimination complaints (as paragraph 3 makes clear), or at least nothing in relation to discrimination complaints which were not concerned with the Claimant's dismissal.

11.2. The statement is largely factual, and so almost entirely uncontroversial.

11.3. We noted what Mr Fox-Hewitt says at paragraphs 18 and 19, but did not think his evidence would assist us in determining the issues before us, because what he says is simply a record of his view about the appeal decision and his view about what the dismissing officer said at the appeal hearing. Those are matters about which a Tribunal must make up its own mind, based on the evidence it hears and Mr Fox-Hewitt's opinions on these points were not likely to make any difference to our conclusions.

11.4. To strike out the Responses, even on those complaints concerned with the Claimant's dismissal, where what the Claimant says was unreasonable behaviour concerns a witness whose evidence is peripheral at best, would have been manifestly wrong.

12. The application was thus refused. We invited the Respondent to consider whether it would need to question Mr Fox-Hewitt, as we could see little, if any, purpose in it doing so. Ms Winstone stated that she would not. As a result, he did not attend to give oral evidence.

Other case management issues

13. The Claimant maintained an application for a witness order for Mr Fox-Hewitt. Whilst it was clear he did not want to come to the Tribunal, the Respondent did not plan to question him, the Tribunal had no questions for him, and so his statement was taken as read. Witness orders are not made lightly, and in those circumstances, together with the fact that Mr Fox-Hewitt could be of little, if any, assistance to us in determining the issues for the reasons given above, we refused the application. Similar applications for two other individuals were not pursued.

14. We indicated at the start of the Hearing that Mrs Bannister had been one of the members of the Tribunal which heard a case brought against the Respondent by a Mr Walton (case 1301548/2021), which dealt with various complaints related to the MDP. The Claimant gave evidence for Mr Walton, and the Judgment of that Tribunal was included in the bundle for this Hearing. Neither party suggested that Mrs Bannister should step aside from also being involved in this Hearing.

Hearing

15. We read the witness statements and some of the documents referred to in them, though we made clear before hearing evidence that we had not read the various policies/guides included in the bundle, the Claimant's impact statement and medical records, the deliberations document prepared by the dismissing officer, the Claimant's pensions complaints, or the minutes of the Claimant's grievance hearing and grievance appeal. We spelt out the obligation on the parties to take us to those documents during oral evidence if there was anything they wished to draw to our attention.

16. We heard oral evidence from the Claimant, Jack Reinholds (Watch Manager of White Watch at the Respondent's Newcastle station and formerly Crew Manager), Derek Stoddart (employed by the Respondent as Station Manager in Learning and Development), James Bywater (employed by the Respondent as Area Manager, formerly Group Manager), Howard Watts (the dismissing officer and formerly the Respondent's Director of Prevent and Protect), Jonathan Pryce (the appeal officer and Chief Fire Officer for Hereford and Worcester Fire and Rescue Service) and Sarah Baddeley (HR Business Partner for Staffordshire Police and Fire Shared Services).

17. Both Counsel provided detailed written submissions, made oral submissions and after 27 February, at our request, provided further written submissions on the complaints of failure to make reasonable adjustments – see our Analysis below. Both parties made amendment applications in their closing submissions, but as will be clear from our Analysis, it was not necessary for us to decide either application.

18. Our findings of fact were based on the above material. Where there were conflicts between witnesses, we resolved them on the balance of probabilities. References to page numbers below are to the agreed bundle of around 1200 pages. Alpha-numeric references are to witness statements, for example RM5 is paragraph 5 of the Claimant's statement and JP4 paragraph 4 of Mr Pryce's statement.

Facts

19. The Claimant was employed by the Respondent as a Wholetime Firefighter from 1 October 1992 and then also as an On-Call (or Retained) Firefighter from 12 November 2008, until his dismissal on 19 January 2021 after 28 years' service.

20. It is accepted he was disabled by reason of depression at all relevant times. He says he was formally diagnosed in 2008 and 2017 (RM34). This was not disputed. He became a representative for the Fire Brigades Union ("FBU") in 2003, ceased to act in that capacity from 2015 to 2019, became branch secretary in early 2019, Brigade Organiser in October 2019 and Brigade Secretary from 30 November 2020. We say more about his union activities below.

Claimant's terms and conditions of employment

21. The Claimant's terms and conditions of employment were collectively bargained, resulting in what was known as the Grey Book, (which included terms

negotiated by the National Joint Council for Local Authority Fire and Rescue Services) – see pages 142 to 227. The Grey Book appears to have been last updated in 2009.

22. Page 40 of the Grey Book, paragraph 10, says that an employee on authorised sick leave shall be entitled to full pay for six months in any 12-month period. Thereafter the Respondent may reduce pay by up to half for six months. There is discretion to extend the pay periods in exceptional cases. The Grey Book says nothing about pay whilst someone is on modified duties.

23. The Claimant's most recent on-call contract (page 263), was dated from 1 January 2017. The contract for his main role and the one relevant for our purposes is at page 274 onwards. We noted the following:

23.1. It states, "Unless otherwise stated in this document or in subsequent changes notified to you during your employment … the terms and conditions of your employment are those set out in your offer letter and the [Grey Book]. These may be supplemented or superseded by local agreements reached with the trade unions recognised by [the Respondent] and you are considered bound by the terms of any such Collective Agreement".

23.2. It then lists collective agreements in the Grey Book including relating to Leave, Sick Leave and Maternity Leave and says, "Local agreements, as amended from time to time, are contained in various documents and are available [from HR]".

23.3. "Your entitlement to allowances during any absence due to sickness or injury is set out in your National Conditions of Service (Grey Book)". It then refers to statutory sick pay ("SSP") and occupational sick pay ("OSP").

23.4. It records the Respondent's view "that it is desirable for its employees to be members of an appropriate trade union".

23.5. In a section headed, "Notification of Changes", it refers to legislative changes and says there is a consultation process which facilitates such changes to be enacted. It says "All documents subject to consultation are published in the weekly i-news" and goes on to say that "changes to individual contractual terms will be notified to you in writing at the appropriate time".

Other policies and procedures

24. We were referred to Consultation and Negotiation Procedures in the Grey Book on page 213. This section is headed, "Local Consultation and Negotiation. Model Consultation and Negotiation Procedures". The opening paragraph says, "These procedures are intended to establish relationships and interactions that promote joint solution seeking to resolve differences between management and recognised trade unions", with the next paragraph beginning, "This procedure shall be used for matters that do not require collective agreement". This clearly is not therefore a procedure governing how collective agreements, locally or otherwise, are to be reached. On page 214, there is a "Negotiation Procedure", which "shall be used for all matters that are the subject of collective negotiation and agreement", the objective of which is to "resolve issues jointly". This is

clearly a procedure intended to deal with disputes between the parties, as the letter at page 602 (see below) makes clear was the FBU's understanding.

25. The Firefighter Fitness Best Practice Guide (pages 238 to 262) refers to the Addendum to the National Framework for Firefighter Fitness in England, agreed with relevant trade unions, Annex C (pages 296 to 323), which includes the following statements:

25.1. Each fire authority is required to have a process of fitness assessment to ensure operational personnel are enabled to maintain standards of personal fitness required in order to perform their role safely.

25.2. Fitness of individuals is paramount to the role (page 240).

25.3. Authorities must ensure no individual will automatically face dismissal if they fall below the fitness standards and cannot be deployed operationally.

25.4. If they do fall below the standards, the authority should consider whether they should be stood down.

25.5. The authority should commit to a minimum of 6 months of development and support.

25.6. It should refer an individual to occupational health ("OH").

25.7. It should ensure the individual receives the necessary support to facilitate a return to operational duties.

25.8. It should fully explore opportunities to enable the individual to remain in employment including through reasonable adjustments and redeployment – otherwise it should commence an assessment for ill-health early retirement ("IHER").

25.9. Examples are given of what various other Services have done to support firefighters, including provision of PE Instructors and in-house training courses.

26. The Respondent's Performance and Capability Policy (pages 283 to 295) includes the following provisions:

26.1. At paragraph 3.5, for disabled employees the Respondent should consider reasonable adjustments to the job and/or performance/attendance standards and/or adjustments to timescales to meet them.

26.2. There is a statement that "It will not always be necessary to go through every stage of the procedure". There are three formal stages.

26.3. At paragraph 4.6, it is said that in the case of capability due to long term sickness absence/modified duties the Service will seek a medical opinion on the prognosis of the condition and, where appropriate, the employee will be given suitable opportunity to become well and able to return to work undertaking their full role before the sustainability of their employment is considered.

26.4. For trade union officials, paragraph 6.1 provides that no formal action will be taken under the procedure until the circumstances of the case have been discussed with the Group Manager or Head of Department, the HR Management team and the permanent union official.

26.5. Paragraph 7.6 says that if there has been no or insufficient improvement or there has been a failure to sustain improvement, the issues should be referred to the first stage of the formal procedure. As stated above, it has three stages (see page 288ff). The first and second stages can result in a first or final written warning, with reasonable timescales given for improvement, the setting of standards and the improvement required, and the arrangements for monitoring and review. The third stage is the dismissal stage although there are a number of alternative options at that point, including redeployment.

26.6. At paragraph 9.6 there is an option to extend a warning by 6 months (page 291).

26.7. Alternative employment should be considered (page 292).

27. The Respondent's Attendance Management Policy (pages 325 to 337) includes the following provisions, so far as relevant to this case:

27.1. Employees are entitled when absent to be paid in accordance with their contract.

27.2. Paragraph 7.4 says that if an employee returns to work in a modified role, they should refer to the Service Policy on Modified Duties. The Claimant did not seek to argue that the Attendance Management Policy was not in force and implemented.

27.3. Long term absence is covered at page 334, which includes the requirement for OH to be involved. We did not see the need to consider this further.

27.4. There is provision for the exploration of IHER (page 335).

27.5. There is a statement (page 336) that the Respondent can consider ending employment if there is little expectation of a return to full duties in 3 to 6 months. OH advice is then required. There is no provision for payment in lieu of notice ("PILON") on termination.

Modified Duties Policy

28. The MDP is at pages 338 to 349. The Respondent says it was introduced on 7 June 2015. The Claimant says it was not sent directly to the FBU, nor introduced in line with the Consultation and Negotiation Procedure referred to above. Although she was not employed until 2016, Ms Baddeley told us that all policies are sent out for consultation, to all employees, via the Respondent's intranet (i-news) after they are considered at the Service Management Board ("SMB"). The discussions of the Board are facilitated by a report on the policy being circulated beforehand. We were not told in any detail how the consultation then proceeds in practice, but broadly are satisfied that this is how new policies are and were considered. The Respondent says it consulted about the MDP at a meeting of the SMB on 31 March 2015. UNISON and RFU reps did not attend

but it can be seen from the notes of that meeting (pages 404 to 406) that an FBU rep was present. On the MDP (just one of the policy areas discussed at the meeting) the notes record:

28.1. It was a brand-new policy.

28.2. There was a discussion of who should set modified duties.

28.3. The then Director of Response (Mr R Barber) said line managers should be "kept informed of the process of the [MDP]".

28.4. The then Deputy Chief Executive "asked for the Policy to be put out for Consultation".

29. Parental leave and Shared Parental Leave policies were also to be put out for consultation in the same way, having been discussed in the same way as the MDP at the same meeting. There was nothing about any policies in the "Decisions Made" section of the notes. The MDP was introduced several months later. At page 349, there are various amendment dates, one in late 2016 and one in 2019. Ms Baddeley told us that there was no complaint about the MDP from the FBU or employees until May 2020 (see below). On balance we accept that, in the absence of evidence to the contrary, notwithstanding what the FBU stated in May 2020 (see page 602 below). No complaint or issue has been raised about the other policies either.

30. We noted the following provisions of the MDP:

30.1. At paragraph 1.2 it sets out the Respondent's commitment to support employees to return to work as soon as they are able to do so. It therefore outlines options for those who are not fully fit and so cannot carry out normal duties.

30.2. At paragraph 3.1. it says that if for medical reasons an employee cannot fulfil their duties, the Respondent should consider modifying the role to facilitate them being able to continue to work until they reach full fitness, the modified duties to be agreed under the policy and with OH advice. Paragraph 3.3 says, "These changes would be agreed on a temporary basis while the employee regains their full fitness".

30.3. Paragraph 3.7 says where the Respondent cannot change the duties of the role, "the Service will consider alternative employment opportunities for an employee on a temporary basis during their period of recovery".

30.4. Paragraph 3.8 says that the employee should try to keep connection with their Watch.

30.5. At paragraph 3.10, it is stated that the period of modified duties will not normally exceed 6 months unless there is medical evidence that a return to full duties is likely within a reasonable time frame. Indefinite modified duties arrangements are said to be not sustainable.

30.6. At paragraph 6.1, the MDP states that it is not the Service's intention for employees to suffer any financial detriment due to returning to work when compared to continuing to be absent on certified sickness. It goes on to say:

30.6.1. At paragraph 6.2.1, "For an employee returning from absence, still within entitlement to sick pay, for hours worked, full salary will be paid, for the balance of hours not worked, they will still receive full pay for the duration of their entitlement to full sick pay. If sick pay entitlement has dropped to half pay, they will receive full pay for hours worked and half pay for the balance of normal working hours they are unable to work".

30.6.2. At paragraph 6.2.2, where sick pay has expired, there will be no payment for hours the employee is not able to work. This includes for employees who have returned to work and their period of absence plus their period of modified duties has been of such a length that their entitlement to sick pay would have expired had they remained absent.

31. In short, where the period on modified duties meets or exceeds the period during which an employee would have had full or half (or any) sick pay, it reduces or extinguishes the entitlement to sick pay. At paragraph 6.6 the MDP says that the Respondent reserves the right to consider exceptional cases on their merits and exercise discretion in the rate of pay for modified duties, e.g., following an injury where an employee is awaiting surgery. Ms Baddeley believes this discretion has been exercised, but could not think of specific cases.

Fitness tests/sickness absence/grievances

32. The Claimant accepts that a certain level of fitness is required for the firefighter role, whilst doing operational duties at least, accepting also that strictly speaking he could be recalled to such duties at any time even when deployed in a role where he was not carrying them out. He accepts this was essential to his, colleagues' and public safety. He was required to take regular physical fitness tests, under the Physical Fitness Policy and accepts that the tests were required – see page 247. One such test is a drill ground assessment ("DGA"), designed to simulate an operational incident.

33. The Claimant was placed on modified duties in 2016 and again for 10 months in 2017/18. His sick pay was not affected because he did not in fact go on sick leave. He does not know if the FBU was taking up objections to the MDP when it was applied to him on these occasions. We conclude in the absence of contrary evidence that it was not.

34. The OH referral at pages 933 to 936, made on 27 November 2017, referred to the Claimant's 2017 absence and his failing a fitness test, saying that there "appears to be an underlying stress-related problem". It recorded that he had remained fit for operational duty since his return to work in June 2017, was engaged in regular physical training sessions and had not raised any concerns over anxiety. Prior to a planned fitness assessment on the date of the referral however, the Claimant reported a high level of anxiety. He was referred to OH, in part to identify an alternative fitness test.

35. On an unspecified date in 2018 (pages 937 to 941), there was a further referral to OH. The referral stated, "He suffers with ongoing depression and

anxiety and whilst on modified duties he has expressed his condition is getting worse". It stated that the Respondent was keen to support the Claimant to be a productive team member, but that the person making the referral was "not sure how to do this currently when his depression seems so overwhelming".

36. On 4 February 2018, the Respondent made another OH referral (pages 942 to 945) reporting that the Claimant was experiencing high blood pressure when coming to do fitness tests; it said he had been placed on modified duties, but decided to "book sick", adding, "I would like him to continue receiving help with his ongoing anxiety issues and possible depression". In a referral in July 2018 (pages 946 to 949) the Respondent stated of the Claimant, "He suffers with ongoing depression and anxiety and I believe he is on medication from his GP". The referrer was concerned about his lack of drive to improve his fitness.

37. The Claimant was on 50mg Sertraline medication from August 2017, 100mg from around March 2018 and 150mg from March 2020. We were taken to a number of further OH reports. In the first part of 2019 these were:

37.1. On 22 January 2019 (pages 954 to 955) when it was stated that the Claimant was fit for work without restriction or modification. The report recorded that the Claimant felt anxious and suggested alternative testing methods be considered.

37.2. On 5 April 2019 (page 956) in which it was recorded that the Claimant was anxious about the tests and other life issues. It said he had been placed on modified duties due to blood pressure, so that a planned fitness test did not go ahead (OH did not permit it) and referred to ongoing stress and anxiety impacting on him physiologically.

37.3. On 16 April 2019 (pages 957 to 958) it was said that short notice for tests created anxiety for the Claimant, but that he could take them with a reasonable period of notice. There was said to be no issue with him remaining in post.

38. Around this time, when Mr Reinholds joined the Watch, the Claimant made him aware, over the course of a few conversations, that he had a history of depression. He told Mr Reinholds he struggled to get up in the morning, that he had low mood, struggled with tiredness and that he was on anti-depressant medication. Mr Reinholds was also aware that the Claimant had experienced occasional suicidal thoughts and had received counselling through the Respondent.

39. On 9 June 2019, the Claimant failed a fitness test, for which he got 28 days' notice. He says the equipment for that test was not in accordance with test conditions and the practice test he did before had not been done properly. As a result of failing the test he was again placed on modified duties, it is not clear by whom, though Fiona Prew (then Health and Fitness Wellbeing Adviser) informed Mr Reinholds about it. Initially the Claimant was Watch-based, for about 4 months, doing vehicle and equipment checks, technical training, drills, site inspections and home fire safety checks. From around October 2019 he went into fire hydrant maintenance, a Green Book role, working in various locations but going back to his Station each afternoon. He also had time in working hours to work on his fitness. The Respondent had to pay overtime for staff and engage temporary workers as a result of the Claimant being on modified duties. He

worked full-time (42 hours) and was paid his full salary, under the MDP. The Green Book role was usually paid at £19,000 to £21,000, but he was paid at a rate of around £31,000. OH advised that he undertake no on-call duties from 9 June 2019 but he also received full pay for that role until 17 December 2019.

40. In an email to the Station Manager on 9 June 2019 (page 437) Ms Prew envisaged at least 6 weeks before the Claimant could take another test, to focus on his fitness. The Station Manager replied asking what equipment the Claimant would need, saying the Claimant was "on the warpath" about there being no fitness policy at that point. Ms Prew started working with the Claimant from around this point. He had access to exercise equipment in the fully functional gym at his Station. The Respondent says he was also given information regarding exercises that could improve his fitness (see the fitness plans at page 407 onwards), but the Claimant says he did not see them. We had very little to go on in resolving this conflict, but in the absence of evidence to the contrary, we conclude that whilst the content of the plans was shared with him, at least broadly, he was not given the copies of the plans as such. This is also consistent with what later happened with Spencer Harrison-Edwards and the plans he prepared – see below.

41. It is not entirely clear whether the Watch Manager (the Claimant's line manager, initially Mr M Jenkinson) or the Station Manager met with the Claimant from this point to discuss his fitness with him and the support he might need, though Mr Reinholds and Mr Jenkinson offered to train with him in the Station gym. The Claimant did not pass a further fitness test on 25 June 2019. Mr Reinholds says (JR9) that the Claimant practised the test alone, as he preferred, and whilst on the small number of times Mr Reinholds saw him he was walking through the test, he was still putting in effort.

42. On 11 August 2019, the Claimant did not complete the test in the required time, though he improved on his June time. On 13 August Ms Prew wrote to Julie Beetlestone (of OH) to say that the Claimant's intentions to get fit had not translated into action. Ms Prew had thought about him undertaking another type of test, but some concerns had been voiced (it is unclear by whom) about the Claimant's psychological state. She asked, "Is the level of clinical anxiety and/or depression that Rob is exhibiting commensurate with his exercise avoidance behaviour?"

43. In an OH report on 15 August 2019 (pages 959 to 961) it was said that the Claimant was still taking anti-depressant medication and was proposing to actively address his fitness needs after annual leave. It advised that there was no evidence to suggest any psychological barrier preventing him achieving the required fitness levels, adding that the Claimant felt supported by the current Watch Manager (Mr Jenkinson). It said he was fit for work with temporary job modifications, namely those he was doing under the MDP.

44. The Claimant took another test on 12 September 2019 and failed again, though again with a slightly improved time. Ms Prew reported to colleagues by email the next day (page 1169) that the Claimant had not been properly prepared for the test. He had told her he was lacking motivation for daily routine let alone exercise.

45. On 9 October 2019 Mr Jenkinson emailed the Station Manager and Ms Baddeley (page 491), saying that the Claimant was taking the path of least resistance, other crew members were unhappy at his lack of engagement, the Crew Manager (Mr Reinholds) and himself had offered to set up training sessions, including in the evenings, but the Claimant had given multiple reasons why he could not engage with them. Whether or not as a direct result of that email is unclear, but on 10 October 2019, the Respondent invited the Claimant to a capability hearing (pages 493 to 494). The letter said he was unsuccessful in achieving the required standard of fitness and so the Capability Procedure was being invoked to review the situation and provide him with support. It said the hearing would cover such matters as his awareness of the requirements upon him and whether he had the necessary support and equipment. He was sent a timeline, various emails (which ones, we were not told), the Capability Policy and the Health and Fitness Policy. He was told a sanction could be imposed and that it was a serious matter.

46. The hearing did not go ahead as the Claimant raised a grievance regarding the fitness tests, saying he had been set up to fail and that the test he had taken was not specified in any Fitness Policy. He also complained about the capability process being instigated without warning and about the provisions for payment under the MDP – see page 495. This was his first objection to the MDP, because of the impact on his sick pay – he says he could not have brought a grievance about it until he was adversely affected by it.

47. The grievance was heard on 12 November 2019 by Mr Stoddart. The notes of the hearing are in the bundle from page 522. We made clear we would not read them except to the extent we were taking to particular parts. We note, either from the notes themselves or from oral evidence:

47.1. At page 531, the Claimant was asked if Ms Prew had given him any programme of exercises, to which he replied negatively, though he went on to summarise the advice she had given in relation to the tests and said that a programme of exercises from Ms Prew would be useful.

47.2. The Claimant told Mr Stoddart that he was suffering from depression and taking Sertraline, and that he had difficulties with motivation and struggled to get out of bed. He also said he had had counselling.

47.3. Mr Stoddart (page 525) asked the Claimant if his mental health was affecting his motivation to train; the Claimant did not answer the question, moving on to something else, so Mr Stoddart believed it did not.

47.4. At page 529, the Claimant's representative said the Claimant wanted the capability process stopped and to be given 3 months to build up to an acceptable level of fitness. Mr Stoddart asked "Say 4 weeks then?". The Claimant replied, "I see where you're coming from". The Claimant later said (page 530) he had the potential to improve significantly.

48. Mr Stoddart's focus was on the points of the Claimant's grievance, which were confirmed at the start of the hearing (page 522), namely being set up to fail the DGA, having had two DGAs used against him in the capability process and his sick pay being degraded under the MDP. Mr Stoddart did not discuss the situation with Ms Prew, or the Claimant's Watch Manager, though he believed the

Claimant was being properly supported. The grievance was in large part not upheld – see pages 518 to 521. In summary:

48.1. Mr Stoddart concluded the fitness tests had been done in good faith. The Claimant had agreed to the DGA which was a valid testing method.

48.2. It was appropriate to keep a record of test results, though they should not have been included in the capability process pack.

48.3. He granted a 23-day extension to the Claimant's entitlement to full pay when on sick leave because of annual leave the Claimant had taken whilst on modified duties, but otherwise held that the MDP was applied correctly.

48.4. He specified that the only official (as opposed to practice) tests the Claimant had done to date were those on 9 June and 12 September 2019.

48.5. The Claimant was to achieve the fitness standard by 19 January 2020, Mr Stoddart telling us he chose this date because he wanted to give the Claimant a focus to work towards. The Claimant does not agree this was generous, given the test was so difficult (Mr Pryce described it as a basic fitness standard), though he says he wanted to give it a go.

48.6. He was given a choice of which test to take (an imminently to be released new Fitness Policy would set out various options – this is likely the document at page 388 onwards) and was to contact Ms Prew to set up a date for it, as well as for an interim test in December. There was some discussion of this in the hearing at page 532, when Mr Stoddart said the Claimant would need to take a test in week commencing 13 January 2020; the Claimant did not say whether he agreed to that or not, though he did say at the end of the hearing he wanted to "process it all".

48.7. Mr Stoddart thought two months was reasonable as a timescale to pass the test, though he did not get OH input in determining this or any next steps. He accepts it might have been helpful to ask the Claimant, or his manager, about any other adjustments/support the Claimant might need, but was keen to say to us he was hearing a grievance.

48.8. The capability process was suspended but Mr Stoddart made clear it would resume if the Claimant did not reach the required standard. He emphasised the Claimant's responsibility to improve his fitness.

49. The Claimant appealed this decision on 19 November 2019 (pages 534 to 536). We made clear we would not read his appeal except any extracts we were expressly taken to, but it was agreed that it was principally concerned with the effect of the MDP, as the Claimant says otherwise he was trying to go along with what Mr Stoddart determined should happen.

50. The grievance appeal hearing was held on 5 December 2019, chaired by Mr Bywater, accompanied by the then Head of HR, Sue Wilkinson. The minutes are at page 542 onwards. Again, we made clear we would only read the extracts we were taken to, but it is agreed that the discussion focused on the Claimant's rate of sick pay, his not getting formal notification of its reduction prior to the grievance hearing and, as an additional point, his payslips saying he was being

paid OSP which he found demeaning. The Claimant told Mr Bywater he had been taking Sertraline since August 2017, though Mr Bywater was not sure he knew that was an anti-depressant. He was made aware however that the Claimant had difficulty getting up in the morning and with motivation generally. The Claimant said he was not what he considered "sick" and so time on modified duties should not have affected his sick pay; it meant there was no incentive for him to work.

51. The appeal outcome was set out in a letter from Mr Bywater on 18 December 2019 (pages 558 to 560) which in summary said:

51.1. The Claimant did not think of himself as off sick, but whilst Mr Bywater empathised with his position, the MDP had been introduced in 2015. A failure to meet the fitness standards rendered someone "not fit".

51.2. Mr Bywater appreciated that any policy that could reduce income was going to be emotive but the Service had to manage resources appropriately and take management action when necessary.

51.3. The Claimant had said he had no incentive to work but the MDP allowed integration into work and interaction with colleagues, as well as supporting the Claimant's income.

51.4. The MDP had been applied correctly. Mr Bywater told us he found the policy to be favourable and generous.

52. On the same date (page 561), the Claimant was informed by Ms Wilkinson that his sick pay would be reduced to half pay, so that future absence or working less than full time hours on modified duties would result in him receiving only half pay.

53. The Claimant says that the MDP had not been incorporated into his contract because it was not properly negotiated under the Grey Book, though he told us he expected we would find otherwise and that this would not be an unreasonable conclusion. He told us that he never said the MDP did not apply, but that he objected to its impact on his sick pay. He accepts that this is the only element of the MDP that he challenges. He does not challenge the other parts of the policy that were applied to him, such as getting full time pay for full time hours when on modified duties, though he says that the Respondent has for decades kept some people on light duties for long periods. Mr Watts told us that is not the case. Our impression of Mr Watts' evidence was that whilst what the Claimant says may have been the case in the past, it was not the Respondent's intended practice any longer and we saw no evidence of individuals in this position, perhaps apart from Mr Emery (see below).

54. The Claimant also says the MDP discriminates against the "temporarily disabled" because they do not get pay when on sick leave. He told us it punishes people who return to work voluntarily, compared to a person not on modified duties, who when they go off sick, get their sick pay entitlement in full. He accepts however that someone with a mobility issue for example, would have been put at the same disadvantage as him by the application of the MDP (he says it discriminates against all disabled people), as well as by the requirement to

reach a level of fitness and pass fitness tests, and the application of the capability policy.

55. The Respondent says that putting the Claimant on modified duties was not unfavourable treatment because had it not done so, he would have gone off sick and been on half pay from 18 December 2019. It also says that his going on to modified duties was because he had the failed physical fitness test and that this was not something which arose in consequence of his disability. The Claimant told us he accepts he had led no evidence other than his assertion for the link he seeks to draw between his disability and his not passing the fitness tests. The Respondent says that in any event the application of the MDP was a proportionate means of achieving a legitimate aim. It says it has a duty of care (and a statutory duty) to ensure firefighters are fit for their full range of duties, so as to safeguard the public and keep themselves safe, having regard to the fitness tests. It says the MDP was proportionately applied to the Claimant as he received significant payments for lower-level duties whilst the MDP was in operation for him. Using the MDP also helps a person's wellbeing by keeping them in the workplace.

56. A scheduled fitness test on 10 January 2020 did not take place. The Respondent says this was because of the Claimant's attitude to Ms Prew who was the assessor. It is agreed there was a disagreement between them on the day planned for the test, for which the Claimant later apologised; we see no need to deal further with the circumstances in which the test did not occur, though the Claimant did say on that occasion he felt Ms Prew did not support him, which impacted his motivation. There was a media team present at the Station on that date, for an unrelated reason, which the Claimant found off-putting, which Mr Reinholds could understand. The Claimant subsequently took and failed a test on 15 January 2020; we were not told the time he achieved, though at RM182 he says it was his worst result ever. That was the last fitness test he undertook. He says Ms Prew did not work with him thereafter.

57. On 28 January 2020, an OH report (pages 962 to 963) said that the Claimant felt the fitness test was hard to pass and that his best chance of passing would be if he set up the equipment himself. It said he was aware of all of the advice to improve his fitness. The report recommended him seeing his GP as the Claimant believed he may be on the autism spectrum.

58. On 25 February 2020, the Claimant was invited to a capability hearing (pages 588 to 589). The letter again said the meeting was to provide him with support to meet the required standards, review his fitness levels, consider assistance that could be provided, discuss training and equipment, and check his awareness of and engagement with the Respondent's requirements. It appears the same documents were sent as with the 10 October 2019 letter and the Claimant was also given the same warning of a possible sanction, with a note that the matter was taken seriously. This hearing did not take place either, as on the same day the Claimant went on sickness absence. He says the invitation made him ill. From 26 February 2020 he was on half pay. His GP noted on 4 March 2020 (page 1008) that he was off work because of a depressive disorder, and that the capability procedure was "stressing him a lot".

59. There are three undated OH referrals in the bundle between pages 984 and 997. We have not had regard to them as it is not possible to place them chronologically.

60. The Claimant brought Claim 1 whilst on sick leave. ACAS Early Conciliation took place from 17 March to 17 April 2020, and the Claim Form was presented on 15 May 2020.

61. From around March 2020, there was a restriction on the numbers of people who could use the Station gym because of the Covid lockdown and restrictions, though as just noted the Claimant was off sick by then.

62. On 15 April 2020 the Claimant requested an extension of his sick pay (see page 599), which was refused by the Chief Fire Officer ("CFO") (page 598) on 20 April 2020. The CFO said that the MDP had been consulted on locally from 14 April to 12 May 2015 and came into force on 17 June 2015, superseding the Grey Book. She found that the Respondent had complied with the MDP in the Claimant's case. Ms Baddeley told us that she knows of regular instances (seven or so a year) where sick pay is extended, including for employees with cancer, someone with depression who had self-harmed and been repeatedly admitted to hospital, and someone who had a knee replacement.

63. On 5 May 2020, the FBU wrote to the CFO (pages 602 to 603) raising a formal dispute about the MDP. It accepted it had been consulted on in 2015 but said this was through a release in i-news, and not formally through the agreed negotiating structure. It said no collective agreement had ever been reached and so declared a failure to agree, having, it was said, raised the issue several times. On 15 May 2020, the Claimant was told his sick pay would reduce to nil from 26 May 2020 (see page 604), but in fact this seems to have been effective from 26 June 2020 (page 609), though he continued to receive SSP until September.

64. The Claimant did not want to see OH in March 2020 but did attend an appointment on 5 June 2020. The resulting report (pages 968 to 969) noted that the Claimant had said measures to help him pass the test were not put in place. It reported that the Claimant was "significantly unwell from a mental health point of view" and not fit for the firefighter role. It said he was not exercising much due to poor motivation and concluded, "It is my opinion that his poor motivation is secondary to his mental health issues". On 30 June 2020 Ms Baddeley requested a further review (page 613).

65. The Claimant returned to work on 1 July 2020, though then took annual leave. He told us he could not afford to stay on sick leave. On his first actual day back, 13 July 2020, he asked Station Manager Bourne who it was who had made the decision to invoke the capability procedure. Mr Bourne replied that HR had told him it was a "service decision" (page 619). The Claimant invites us to say it was instigated by Area Manager Luznyj (see below).

66. On 14 July 2020 the Claimant emailed HR (pages 621 to 623), saying he had showed an improvement in his fitness in September 2019 only to then be put into capability proceedings. He did not think the test he was supposed to pass was in accordance with the Respondent's Fitness Policy, and felt that others were not tested to the same standard. He also said his condition was covered by the Act, his having been treated for depression for 3 years and being on a substantial

dose of daily medication. He closed by saying he would like the Respondent to account for his mental health and make reasonable adjustments and to feel supported to achieve fitness in an encouraging environment, having felt cast adrift and left to himself before his absence on 26 February 2020.

67. Shortly thereafter, he raised another grievance regarding his sick pay and the capability procedure. He says the essence of his grievance was that he should have had two tests earlier in the year, 6 weeks apart, but this had not been done as Mr Stoddart recommended – though Mr Stoddart told us very firmly he at no point stipulated a date for a second test, as seems to be borne out by his decision letter. The Claimant says that instead, at around the time he expected the second test, he was invited to a capability meeting, which as we have noted was followed immediately by him going off sick. The Claimant said he could not meet to discuss the grievance until September. The Respondent offered him several dates.

68. On 16 July 2020, three days after the Claimant's actual return to work, OH reported (pages 971 to 972) that his mental health condition was stable, though it described it as a long-term condition having a substantial impact on daily activities (it did not say what those activities were) so that the Claimant was likely to be disabled under the Act. It said he was fit for modified duties and to start exercise in the gym. It went on to say he needed further time before progressing his modified duties. He was not exercising due to poor motivation and his union role, but would start work in the gym during the next week.

69. In a further report on 9 September 2020 (pages 974 to 975), OH said the Claimant was doing some online learning and union duties. It advised that he could progress to equipment checks and some parts of drills, but that he "remain[ed] impaired by his mental health problems" and he was not yet at the point where he could take a fitness test due to his mental health problems and musculoskeletal problems. It recommended a review in 2 months.

70. On 23 September 2020, the Claimant completed an appraisal (pages 640 to 642) with Mr Jenkinson. The headlines were:

70.1. The Claimant was distracted from working towards passing the fitness test, by the capability process.

70.2. Mr Jenkinson made various positive comments regarding the Claimant's involvement in his union duties.

70.3. The Claimant needed to complete the fitness test and engage with Ms Prew – "a schedule of training now needs to be completed".

71. Shortly thereafter, it was agreed that the Claimant would be given one-to-one fitness training with Spencer Harrison-Edwards, a firefighting colleague who worked under Ms Prew. At pages 646 to 648 there are email exchanges between Mr Harrison-Edwards and Ms Prew from 1 to 4 October 2020 in which Ms Prew noted that these sessions would be twice per week. Ms Prew said, "The Claimant's mental health is variable and he is currently taking medication for depression". She asked Mr Harrison-Edwards to agree short-term and long-term goals that would give an outcome at 4, 6, 8, 10 and 12 weeks. The Claimant was positive about working with Mr Harrison-Edwards. He says the Respondent had

provided no support for him before this point because it had not worked, but that this new arrangement gave him a new focus.

72. On 10 October 2020 Mr Harrison-Edwards emailed Area Manager Luznyj, Ms Prew and Ms Baddeley to say that the Claimant had had two sessions with him and was fully engaged. He said that alongside physical fitness "I will also be working on his mental fitness, as this is a key area of support for Rob at this time". A ten-week programme was put in place (pages 690 to 693) from 12 October to 21 December 2020, which the Claimant says he embraced, though (RM125) he says Mr Harrison-Edwards did not do any work on his mental fitness.

73. On 20 October 2020, S Cooper in HR invited the Claimant to what he understood (and the Respondent agrees was) to be a Stage 2 capability meeting chaired by Mr Bywater, although the letter did not make the stage clear (pages 654 to 656). Mr Watts says this was the meeting the Respondent had been trying to arrange since October 2019.

74. The letter said:

74.1. Because of time constraints and the difficulty in arranging grievance hearing dates, the Respondent was "continuing with the capability process originally due to take place [on] 3 March 2020", adding that most of the Claimant's grievance points related to that process and so the Claimant could raise them in that context.

74.2. The Claimant had not achieved the fitness standard after tests on 9 June 2019, 12 September 2019 and 10 January 2020.

74.3. The Capability Procedure was therefore being invoked to review the situation and provide him with support to meet the required standards.

74.4. The Claimant was invited to a hearing on 28 October 2020 with Mr Bywater, which would consider whether the Respondent's recommendations so far had been achieved, what support or training the Claimant might require, review the available equipment, and discuss his awareness of the necessary fitness standards.

74.5. It again enclosed a timeline, emails, the Capability Policy and the Physical Fitness Policy.

74.6. It again said the hearing may result in a sanction and it was a serious matter.

75. In response, on 21 October 2020, the Claimant raised a further grievance (page 657, which we have not read) about the escalation of the capability procedure. On 22 October 2020 HR responded (page 659) to say the grievance was designed to delay the capability meeting, the Claimant had been supported and the Respondent had exceeded its duty to him, but HR wished to review the case "so that a decision can be taken as to how to manage things going forward". It set a meeting for 28 October 2020. The Claimant had apparently asked for a senior officer to chair the hearing, and so Mr Watts was asked to do so.

76. At Mr Watts' request, on 26 October 2020, Ms Prew produced a report (pages 665 to 668). This was not shared with the Claimant. She said he had shown little engagement in fitness work and that agreed behaviours had not been actioned. She said, "Whilst it is important to acknowledge that poor mental health can affect the ability to make healthy decisions, adequate support was made available to assist in this process". She also highlighted some of the disagreements they had had. She described the Claimant as not taking accountability for his own inaction. He told us he agrees he did little outside of work to improve his fitness, finding he was tired from long days at work. The Claimant accepts that there was a difference between what he was required to do or said he would do and what he actually did: he says that is what depressed people do – "avoidant behaviour" – and that he was "waiting to die". His union duties, which he could do, were he says, "keeping him alive". He nevertheless says he made maximum effort to pass the fitness tests, but the MDP demotivated him and the capability process "oppressed" him, though he accepts it has to be implemented at some point in respect of someone who cannot perform their duties. He also told us he accepts that depression does not automatically result in becoming unfit.

77. Mr Watts met the Claimant on 28 October 2020 (the notes are at page 677 onwards – again we have only read what we were taken to). They had only met before in the context of the Claimant representing union members at hearings Mr Watts was involved in. Contrary to the Claimant's suggestion, Mr Watts did not see the Claimant as having made a nuisance of himself at such hearings, telling us the FBU does a very good job of defending its members and that he welcomes FBU representation at hearings. More broadly, he sees relations with the FBU as very important to getting things done. He was not aware the Claimant had raised "split pensions" issues with the Respondent, though he told us – and we accept – that it was an issue for all Fire Services, and indeed for the broader public sector, which rightly had to be dealt with. Mr Watts was aware, for example from the Claimant's most recent appraisal (page 640) that he was seeing OH and his GP. He was also aware of the arrangements Mr Stoddart had stipulated.

78. The Claimant says Mr Watts made clear at the start of their discussion that this was not a grievance hearing, contrary to the Claimant's expectations. Mr Watts for his part says he wanted to understand what had gone on and see how the situation could be moved forwards. At page 680, the Claimant is noted as saying in effect that he did not keep fit whilst on modified duties because he thought he was going to continue in the Green Book role, in other words continue with his modified duties status.

79. At pages 684 to 685, Mr Watts mentioned a redeployment process which he said may have to be considered at some point. The Claimant said he could not leave at that point, for financial reasons, and needed to reach 30 years' service. Mr Watts replied he could not have the Claimant "coasting", saying "And if you want a conversation about other jobs", the Claimant replying, "Have you got Grey Book?" to which Mr Watts replied, "You know for that you need to pass the fit test".

80. Mr Watts asked the Claimant to say a reasonable time by which he might pass the fitness test, so that the position could then be reviewed and a process put around it. The Claimant agrees that it was reasonable to agree a time to

pass the test, but says (see below) that what was agreed did not happen. Mr Watts says at HW10 that the Claimant suggested he lacked motivation to exercise due to his mental health, to which Mr Watts replied that OH had confirmed there was no reason he could not achieve the required standard.

81. The outcome letter from that meeting, dated 28 October 2020, is at pages 675 to 676. In summary it said:

81.1. Mr Watts recognised it was not an easy meeting for the Claimant and appreciated his openness.

81.2. It was the Claimant's responsibility to reach the fitness standard and Mr Watts believed he was entirely capable of doing so.

81.3. The Service would support him but he needed to address his apathy. His employment was in jeopardy if he did not reach the required standard.

81.4. The Claimant could not coast to retirement.

81.5. Mr Watts would write separately with an invite to a capability hearing.

81.6. The Claimant should let Mr Watts know if any further support was required to get him fully competent in a reasonable time. The Claimant did not reply.

82. The Claimant did not regard this outcome as positive because it did not deal with his grievance. Mr Watts formed the view, which influenced his later decision to dismiss the Claimant, that he was incredibly unmotivated because he was not going to be able to retire when he had planned, due to pensions changes. He did not want to be at work, but was hanging on to get his maximum pension after 30 years' service. Mr Watts says the Claimant made clear he had considered IHER but the finances did not stack up for him. Nevertheless, it was Mr Watts's hope that the Claimant would show something that evidenced he was taking steps to improve.

83. On 2 November 2020, the Claimant was invited to a Stage 3 capability hearing to take place on 4 December 2020 (see pages 686 to 687), due to him not meeting the required fitness standards for over 12 months "despite the provision of significant support". The hearing was to consider his performance, fitness results and "determine future action as needed". It acknowledged the Claimant's wish to move to the same Station as Mr Harrison-Edwards (there was no vacancy at that point) and said it was encouraging that he was making progress with Mr Harrison-Edwards' assistance. It was expected that by the date of the hearing the Claimant would have reached the required standard. He was expected to take a test in week commencing 23 November 2020. Mr Watts was aware of the Claimant's position as a union representative and so would confirm whether the Claimant would like him to discuss his case with a senior union official.

84. On 4 November 2020, Mr Harrison-Edwards emailed to Ms Prew a fitness plan he was using for the Claimant (page 688). On 10 November 2020 (pages 977 to 978), OH reported that the Claimant's mental health was stable, though it said he clearly had ongoing mental health issues. OH advised that the Claimant had "become physically deconditioned during his absence with the mental health

issues". It said there was a reasonable prospect of him passing the fitness test within a reasonable time period, the Claimant having been working on his fitness. He was fit to continue to progress his rehabilitation and OH would see him again in 2 months.

85. On 11 November 2020 (page 694) Mr Harrison-Edwards emailed Ms Prew again to say that his last session with the Claimant was on 29 October 2020, before the Claimant had developed a chest issue. On 12 November 2020 (page 697) Mr Watts emailed Ms Prew and HR for a test to be arranged in week commencing 23 November 2020 and said that the Claimant's "final capability hearing" would follow the following week. Mr Watts says he did not think too much about that email; Stage 3 was the final stage. No arrangement was made. The Claimant says doing so was completely at odds with his 10-week fitness programme with Mr Harrison-Edwards and that he was still unwell (with chest issues).

86. On 13 November 2020 the Claimant was sent a reminder about the invitation to the Stage 3 hearing (pages 702 to 704) as he had not confirmed his attendance. It was broadly the same as the previous invitation. It said the results from the DGA due to take place in late November would be considered and the Claimant should liaise with Mr Harrison-Edwards about that. On 23 November, the Claimant presented a grievance to Deputy CFO Barber (pages 712 to 716). We did not read this document but the Claimant summarises it in his Claim Form for Claim 2 by saying he had been given no support to pass the fitness tests, and his case had not been discussed with his manager, HR or the permanent union official. In other words, he was saying the Respondent was in breach of the Capability Policy. He says (RM158) he also pointed out he had been isolating because of his chest issue, had depression and the Service had not done anything to assist him. DCFO Barber refused to progress this as a grievance (pages 719 to 721). We do not deem it necessary to recount any details from his decision letter.

87. At page 648 is a record (it is not clear who produced it) of the Claimant's work with Service Personal Trainers. It records five one-to-one sessions from 5 to 20 October 2020, the Claimant training on his own on 22 October, cancellation of a session on 26 October because of car problems, and a further session on 29 October. On 1 November 2020 he left a session because he felt unwell. As at 20 November, he was awaiting a GP consultation regarding his chest, before resuming any physical activity.

88. On 2 December 2020 Station Manager Bourne emailed Mr Watts (pages 731 to 732) to update him about the Claimant. He said initially it had been a challenge to progress the Claimant's fitness, mainly due to the Claimant's mental health, and the Claimant had prioritised union duties. The Claimant then became fully engaged and was often seen in the gym, to the point where passing the test would have been achievable by the end of the year. This had stalled however because of respiratory issues and the capability process which had led to him becoming less motivated. Station Manager Bourne summarised by saying, "I feel Rob has fully engaged with myself and the fitness team for long periods of time, but it was always a slow process". He went on to say that if the Claimant had continued to invest the required time, the fitness test could have been passed, but awaiting the respiratory tests had created another delay and time on union duties may also prevent him giving enough time to his fitness. Also on 4

December 2020, Station Manager Bourne emailed OH (page 723) to mention the Claimant's respiratory issues over the preceding 6 weeks and to ask if OH could advise on whether and when he might be able to "start doing light exercise".

89. On 4 December 2020 the Claimant emailed the CFO to let her know he had been elected Brigade Secretary. He asked how the Service intended to support him in fulfilling his duties, referred to the previous secretary having an agreement on facility time to perform them full-time, and asked if he could do the same (page 722). On the same date, he also wrote to her (page 726) raising a collective issue about the Respondent not hearing grievances, including his own. Mr Watts was not aware of this email. On 9 December 2020, the CFO agreed to him carrying out union duties full-time on a trial basis (page 737) until the end of January 2021.

90. On 7 December 2020 (page 735) the Respondent sent the Claimant a new invite to the Stage 3 meeting, to take place on 11 December 2020, as the Claimant's representative could not make the original December date. On 10 December 2020, the Claimant sent a grievance to CFO Bryant, complaining about the escalation of the capability process and saying that this appeared to be in response to his grievance. Like DCFO Barber, she too refused to hear it (page 746), because she regarded the grievance as repetitious. She emphasised that the capability process was a "supportive mechanism".

91. Accordingly, the Claimant met Mr Watts on 11 December. The notes of that hearing are at page 747ff. Again, we have not read them except as taken to them by the parties. We note:

91.1. Near the start (page 748), Mr Watts outlined possible outcomes – a timeline for the Claimant to reach the required standard, extension of warnings, redeployment, withdrawal of salary or dismissal.

91.2. Mr Watts says at HW22 that the Claimant told him not being able to retire in 2019 affected his motivation; he admitted he did little exercise and ate an unhealthy diet, but (HW23) his election to Brigade Secretary had a positive effect on his motivation and he had a good relationship with Mr Harrison-Edwards.

91.3. At page 763 Mr Watts asked if anything had changed; the Claimant said he was giving his all. Mr Watts asked why the situation would be different now. The Claimant said his "outlook ha[d] totally changed" working with Mr Harrison-Edwards and asked for a chance to get fit.

91.4. At page 764 Mr Watts said that the Claimant seemed to have gone backwards since they last met 6 weeks before. The Claimant said his chest issue made it look like he was not engaging. At page 765, he said he did not know if he was well enough for a test and was awaiting X-ray results. He said he knew he needed to be fit.

91.5. The Claimant says (see RM179ff) that his fitness dipped when his mental health dipped, the lateness of responses was a symptom of his mental health issues, he was going in the right direction until the capability process, and his training with Mr Harrison-Edwards was going well until his chest issue.

92. The hearing was adjourned for Mr Watts to consider the position further. Mr Watts (HW24) thought an adjournment would give the Claimant a further opportunity to demonstrate his intention to improve his fitness but did not want to give him any tasks to complete so as not to set him up to fail.

Dismissal

93. On 16 December 2020 HR contacted the Claimant (page 767) to say that Mr Watts was still considering his decision and that the Claimant should continue working with Mr Harrison-Edwards and make arrangements with Ms Prew to undertake an indicative fitness test. It seems clear the Claimant did not do so. On 14 January 2021 OH reported (pages 980 to 981) that his mental health was more stable and things were "resolving". It said he was fit to exercise within his capability and that OH would support him undertaking a structured exercise programme to achieve the necessary fitness level over several months. It suggested reviewing him again in 4 weeks. The Claimant did not carry on working on his fitness, he says because he was unwell throughout January with his chest issue. Page 999 shows that he went to see his GP on 22 January 2021. The problem was "Wheezing (Mild)" and the GP noted that the X-ray results were "fine"; there was clearly still some issue with his chest but it was equally clearly getting better.

94. Mr Watts did not see the need to consult Ms Prew before making his decision, having had her report on 26 October 2020, nor did he speak with Mr Harrison-Edwards as he worked for Ms Prew and Mr Watts knew they were communicating. Similarly, he did not speak to the Claimant's Watch Manager, telling us it was more important to seek from the Claimant himself what more the Respondent could do. He did not consult with OH, to get any clarity on the view expressed on 10 November 2020 that there was a reasonable prospect of the Claimant passing the test in a reasonable time and did not see the OH report of 14 January 2021 at all. He noted in his evidence that OH had previously advised there was no psychological barrier preventing the Claimant reaching the required standard (this was in the report on 15 August 2019), that the Claimant always wanted more time, but nothing had changed. He accepts the last fitness test was a year before the dismissal, but says the Claimant did not contact Ms Prew to arrange another one.

95. After the hearing in December and before making his decision, Mr Watts produced a detailed note (pages 772 to 791), though this was not sent to the Claimant. He produced it to help HR produce a draft decision and because he thought he might himself be about to retire. We note the following comments made in the document:

95.1. Nothing had come to light in the hearing (page 772) that "realistically offers any change".

95.2. The move to Stage 3 was appropriate due to the protracted nature of the case and the Claimant's apparent lack of engagement.

95.3. At paragraph 6.10 (page 782), Mr Watts noted that the Claimant accepted he did not take offers of support from Ms Prew as "he wasn't feeling very good"; he "didn't recall doing any other fitness to prepare for the test" in June 2019.

95.4. At paragraph 6.16 (page 782), Mr Watts stated there was no reason for the Claimant not accepting support.

95.5. At paragraph 6.18, he acknowledged the Claimant's engagement with Mr Harrison-Edwards, stated that he had made no progress from October to December because of chest issues, and said that since the December hearing he had made no contact with Mr Harrison-Edwards and had only done a couple of walks. The Claimant told us he was not well enough and that he felt "besieged" by the process.

95.6. At paragraph 6.20, Mr Watts said there had been no progress between the 28 October and 11 December 2020 meetings and the Claimant did not follow the instruction to contact Ms Prew. The Claimant told us this was because of his chest infection.

95.7. At page 784, Mr Watts stated, "I was unsure any change would occur" and be prioritised. He noted he had made clear in October that the Claimant's job was in jeopardy. He accepted however that there had been a change, in that the temporary union role had given the Claimant motivation.

95.8. At page 786, it was said that a contributory factor in the problems with fitness was the Claimant's lifestyle and at page 787, that it was the Claimant's lack of actively working towards it which was preventing him reaching the required standard.

95.9. At page 787, Mr Watts recorded that he had made enquiries about suitable alternative employment, that there was a vacancy for an "Operational Assurance Coordinator", and (at paragraph 8.7.8 (page 790)), "an offer of redeployment ha[d] been made to [the Claimant]."

95.10. At page 790, Mr Watts concluded that there was "no medical reason identified which prevents [the Claimant] maintaining a healthy active lifestyle and participating in regular exercise which would enable him to achieve the required standard".

95.11. At page 791, he said that the failure of the fitness test was the fault of the Claimant due to his "persistent and inexcusable failure to actively work towards the required fitness levels", adding that a further extension of time would not achieve the desired result as the Claimant had made commitments in the preceding 24 months but "these have never amounted to any sustained improvement".

96. On 19 January 2021, the Claimant was dismissed, ostensibly on capability grounds, with PILON. Mr Watts told us the reason for dismissal was the failure to achieve the required fitness standard as required by the Claimant's contract. The record of their meeting on this date are at pages 825 to 826, from which we note the Claimant said he had only done gentle walking since the December meeting as he did not yet know what was up with him. Mr Watts said, "If a Green Book role that fits your skill set becomes available during your appeal period, then we'll consider you for that role". At page 827, there is an email between HR colleagues regarding the practicalities of the dismissal, which concludes with the comment, "[Mr Watts] also offered the alternative of Green Book redeployment

during Rob's notice period. Please can you collate details of any current Green Book positions?".

97. The dismissal letter is at pages 830 to 833. We note:

97.1. It set out the support the Respondent says it gave to the Claimant, including adjustments to the fitness tests, gym access, time in working hours for training, fitness advice and OH support, but many aspects of that support the Claimant had failed to engage with and had not maintained the required standard.

97.2. It recited the history of his grievances.

97.3. It noted that the Claimant had linked his motivation and mental health. Mr Watts said that the Respondent had provided "sustained support for this" and that OH advised the fitness standard was achievable.

97.4. It was stated that progression to Stage 3 was appropriate "due to the protracted nature of the case and apparent lack of engagement from yourself".

97.5. Mr Watts had noted the Claimant's renewed motivation resulting from the new union role, but "disappointingly, during the following 5 weeks you have again failed to engage or show any personal responsibility to improving your fitness or take part in a test". There was "insufficient improvement in your performance, generating reasonable grounds to believe that you would not reach this standard within a short timescale. Therefore, extension of the existing warning was not appropriate". We note that there was in fact no warning.

97.6. Green Book roles were open for the Claimant to apply for until his appeal was dealt with – though we accept that the Claimant could not access the Respondent's system once dismissed. He did not ask HR about this because he says it would have been premature whilst trying to get his old job back (via his appeal – see below).

98. Mr Watts does not accept that the Claimant was unwell with his chest infection up to the EDT, saying in support of that assertion that the Claimant did not take sick leave, that the medical tests showed nothing, and that OH said he could exercise. He also says the Claimant's GP refused to provide a note to say he could not do the fitness test. We do not read the GP record we were taken to (pages 1000 to 1001) as showing that. The GP said he would say the Claimant was not unfit to do office work but that the Claimant had concerns about his ability to complete a fitness test; we know nothing of the reasons why the GP did not go further. Mr Watts also told us he was "blown away" by the level of support the Respondent had given to the Claimant.

99. The Claimant says the dismissal was unfair because he was not taken through all three Stages of the capability process, the Respondent did not consider allowing him to remain in a non-operational role or allow him to continue his full-time union activities. The latter is why he says the dismissal was automatically unfair, namely that Mr Watts (and Mr Pryce as appeal officer) did not recognise he could have used the time he had secured for working as a full time official to regain his fitness. Mr Watts says the CFO was not making any commitment to continue employing the Claimant when she agreed to him undertaking full-time union duties, though she knew when making the offer he

was not fit for firefighting duties, adding that the Claimant would nevertheless have had to be fit, because of the Service's operational resilience.

100. The Claimant also says Area Manager Luznyj influenced the dismissal decision, because Ms Prew reported to him. Mr Watts firmly denies that, saying he was not involved in any way. Although it is not clear why Mr Luznyi was copied into certain emails, we accept Mr Watts' evidence on this point, as the evidence the Claimant relies on to the contrary is circumstantial at best and certainly nowhere near enough to draw a conclusion that Mr Luznyj was some kind of background influence. We are clear, having seen him give evidence for almost a full day, that Mr Watts is very much his own man and will make his own decisions. The Claimant also does not understand why he was dismissed in a period where he was undergoing agreed training to pass the fitness test and when Mr Harrison-Edwards said he was improving.

101. Mr Watts' evidence as to why he went to Stage 3 of the Capability Procedure was that there had been several attempts (October 2019 and February 2020) to start the Procedure but without success, and that the issues with the Claimant's fitness had been going on for two years, his having failed a routine test in December 2018, though no action was taken at that stage and it was not at that point a cause for concern. He pointed out to us that the Claimant was way beyond the 6 months of modified duties envisaged in the MDP. In his mind, a lot of time had elapsed with a marked lack of progress. He is not aware of any case going straight to Stage 3 before, though says given the length of time on modified duties, it was not unusual. Ms Baddeley told us the earlier Stages would usually be skipped where OH advise there is no reasonable prospect of the employee performing their role again, or where timescales have been protracted.

102. The Claimant says the Respondent did not fulfil its responsibility to consider redeployment and disputes that he would not have taken a Green Book role permanently, even though his pay would not then have been protected. The MDP provides for redeployment to be considered at section 4 (page 340). At RM226, the Claimant says that a colleague, Mr R Emery, had similar issues and was ill-health retired, having been offered a role maintaining hydrants (on a temporary basis) or an alternative job. Mr Emery had more than one serious knee operation, which kept him away from operational duties for 4 years.

103. Mr Watts says he did not explicitly explore with the Claimant either redeployment or IHER (which is usually raised by OH when it is felt there is no prospect of an employee regaining fitness for their role), as the Claimant made clear he could get fit and the OH advice supported that, though as noted above Mr Watts did ask HR to check for vacancies. As also noted above, his report document, at pages 787 and 790, refers to a specific vacancy considered for the Claimant, but Mr Watts has no recollection of it, though he believes it was a Green Book role which would have meant – unlike on dismissal – that the Claimant could not access his pension. Given Mr Watts' evidence, we must conclude that no such offer was made. Ms Baddeley could not tell us what redeployment opportunities may have been available for the Claimant. Mr Watts told us that redeployment was alluded to in the meetings on 28 October and 11 December 2020 and the Claimant did not pursue the point, though in his statement he says no suitable Green Book roles were available (HW30). The

Claimant was dismissed with PILON because Mr Watts did not see the need to retain him further when he was not performing his role.

104. Mr Watts did not think a formal warning was appropriate because the Claimant would have appealed it, and several more months would have passed as a result. He did not think the Claimant had shown any commitment to getting fit, including in the last couple of months of his employment. Unlike Mr Emery, who Mr Watts says was never going to get better, the Claimant in his view did not have an excuse; he was apathetic. He considered whether that was linked to depression, but did not believe the medical advice and the Claimant's assurances he could get fit supported that conclusion. In summary (HW29), Mr Watts felt that the Respondent had done everything it could to assist the Claimant over 24 months, there had been no sustained improvement, and no steps taken between the December and January meetings, so that it was not appropriate to give him further time as there was no reasonable prospect that he would improve in any such period.

105. As to reasonable adjustments, the Respondent says it gave the Claimant multiple chances to pass the fitness test, adjustments to the test process, longer notice of the tests, information on exercise, the use of training equipment, the support of its fitness team (Ms Prew), one to personal training (Mr Harrison-Edwards), use of working time for training, referrals to OH, an offer of nutritional guidance (though we saw nothing in writing in that regard), and an offer from Ms Prew to go food shopping with him, which the Claimant found patronising.

106. The Claimant says all employees get gym access, time in the working day for training, one-to-one support, access to the Employee Assistance Programme and referrals to OH. The adjustments he contends the Respondent should have made are:

106.1. Full pay for 6 months of actual sick leave. He could not say how that would have enabled him to stay in productive work.

106.2. Advance notice of fitness tests – he was given 28 days' notice only for the test on 9 June 2019 and says this should have been maintained. Mr Reinholds told us the usual notice is about 2 weeks, which we accept and Mr Watts points out that each test was arranged with the Claimant's input.

106.3. An opportunity to continue one-to-one training with Mr Harrison-Edwards, who should have been engaged sooner.

106.4. From October 2020 onwards, he should have had his own copy of Mr Harrison-Edwards' training plan. He said in evidence he was not disadvantaged by Mr Harrison-Edwards keeping the copy, though if he had been given a copy himself, he could have done exercises between their meetings.

106.5. More time to pass the fitness test – he did not say how much, though he described the 10-week programme as a great start.

106.6. One-to-one counselling. There appears to be no limit on the number of sessions the Respondent can provide, at least not financially, as the Head of HR pointed out in the grievance hearing with Mr Stoddart.

106.7. The test on 15 January 2020 should have been a practice test, though in oral evidence the Claimant said it should have been test 1, with test 2 following 6 weeks later.

106.8. The Claimant's formal case was that he should have been given motivational coaching and/or the use of a sports psychologist, but he accepted in evidence that he could not maintain those as reasonable steps for the Respondent to take.

Appeal

107. The Claimant appealed against his dismissal (pages 813 to 824), citing defects in the dismissal process and the outcome being disproportionate and potentially unlawful. As to the former, he mentioned the 9 September 2020 OH report saying he was not fit to take the test and was engaged with Mr Harrison-Edwards and said that the Respondent had effectively ignored this by escalating him to Stage 3 of the Capability Procedure. He also mentioned the 10 November 2020 OH report which said he had a reasonable chance of passing the test in a reasonable period. He went on to say he was in the full-time union role, there had been no Independent Qualified Medical Practitioner referral (for IHER), and lockdowns had impacted his getting fit, as did his chest infection. As to the outcome, he referred to mental health issues impacting his motivation and said his absence was due to mental health issues impacting his fitness. He also listed his various union activities and connected them to his dismissal. He said alternatives could have included a warning, continuing his union role, and reasonable adjustments such as provision of a counsellor and personal trainer.

108. We have not read the notes of the appeal hearing at pages 848 to 863 except to the extent we were taken to them in evidence. The hearing was on 26 February 2021 before Mr Pryce, CFO from another Service. Mr Watts was also present, and the Claimant was accompanied by Mr Fox-Hewitt. Mr Pryce told us the hearing was a review, not a re-hearing as this was not requested. At the hearing:

108.1. Mr Pryce was focused on the appeal points, related to the dismissal process and sanction.

108.2. He did not have the OH report from 10 November 2020 (pages 977 to 978) which referred to the Claimant having a reasonable prospect of passing the test in a reasonable time. He could not recall if he reviewed the 14 January 2021 OH report (pages 980 to 981), which said OH would support a structured programme for the Claimant. As he did not see the earlier report, we think it unlikely he saw this later one.

108.3. He did not realise the Claimant was in the middle of a fitness plan when dismissed, though (JP11) he asked the Claimant what changes he had made in his own time and no evidence was provided.

108.4. Mr Fox-Hewitt reminded the hearing of the options available to Mr Pryce, including continuation of the Claimant's non-operational role (AFH17).

108.5. The Claimant mentioned depression and there was a brief discussion; they spoke about physical activity being a positive influence, though they agreed motivation can be difficult when struggling with mental health.

108.6. Mr Pryce did not see any fitness plans, but was satisfied by Mr Watts' assurances that the Claimant had been appropriately supported – including by OH, paid time for training, and use of the gym – to reach what he regards as a basic level of fitness. He saw no reason to doubt Mr Watts' word. He was also assured any duty to make adjustments had been taken into account, though he says the Claimant did not ask for any.

108.7. Mr Pryce asked the Claimant why he had not passed the test in 12 months from late 2019 and the Claimant said he had thrown himself into the Green Book work, which he took as a sign the Respondent would redeploy him.

108.8. Mr Pryce asked the Claimant if, at the date of the hearing, he would pass the fitness test and the Claimant said no. Mr Pryce thus saw no signs of or intention on the Claimant's part to work towards an increase in fitness and thought it unlikely he was ever going to improve. He felt if the motivation was not there, there was no point extending the Claimant's employment.

108.9. He accepts the Claimant was putting effort in during October 2020, and that he could not exercise or take tests from late October 2020 because of chest issues, but his focus was on the overall period of modified duties and those periods when the Claimant had no health issues, during which there had still been no improvement. He was also influenced by the fact that the Claimant said he could not pass the test in February 2021.

109. Mr Pryce's decision letter was dated 12 March 2021 (pages 869 to 871). In summary it said:

109.1. The Claimant only wanted reinstatement as a firefighter.

109.2. There were no material defects in the dismissal process and the outcome was the only reasonable one in the circumstances.

109.3. The Claimant had been given ample opportunity and significant time to make sustained and significant progress to the required fitness level.

109.4. There had only been one brief period, June to September 2019, where his test results improved, but they were still below standard. Any improvement must be sustained.

109.5. There was much evidence of support, including the Claimant using work facilities and adjustments being made, over a 19-month period.

109.6. The Claimant chose not to improve his fitness when on modified duties nor in his own time.

109.7. There were significant periods when the Claimant was well enough to demonstrate progress, but he had not done so.

109.8. This reflected the predicted likelihood of any future success in further extensions to the capability programme. It was reasonable to cease employing

the Claimant, having fully explored reasonable adjustments, improvements and other viable alternatives.

109.9. Mr Pryce said, "I acknowledge that you have experienced challenges with your mental health, which has affected your motivation to improve your fitness levels" but that he was satisfied the Respondent had considered adaptations and had sought to engage the Claimant on multiple occasions to provide support.

110. Mr Pryce told us that his decision to uphold the dismissal was not a punishment of the Claimant for failing the fitness test but because it was not reasonable to continue his employment when he would not pass the test in February 2021. He accepted that Stages 1 and 2 of the Capability Policy could have given the Claimant scope to show improvement but described the reason for dismissal as the Claimant's inability to pass the fitness test and a lack of sustained improvement over 19 months, when in his experience (JP15) usually 6 months is sufficient. He felt future improvement was unlikely in a reasonable period. As to how dismissal met the Respondent's pleaded legitimate aims, he said that its efforts towards the Claimant were not reciprocated and reminded us that the Respondent was having to backfill his role.

111. Mr Pryce was not aware of the vacancies available for consideration by the Claimant, telling us that Mr Watts and HR assured him they had checked this and, in his view, it was not relevant anyway as the Claimant wanted reinstatement and did not raise redeployment in the appeal hearing. On 12 March 2021 Mr Fox-Hewitt enquired about the Claimant getting IHER. The reply (page 869) was that because he had left the Service, it was not an option.

112. ACAS Early Conciliation for Claim 2 took place from 24 March to 5 May 2021. The second Claim Form was presented on 3 June 2021. This is the Claimant's first experience of Tribunal litigation. He did not know about time limits before, did not think issue 3.1.3 was something he could bring to the Tribunal and as to issues 4.1.3 to 4.1.5, did not think he could bring a claim whilst engaged in an internal dispute process. His pay date was always the last working day of the month.

Union activities

113. The Claimant says he had a fractious relationship with Area Manager Luznyj who, like him, was a member of the pensions board. He says he attended the board as the FBU rep, from 2015, though he was not a union official at that point. In January 2019, he identified an issue related to "split pensions" and raised it on behalf of an individual with the pensions board. It was discussed at a meeting on 3 May 2019 and resulted in the Respondent recalculating split pensions for already retired people. Two scheme members pursued complaints to the Pensions Ombudsman, which the Respondent settled by interest payments. On 8 July 2019, the Claimant attended a pensions workshop, where the split pension issue was raised again. He notified the Respondent of issues arising (RM52).

114. Whilst the Union Secretary would be the first port of call for representing colleagues at hearings, from October 2019 when the Claimant became Union Organiser, to February 2020 when he went off sick, and again on his return from sick leave from July 2020 until he became Brigade Secretary, the Claimant

represented colleagues in various hearings. He was also engaged in the following activities:

114.1. He was on the Staff Communications and Consultation Forum from October 2019 to the EDT. That appears to have been a collective bargaining body.

114.2. On 4 January 2020 he raised a dispute on behalf of the workforce regarding the Respondent not adhering to policy requirements about hearing grievances – see above.

114.3. After his return from sick leave in July 2020, he represented 7 employees in investigation meetings in front of Mr Watts.

114.4. On 7 December 2020 he emailed the CFO regarding facilities time – see above.

114.5. As noted above, on 9 December 2020 the CFO agreed to him carrying out union duties full-time on a trial basis (page 737) until the end of January 2021. The Claimant does not accept that this shows support for union activities as he says that if the CFO was supportive, she would have heard his 10 December 2020 grievance. He told us the Respondent has an issue with officials who stand up for members. He also says the capability process was escalated to coincide with his appointment as Brigade Secretary. The Claimant did not raise in any of his grievances that the capability proceedings were because of his union activities, though as noted above he mentioned it in his appeal against dismissal.

114.6. He says (RM171) that on 8 December 2020 he cross-examined Mr Watts in an appeal hearing for Mr Fox-Hewitt, that Mr Watts' decision was largely overturned and that Mr Watts embarrassed himself. Mr Watts told us he did not see it like that at all – we have set out his views about the role of the FBU above.

114.7. On 17 December 2020 he informed DCFO Barber about FBU concerns regarding Covid-19 safety. These were repeated at a meeting the next day. Mr Watts was not aware of this when making his decision to dismiss the Claimant.

114.8. On 24 December 2020 he informed the Respondent of a whistleblowing complaint (page 796). Mr Watts was not aware of this either.

114.9. On 8 January 2021 (page 798) he sent an email to Mr Barber regarding reduction of operational response provisions.

114.10. On 15 January 2021 he challenged the removal of fire cover at another Station, a matter reported in the press. Mr Watts was aware of this, fully expected it to be raised, and saw it as coming from the FBU rather than from the Claimant personally.

114.11. On 17 January 2021 (page 811), he emailed DCFO Barber regarding concerns about Covid-19 tracing and isolation. DCFO Barber replied (page 812) the same day and mentioned that the FBU had been a key stakeholder in Covid-19 planning, giving details of some of the actions the Respondent had taken and then saying he would welcome a discussion with the Claimant.

Law

Burden of proof

115. Section 136 of the Act provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment tribunals] *could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

116. Tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal ("EAT") in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case …) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage".

117. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

118. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

119. It is section 39 of the Act which renders discrimination unlawful. It provides that:

(2) An employer (A) must not discriminate against an employee of A's (B): -

(a) as to B's terms of employment;

(b) in the way A affords B access … to opportunities … for receiving any … benefit …;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

In determining whether the Claimant has been subjected to a detriment, "one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment? An unjustified sense of grievance cannot amount to 'detriment'" (**Shamoon v Chief Constable of the RUC [2003] UKHL 11**).

Discrimination arising from disability

120. Section 15 of the Act provides:

(1) A person (A) discriminates against a disabled person (B) if -

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

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

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

121. The first question in a complaint of discrimination arising from disability is whether there has been unfavourable treatment. The Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] ICR 230** held that this is essentially equivalent to a "detriment", and is a relatively low threshold, but that it is first of all necessary to identify the treatment in question. In that case, the employee's complaint concerned his entitlement to pension benefits which were based on his working part-time, rather than his previous full-time hours, at the date on which he took IHER. It was agreed that his reduced hours had arisen from his disabilities. The Court held that there was nothing disadvantageous or unfavourable about the treatment afforded to him, as if he had been working full-time, he would not have been entitled to an immediate pension at all.

122. Ms Winstone referred to **Cowie v Scottish Fire and Rescue Service [2022] IRLR 913** in her supplementary submissions on reasonable adjustments, but that decision is also relevant to the question of unfavourable treatment under section 15. The EAT identified that the treatment in question in that case was the employees having to use accrued time off in lieu ("TOIL") and annual leave at a time not of their choosing, before requesting special leave. The EAT held it would be artificial to consider the requirement to use accrued TOIL and leave separately from the entitlement to special leave because the two were inextricably linked. The special leave policy was favourable to the employees. There were conditions for entitlement, but that could not detract from the favourable nature of the treatment.

123. The reason for the unfavourable treatment is to be discerned by consideration of the alleged discriminator's thought processes. Whether the reason for any unfavourable treatment was "something arising in consequence of the Claimant's disability" could describe a range of causal links and is by contrast an objective question, not requiring an examination of the alleged discriminator's thought processes. The approach to complaints of discrimination arising from disability was considered in detail by the EAT in **Pnaiser v NHS England [2016] IRLR 170**. As far as relevant to this case, it said

> *(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act … the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*
> *…*
>
> *(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*
>
> *…*
>
> *(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment.*"

124. We draw the following principles from the relevant case law concerned with whether the unfavourable treatment (or indeed indirect discrimination – see below) can be said to be a proportionate means of achieving a legitimate aim (justification for short):

124.1. The burden of establishing this defence is on the Respondent.

124.2. The Tribunal must undertake a fair and detailed assessment of the Respondent's needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

124.3. What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said,

approving Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

124.4. In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

124.5. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Naeem v Secretary of State for Justice [2017] ICR 640**.

124.6. In summary, the Respondent's aims must reflect a real business need; the Respondent's actions must contribute to achieving it; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action, but whether what it did was reasonably necessary to achieving the aim.

Knowledge of disability/disadvantage

125. The question of knowledge is relevant to discrimination arising from disability as section 15 makes clear, and also to complaints of failure to make reasonable adjustments (see below), where the question of knowledge of substantial disadvantage also arises. Paragraph 20 of Schedule 8 to the Act provides, in wording akin to section 15(2):

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

126. The burden is on the Respondent to show that it did not have knowledge – certainly that is clear enough in relation to section 15 given the express wording of section 15(2). The EAT held in **Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10** that what this provision requires is that the employer knows (or could reasonably be expected to know) that an employee was suffering from an impairment, the adverse effects of which on their ability to carry out day-to-day activities were substantial and long-term, that is the various constituent elements of the definition of disability in section 6 of the Act – though as made clear in **Gallop v Newport City Council [2013] EWCA Civ 1583** it is knowledge of the facts of the Claimant's disability that is required, not an understanding by the Respondent that those facts meet the statutory definition. What is reasonable for the Respondent to have known is for the Tribunal to determine and will depend

on all the circumstances of the case. The question is what the Respondent would have found out if it had made reasonable enquiries – in other words there should be an assessment of what the Respondent should reasonably have done, but also of what it would reasonably have found out as a result (**A Ltd v Z [2019] EAT 0273/18** reflecting paragraph 5.15 of the EHRC Code on Employment (2011)).

Indirect discrimination

127. Section 19 of the Act provides that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's. This is the case when, according to section 19(2):

127.1. A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic.

127.2. The PCP puts, or would put, persons with whom B shares the characteristic (the same disability – section 6(3)(b)) at a particular disadvantage when compared with persons with whom B does not share the characteristic.

127.3. The PCP puts, or would put, B at that disadvantage.

127.4. A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

128. The Respondent accepts that the first step above is established in this case. The Claimant bears the burden of proof in respect of the second and third steps, and of course the Respondent bears the burden in respect of the fourth if it arises. We repeat our summary of the law under section 15 above as to whether a PCP is a proportionate means of achieving a legitimate aim.

129. As to the second step, it is necessary to identify a hurdle that has been placed in the way of the complainant and consider the range of persons affected by it. The EHRC Code of Practice on Employment (2011) states: "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively" – paragraph 4.18. In **Pendleton v Derbyshire County Council [2016] IRLR 580** the EAT did not read "particular disadvantage" for these purposes as requiring any particular level or threshold of disadvantage. The term was "apt to cover any disadvantage". Baroness Hale noted in **Homer v Chief Constable of West Yorkshire [2012] ICR 704**, "all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. [The legislation] was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages". Statistics can help but are not essential to proving particular disadvantage. In brief, the question is whether more people with the Claimant's disability in the selected pool experience the disadvantage than those without it. There will need to be some basis, in evidence or on judicial notice, on which to conclude that this is the case.

130. The EAT in **Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] IRLR 729** held that there are two broad categories of matters of

which judicial notice may be taken: facts that are so notorious or so well established to the knowledge of the court or tribunal that they may be accepted without further enquiry; and other matters that may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources. It went on to say that the tribunal must take judicial notice of matters directed by statute and of matters that have been so noticed by the well-established practice or precedents of the courts. Thirdly, it said that the court or tribunal has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence. Finally, the party seeking judicial notice of a fact has the burden of convincing a tribunal that the matter is one capable of being accepted without further inquiry.

Reasonable adjustments

131. Section 20 of the Act provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A 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.

132. Section 21 provides:

(1) A failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

133. “Substantial” in this context means “more than minor or trivial” – section 212(1) of the Act. The Tribunal’s task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, it must consider what it is about the PCP that puts the Claimant at the alleged disadvantage.

134. As can be seen from section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others. As indicated in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** the comparators are merely persons who were not disabled. They need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP puts the Claimant at the substantial disadvantage.

135. The ECHR Code at paragraph 6.16 says that “The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular PCP … disadvantages the disabled person in question. Accordingly … 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". In **Sheikholeslami v Edinburgh University [2018] IRLR 1090**, the EAT reflected on the employment tribunal's decision that it was necessary for the claimant in that case to prove facts from which the tribunal could conclude that the claimant would be placed at a substantial disadvantage by that PCP because of her disability, and held, "*that is not what the statutory test requires: [section 20] does not contain a strict causation test to be established in this way. Rather, a comparison exercise is required by it to test whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability. The Tribunal was therefore wrong to impose this requirement on the Claimant*".

136. The EAT in **British Telecommunications Plc v Robertson [2021] UKEAT/0229/20** held in what appears to be a contrasting approach, at paragraph 45:

"*As to ground 3 [of the appeal], this is to the effect that, as in relation to the section 15 complaint, the Tribunal erred because it failed to make any finding about what specific contribution, if any, the only found disability made to the Claimant's absence. In relation to the section 20 complaint, if there was a PCP applied, the Tribunal would then have needed to consider whether the found disability did indeed make the Claimant more vulnerable to being absent long-term and, ultimately, to lose his job as the result of the application of any such PCP. But it could not do that without considering what impact, if any, the found disability had had on his absence. I agree with Mr Sheehan that, without making a finding about that, the Tribunal could not have properly determined whether any found PCP placed him at the requisite disadvantage*". This ground of appeal was thus upheld.

137. Returning to **Griffiths**, the Court of Appeal held at paragraph 58:

"*[T]he language of section 20 is very different from the language in section 24 of the Disability Discrimination Act 1995. The nature of the comparison exercise in the former case is clear: one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able bodied. Of course, if the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability. But if the disability leads to disability-related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by that category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove the disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant*" (emphasis added).

138. It seems to us therefore that whilst, as said in **Sheikholeslami**, there is no strict causation test in order to establish substantial disadvantage, **Griffiths** make clear that the disadvantage must arise out of the disability, or as it was put in **Robertson**, the impact of the disability must be considered. In **Essop v Home**

Office (UK Border Agency) [2017] ICR 640 the Supreme Court made clear that a claimant does not have to show the reason for the group disadvantage in an indirect discrimination case (in that instance why people of one protected characteristic were more likely to fail a test). Group disadvantage is not however what is required to be shown in a complaint of failure to make reasonable adjustments, and such complaints were not under consideration in **Essop**. We also note that the Supreme Court acknowledged that it is open to an employer to show that there was no individual disadvantage (which is the focus in a reasonable adjustment case) as a result of the PCP, for example because a claimant did not bother to prepare for the test. It is also fair to assume that the EAT in **Robertson** was aware of **Essop**. We note finally in relation to this point that Ms Winstone in her supplementary submissions referred to **Hillingdon LBC v Bailey [2013] UKEAT/0421/12**, in which it was held that the relevant comparator group in an absence dismissal case was persons who by reason of illness were subject to a procedure for managing attendance but not disabled, but this case pre-dated **Griffiths**.

139. The next question is whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It is well known that assessing whether a particular step would have been reasonable entails considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support available to it. The question is how might the adjustment have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the Respondent.

140. In **Environment Agency v Rowan [2008] IRLR 20,** the EAT restated that tribunals must identify:

"(*a) the provision, criterion or practice applied by or on behalf of an employer, or;*

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant."

141. In **Bank of Scotland v Ashton [2011] ICR 632**, Langstaff J emphasised the importance in all cases of the tribunal focusing on the words of the statute and considering the matter objectively. He held:

"*The Act demands an intense focus by an Employment Tribunal on the words of the statute. The focus is on what those words require. What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that employer has gone through*."

142. In **Aleem v E-Act Academy Trust UKEAT/0099/20**, the EAT referred to **O'Hanlon v HM Revenue and Customs UKEAT/0109/06** in which the EAT held that it would be a very rare case in which maintenance of full pay would be a reasonable adjustment, in that case in the context of a sick pay arrangement.

That decision was upheld by the Court of Appeal. It also referred to **G4S Cash Solutions (UK) Limited v Powell UKEAT/0243/15** where a disabled employee returned from absence into a new role but with his former, higher, rate of pay maintained. Some months later the employer sought to change that, but the EAT held there was no reason in principle why it could not amount to a reasonable adjustment to maintain it. In **Aleem** itself, the employer had been clear throughout that the employee could not retain her higher pay from her previous role, though it maintained it for a while for specific reasons, including the conclusion of a grievance process. The EAT held that even discounting financial pressures – argued in that case, though not in the case before us – in the light of **O'Hanlon** and **Powell**, there was nothing particularly exceptional or unusual about the case such that it was a necessary reasonable adjustment to maintain the employee's pay.

143. Both Counsel referred to further cases in their supplementary submissions. It is not necessary to refer to them all, but briefly:

143.1. In **Kenny v Hampshire Constabulary [1999] ICR 27**, the EAT held that the duty to make reasonable adjustments concerned job-related matters and did not extend to assisting an employee with toileting needs.

143.2. In **Crofts Vets and Others v Butcher [2013] UKEAT/0430/12**, the EAT considered **Kenny** but held that the employer paying for counselling was job-related in the required sense, having been medically recommended, because it was a specific form of support that would enable the employee to return to work and cope with difficulties she had been experiencing there.

Unfair dismissal

144. Section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 renders a dismissal automatically unfair where the reason or principal reason for it is that the employee had taken part in the activities of an independent trade union at an appropriate time. Such activities must be activities of the union and not undertaken by the employee in a personal capacity. The Claimant has the burden of establishing a prima facie case that this was the reason for his dismissal.

145. If he does not, the Tribunal is to consider section 98 ERA which says so far as relevant to this case:

"*(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 … a reason falling within subsection (2) …

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

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

(3) In subsection 2(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any or physical or mental quality …

(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".

146. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers, leading them to act as they did in effecting the Claimant's dismissal. If and when the employer shows the reason for dismissal as above, it must then establish that it falls within one of the fair categories of dismissal set out by section 98(2) ERA (here the Respondent relies only on capability).

147. If the Respondent shows the reason and establishes that it was a reason falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the organisation, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant, determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of the reasonableness of the decision to dismiss. In all respects, the Tribunal must not substitute its opinion for that of the employer; rather, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

148. In addition to the general questions set out at section 6 of the List, the parties were agreed that the Tribunal should also consider in the context of section 98(4) ERA, whether the Respondent genuinely believed the Claimant was no longer capable of performing his duties, whether it adequately consulted him, whether it carried out a reasonable investigation including in relation to the

medical position at the EDT, whether it could reasonably be expected to wait longer to dismiss him and whether it properly considered alternatives to dismissal. Whilst of course the ACAS Code on Disciplinary and Grievance Procedures does not apply in such cases, the procedure followed by an employer in effecting dismissal, including the appeal process which is a well-recognised part of a fair dismissal in most cases, was also relevant to consider.

Wages

149. Section 13 ERA provides:

(1) *An employer shall not make a deduction from the wages of a worker employed by him unless – (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised – (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

150. It is not necessary to refer in any detail to case law on unauthorised deductions from wages. We do note though the decision of the EAT in **Weatherilt v Cathay Pacific Airways Ltd [2017] UKEAT/0333/16**, which said that a tribunal "is required to determine a dispute on whatever ground as to the amount of wages properly payable as a necessary preliminary to discovering whether there has been an unauthorised deduction. This must include a dispute as to the interpretation of the contract or the existence of an implied term. It would be surprising if the [tribunal] could not construe a provision of the contract to see whether it authorised a deduction when this very question is central to the operation of section 13".

Analysis

151. We set out our conclusions in relation to the complaint about wages first, then deal with the question of knowledge of disability which was relevant to both the section 15 and section 20 complaints. Thereafter we deal with the complaints and each of the relevant issues in the order set out in the List, with the exception of time limits which did not fall to be considered at all, hence the absence of any reference to time limits in our summary of the law above.

Wages

152. The Claimant's complaint is that the Respondent underpaid him sick pay, and thus made unauthorised deductions from his wages, between 26 February and 30 June 2020. The complaint was set out in Claim 1, submitted on 15 May 2020, giving rise to an application during closing submissions to amend his Claim to include the alleged underpayments for May and June 2020 respectively.

153. As is evident from our findings of fact and as is agreed, the Claimant was paid less OSP than was provided for in his written particulars of employment because of the time he spent on modified duties prior to his sickness absence. The questions for us to answer therefore were whether he was paid less than was properly payable to him (section 13(3) ERA) and, if so, whether any deduction was authorised by a relevant provision of his contract (section 13(1)). Section 13(2) defines a relevant provision as above.

154. It was necessary therefore to construe the terms of the Claimant's contract of employment. As we have set out above, the written contract incorporated the provisions of the Grey Book, which it said could be supplemented or superseded by local agreements with unions. As also set out above, if there was a local agreement with the FBU (in the Claimant's case) in relation to the MDP (or anything else for that matter), it would automatically form part of the Claimant's contract and he would be bound by it. As further already noted, we had little information about the collective bargaining process, whether generally, or specifically in relation to the MDP. The evidence we did have however, from Ms Baddeley orally and from the notes of the SMB meeting on 31 March 2015, made the position sufficiently clear.

155. We have already set out that neither the Claimant's written contract nor any part of the Grey Book to which we were taken stipulated a particular process for reaching local agreements. We were taken to page 213, but the procedure set out there is expressly not about collectively bargained matters, and to page 214, but that is only about disputes related to collectively bargained matters and not about any required process for reaching agreed terms by way of a collective bargaining process. Contrary to what it claimed in subsequent correspondence therefore, the MDP does seem to have been collectively negotiated with the FBU – in accordance with the standard process for the SMB that Ms Baddeley described to us. It clearly seems to have been sent to the union before the SMB meeting in March 2015, otherwise its representative would not have been able to discuss it and, it can properly be assumed, would have raised this at the meeting. Only then was it distributed to all employees for consultation. The fact of that distribution plainly does not mean the FBU had not had an opportunity at the SMB to negotiate about the MDP, nor that it could not continue to do so once the employee consultation commenced. Given that we are satisfied that this was the collective bargaining process the Respondent usually followed and followed in this instance, the fact that there is nothing written in the "Decisions made" section of record of the SMB meeting seems to us to be of no significance.

156. We are satisfied therefore that the MDP was the subject of local collective bargaining involving the FBU. The Respondent says that after the process we have just described, the MDP was implemented, in other words a local agreement was concluded. All the evidence supports that:

156.1. The Attendance Management Policy (page 325), at paragraph 7.4, refers to the MDP. The Claimant accepts that the Attendance Management Policy applied and was in force. It would be strange for such a Policy to refer to something that had not been agreed.

156.2. Other policies were discussed at the same SMB meeting in 2015 and evidently negotiated and consulted on with unions and employees respectively in the same way as the MDP, namely policies relating to parental leave and shared parental leave. Neither the Claimant nor the FBU have sought to argue that these other policies do not apply and are not enforceable. It is safe to assume that they must have been in frequent use.

156.3. No complaint is made by the Claimant, nor by the FBU for that matter, about the operation of the central plank of the MDP, namely to maintain employee pay on modified duties. The Claimant thus substantially benefitted from the MDP and it is cherry-picking to then complain about the aspect that did not suit him when it arose. Given the terms of the Claimant's written contract about the automatic effect of local agreements, whether he personally accepted the agreement about the MDP is nothing to the point, but it is nevertheless telling that he plainly did.

156.4. The MDP was clearly applied to other employees, not just the Claimant. It operated for more than 5 years before any complaint that we were taken to was made.

156.5. As noted in our findings of fact, the Claimant expected us to find against him in this respect. Of course, that is not determinative, but it too is telling.

157. In view of our conclusions that the MDP was the subject of a local agreement, the complaint of unauthorised deductions from wages is not well-founded, whether analysed on the basis that the OSP the Claimant says he was entitled to was not properly payable or on the basis that a contractual term authorised the reduced payments. As to the latter, we note the requirement of section 13(2) that the term of the contract must be in writing before any deduction, or else the existence and effect of the term must be notified to a worker before any deduction is made. The relevant term was given to the Claimant in writing because it was not disputed that he had a copy (or access to a copy) of the MDP well before any deduction, and in any event as set out in our findings of fact the Respondent wrote to him explaining the effect of the MDP on his sick pay before it took effect – see in particular page 561. Given our conclusion that the complaint of unauthorised deductions from wages is not well-founded, we do not need to address the Claimant's amendment application nor any time limit issues.

Knowledge of disability

158. Turning to knowledge of disability, the test we have sought to apply is as set out above in our summary of the case law. What the Respondent knew or should reasonably have known had it made reasonable enquiries is to be assessed corporately and collectively – in other words, there is no particular individual within the organisation whose knowledge or "constructive knowledge" is determinative of the question.

159. We begin with the facts that were actually known to the Respondent:

159.1. It knew that the Claimant was not carrying out his full duties for 10 months in 2017/18 because of depression, and that he underwent counselling in 2018.

159.2. On an unspecified date in 2018 (pages 937 to 941), the Respondent when referring the Claimant to OH acknowledged “ongoing depression”, describing it as “overwhelming”.

159.3. The OH referral on 4 February 2018 (page 942 – it is difficult to know whether this was before or after the one just mentioned) referred to “possible depression”.

159.4. The OH referral in July 2018 again referred to “ongoing depression” and indicated that the Claimant’s GP had prescribed medication.

159.5. On 22 January 2019, OH reported that the Claimant was fit for work, but anxious. There was no mention of depression.

159.6. Mr Reinholds knew from around April 2019 that the Claimant had depression, was taking anti-depressant medication (though he did not know how much), had issues getting up in the mornings, experienced low mood, tiredness and occasional suicidal thoughts, and was or had been undertaking some counselling.

159.7. On 5 April 2019, OH reported that stress and anxiety were impacting him physiologically. Again, there was no mention of depression.

159.8. On 16 April 2019 OH confirmed that there was no issue with the Claimant remaining in post. There were several references to anxiety but not to depression.

159.9. On 15 August 2019, OH reported that the Claimant was on anti-depressant medication, and said he was fit for work with temporary modifications.

159.10. At their meeting on 12 November 2019, the Claimant told Mr Stoddart that he had depression, was taking Sertraline, struggled with motivation and getting up, and had had counselling. Not dissimilar information was given to Mr Bywater in December 2019.

159.11. The OH report on 28 January 2020 did not mention depression.

159.12. The Claimant was on sick leave from February to July 2020. The GP note on 4 March 2020 referred to depressive disorder.

159.13. The OH report from 5 June 2020 described the Claimant as significantly unwell from a mental health point of view.

159.14. On 14 July 2020, the Claimant informed the Respondent that he had been treated for depression for 3 years and was on a substantial dose of daily medication.

159.15. The further OH report on 16 July 2020 said that he was likely to be disabled under the Act (the definition of disability was set out) though his condition was stable.

159.16. On 9 September 2020, OH said that he was not able to take the fitness test partly because of mental health problems, though these were not specified.

160. Taking all of that together, it is wholly clear that the Respondent knew that the Claimant had the mental impairment of depression from 2018, and in all likelihood from some time in 2017. Ms Winstone in her written submissions conceded knowledge of the impairment, though without saying from when.

161. As to whether it knew that the impairment had a substantial (more than minor or trivial) effect on the Claimant's ability to carry out normal day to day activities, for at least part of the period from 2018 to June 2019, the Claimant was carrying out his normal duties as a firefighter which, even absent emergencies, it can be readily acknowledged are physically strenuous and particularly in relation to emergencies can be mentally and emotionally demanding. That said, aside from the question of whether his firefighter duties or any part of them could be said to be normal day to day activities, the focus should be on what the Respondent knew he could not do or only do with difficulty. Albeit without any specifics, the Respondent acknowledged in 2018 that the effects of the Claimant's depression were "overwhelming", and from April 2019 Mr Reinholds knew of the Claimant's struggles getting up and getting to work which are plainly normal day-to-day activities. Furthermore, the substantial adverse effect does not have to be daily in order to be substantial, if it is likely to recur – see paragraph 4 of Schedule 1 to the Act. He might have had periods in work, but the Respondent was of course fully aware that the Claimant was on modified – rather than firefighter – duties for 10 months in 2017/18 and from June 2019, and that this was connected to depression.

162. We are satisfied therefore that from at least April 2019 and quite probably before, the Respondent knew that the Claimant's depression had a more than minor or trivial impact on his ability to carry out normal day-to-day activities. Further, whilst it had no actual knowledge of what the effect on the Claimant's ability to carry out such activities would have been without medication (and indeed without the counselling he had received), it did not require expert medical advice to appreciate that the effects would have been markedly more than minor or trivial without those interventions. The Respondent should reasonably have known from at least April 2019 that this was the case.

163. Did it know or should it reasonably have known that the effects were long term and, if so, when? Ms Winstone conceded in her written submissions that it did, though again without saying when. Based on the evidence before us, the Respondent first had a clear understanding of the more than minor or trivial effects on the Claimant from April 2019, but whilst the OH reports in the first half of 2019 did not refer to depression at all, the Respondent itself described the depression as "ongoing" in two OH referrals in 2018 and, as we have said, referred in one of those referrals to it being "overwhelming". Collectively therefore, it knew – or should reasonably have known – that by the time of the Claimant's disclosure to Mr Reinhold in April 2019, the effects of the Claimant's depression had lasted for at least 12 months or were likely to do so.

164. The earliest date on which the Claimant relies for a relevant complaint is June 2019. We are satisfied that by April 2019, the Respondent knew or should reasonably have known the relevant facts which together defined the Claimant as a disabled person within the meaning of the Act.

Discrimination arising from disability

Unfavourable treatment

165. We conclude that the Respondent did not treat the Claimant unfavourably by applying the MDP even though it eventually had the effect of reducing the amount of his OSP. Overall, the application of the MDP was plainly advantageous and favourable to the Claimant. The alternatives (ignoring dismissal) were for him to go on sick leave as soon as he could not carry out his firefighting duties and receive overall less pay than he did, or else be permanently redeployed to something other than a firefighter role which again would have resulted in overall lower pay. The reduction in sick pay in isolation looks unfavourable, but by analogy with **Cowie**, it is artificial to separate it from the benefits of the MDP because the two were inextricably linked.

166. Using gross figures, the Claimant says he lost around £5,000 in sick pay. Under the MDP, he spent over 14 months on full pay of around £31,000, when the role he was carrying out carried a salary of around £20,000. By our calculation therefore, for the period spent on modified duties and sick leave taken together (that is from June 2019), he was overall almost £8,000 better off than he would have been without the MDP. Moreover, whilst he had to work for that to be the case, that had the advantage of keeping him integrated into the workforce and interacting with his colleagues, which was of itself a benefit and increased the likelihood of his returning to work, certainly when compared to simply being absent. We do not agree with the Claimant therefore that the application of the MDP "punishes the temporarily disabled"; we do not think a reasonable employee could properly regard it as being to their detriment.

167. The second allegation of unfavourable treatment is the reduction of the Claimant's sick pay – see paragraph 3.1.2 of the List. This is the concomitant of, or in truth a different way of stating, the first allegation. Again, taken in isolation it appears to be unfavourable treatment, but it was inextricably linked to the application of the MDP. We thus repeat our conclusions above: without the MDP the Claimant would have been in a much worse position. He could not reasonably regard the application of the MDP and its impact on his sick pay as unfavourable. We also note, though of itself this would not have been determinative of the point, that we have concluded that he was paid in accordance with his contract.

168. The first two complaints fail on this basis. The Respondent denied that the commencement of a capability process (the third allegation) constituted unfavourable treatment. We accept that it was, at least in large part, designed to be a supportive process, that is to assist the Claimant with returning to full duties, and we also accept that there was no threat of dismissal until the final stage. Nevertheless, at each stage, from October 2019 onwards, the Claimant was told that a sanction could be imposed and that the process was a serious matter. Noting the relatively low bar described in the case law, we accept that the Claimant could reasonably regard this as unfavourable – it certainly put him on a

different footing to before. The Respondent accepts – rightly so of course – that the dismissal (the fourth allegation) was unfavourable treatment.

The reason for the unfavourable treatment

169. The further questions posed by section 15 therefore fall to be answered in relation to the commencement of the capability process and the Claimant's dismissal. The first question is to identify the reason for the unfavourable treatment, which in relation to dismissal inevitably anticipates our conclusions on the reason for dismissal in the unfair dismissal context. The reason or reasons for the treatment are, in the statutory language, the "something(s)" said to arise in consequence of the Claimant's disability – a separate question which we come to below.

170. As the List shows, the Claimant identified as the reason for the commencement of the capability process his being unable to pass (or start) fitness tests and the reason for his dismissal as a "lack of fitness" and/or his absence from 26 February 2020. The Respondent did not contest that those were the reasons. It is however for us to determine what the reasons actually were, based on the evidence presented, and it is clear to us that it was the "lack of fitness", or inability to reach the required standard of fitness, which was the operative reason in both cases. Although the Claimant's absence appears at times to have impacted his fitness, the Respondent did not commence a capability process or dismiss the Claimant because of his absence. Indeed, he was not absent when the process was started in October 2019 or when he was dismissed in January 2021. The Respondent's letter of 10 October 2019 invoked the capability process because the Claimant had failed to achieve the required standard of fitness and all of the subsequent letters under the process proceeded on that basis. None referred to his absence. As to the dismissal, Mr Watts was clear that this was because the Claimant had not, and in his view would not, reach the required standard of fitness in a reasonable time.

Did the reasons arise in consequence of the Claimant's disability?

171. We have not taken a literalist, inflexible approach to the reason as described by the Claimant, adopting "failure to reach the required fitness standard" as the reason, of which the inability to pass or start the fitness tests was the evidence, or at least part of the evidence. The crucial question therefore is whether the Claimant's inability to reach the required standard of fitness arose in consequence of his disability.

172. The burden is on the Claimant to establish that it did, though as our summary of the case law makes clear, he does not have to show an immediate connection between his failure to reach the standard and his disability, and equally it is clear that the disability does not need to have been the only factor contributing to his failure to reach the standard in order for the latter to arise in consequence of the former. The test is also an objective one and so is not determined by what the Respondent – or indeed for that matter, the Claimant – thought was the case. He nevertheless does have to establish a connection.

173. The Claimant himself said, as noted above, that there was nothing before us other than his assertion that the failure to reach the fitness standard arose in consequence of his disability. That admission cannot be ignored, though we

have of course assessed the evidence with which we were presented and it presents the following picture:

173.1. The OH referral in November 2017 referred to an underlying stress-related problem but said that the Claimant had remained fit for operational duties since returning to work in June.

173.2. There are several references, for example in the February 2018 OH referral, to the Claimant experiencing high blood pressure and/or anxiety when coming to do fitness tests. In April 2019, OH advised that he could take the tests with reasonable notice.

173.3. On 15 August 2019, OH advised that there was no "psychological barrier" preventing the Claimant reaching the standard.

173.4. On 12 November 2019, Mr Stoddart asked the Claimant if his mental health was affecting his motivation to train; the Claimant did not answer.

173.5. The Claimant said on more than one occasion – both to us and to the Respondent – that he lacked motivation to exercise, though in January 2020, OH reported that he wanted to take the test and the Claimant himself regularly said he wanted to reach the required standard, though he told us he was often tired after long days at work which affected the exercise he did in his own time.

173.6. The Claimant was very clear that the capability proceedings caused him to be unwell (and go on sick leave) and that the effects of the MDP, that is the reduction in sick pay, also demotivated him.

173.7. In June 2020, OH gave the opinion that the Claimant's "poor motivation is secondary to his mental health issues".

173.8. In July 2020, OH reported that he was not exercising due to poor motivation and his union role, but would start work in the gym during the next week.

173.9. In September 2020, OH reported that the Claimant was not yet at the point where he could take a fitness test due to his mental health problems and musculoskeletal problems. At his appraisal that month, it was recorded that the Claimant was distracted from working towards passing the fitness test by the capability process.

173.10. In November 2020, OH reported that the Claimant had "become physically deconditioned during his absence with the mental health issues" but there was a reasonable prospect of him passing the test in a reasonable period as he was working on his fitness. He was clearly engaged in physical training with Mr Harrison-Edwards, someone he clearly got on with better than he did with Ms Prew, over a few weeks ending in late October 2020.

173.11. Chest issues appear to have stalled that progress, though the January 2021 report said OH would support him to achieve the required level of fitness over several months.

173.12. The Claimant told Mr Watts in October 2020 that he did not keep fit whilst on modified duties because he thought he was going to continue in the Green Book (non-firefighting) role.

173.13. We also considered the Claimant's impact statement (pages 65 to 73), though this was only mentioned to us for the first time, and then only in passing, in Miss Johnson's oral submissions.

174. We begin our analysis of the above summary of the relevant evidence with what the Claimant said. Whilst he several times said to the Respondent that he lacked motivation, it is noteworthy that he did not say to the Respondent what he said to us, namely that this was effectively a result of depression. He did not answer Mr Stoddart's direct question on the point at all, and gave Mr Watts an explanation for not keeping fit that had nothing to do with his depression at all. As a result, and particularly given the Claimant's undoubted ability to voice his opinions to the Respondent throughout his employment, we felt unable to attach much weight to the Claimant's assertion before us of a connection between his disability and the failure to achieve the fitness standard. To the same point, although we acknowledge that the Claimant's disability does not have to have been the only thing from which the lack of fitness arose, we note the other factors that clearly had an impact, such as his being demotivated by the application of the MDP and – as he accepted was the case – aspects of his lifestyle that were sometimes unhealthy, such as his eating habits plus, particularly noteworthy, his belief that he would continue in the Green Book role.

175. As to the medical evidence, we do not think that the Claimant's anxiety about taking the tests, referred to in various OH reports, takes us any further forward, both because the disability in question in this case is depression and not anxiety, and because that was a particular issue with the testing regime not with the Claimant getting fit as such. The OH report in August 2019 is an early piece of medical evidence in the overall scheme of this case, but it is the clearest on this point, and said that there was no psychological barrier to the Claimant achieving the fitness standard. We have noted the later reports, in June and July 2020, both of which stated that the Claimant's poor motivation meant he was not exercising much, and the first of which said that this poor motivation was "secondary to his mental health issues". It is not clear what is meant by that statement, there is no explicit link to depression, and neither party adduced any evidence as to how it should be interpreted. The report in September 2020 referred to the Claimant not being able to take a test at that point, but again there is no clear link drawn to depression and moreover, as just noted, the question of whether the Claimant could face taking a test seems to have been bound up with anxiety about the testing regime. Finally, the reference in the report of 10 November 2020 to the Claimant becoming deconditioned by his absence with mental health issues draws a link between fitness difficulties and the Claimant's absence, but not at all clearly with his depression.

176. We acknowledge again that the Claimant does not have to show that only his disability led to his failing to achieve the fitness standard, but carefully weighing up the medical evidence we do not think that he has established on the balance of probabilities that this arose in consequence of his disability and we certainly do not think we can take judicial notice of the same (nor were we invited to do so). Even if one summarises the position by saying that the Claimant was on modified duties because of depression, that is not the same as saying that his

inability to achieve the required fitness standard (and the consequences which flowed from that) arose out of or was impacted by his disability. There might be any number of reasons why depression would mean a firefighter was on modified duties, not least the mental and emotional demands (as opposed to the physical fitness aspects) of such a crucial role.

177. That conclusion is not altered by the question asked by Fiona Prew on 13 August 2019, which was after all only a question, nor by her acknowledgment in her 26 October 2020 report that poor mental health can affect the ability to make healthy decisions, which was no more than a general statement of the obvious. Similarly, it is not altered by Mr Pryce's acknowledgement in his appeal decision that the Claimant had "experienced challenges with [his] mental health, which [had] affected [his] motivation to improve [his] fitness levels". Mr Pryce was not able to make a medical judgment of course, he had paid scant regard to the OH reports, and in any event what he said was doubtless based on what the Claimant had asserted. Moreover, the Claimant did not seek to argue, or put to Mr Pryce in cross-examination, that this comment established his case in this respect.

178. For the reasons detailed above therefore, the Claimant has not established that the unfavourable treatment arose in consequence of his disability. His complaints of discrimination arising from disability therefore fail, and it is not necessary for us to go on to consider whether the unfavourable treatment was a proportionate means of achieving a legitimate aim, or the Respondent's late amendment application in relation to those aims.

Indirect discrimination

179. We can deal with these complaints much more briefly. The Respondent accepts that it applied each PCP to the Claimant. As for issue 4.3 in the List, in respect of the first and third PCPs it accepts that it applied them to other employees not capable of fulfilling their contracted role, whether because of disabilities or other reasons, but not that they were applied more broadly. It accepts that the remaining PCPs were applied to all firefighters.

180. The complaints must fail however because the Claimant has not established a prima facie case that any of the PCPs put persons with whom he shared the protected characteristic – that is, specifically, depression – at a particular disadvantage when compared with persons who did not have that disability. The Claimant led no evidence whatsoever, whether statistical, anecdotal or otherwise, and indeed made no argument, to provide any indication that firefighters employed by the Respondent who had depression were or would be more likely than firefighters with other disabilities (and, in relation to the PCPs applied to everyone, more likely than firefighters with other disabilities or none) to:

180.1. Have difficulty in starting fitness tests (issue 4.4.1).

180.2. Have difficulty in passing fitness tests (issue 4.4.2).

180.3. Be on modified duties and thus have their entitlement to OSP reduced (issue 4.4.3).

180.4. Be less likely to pass fitness tests and thus more likely to be subject to capability proceedings.

181. In fact, the only evidence that could be said to be relevant to this question was contrary to the Claimant's case, namely that Mr Walton and Mr Emery were apparently both placed on modified duties when neither had depression.

182. We were certainly not prepared to take judicial notice of the same, and were not invited to do so in any event. We would also add that for the reasons already outlined above in the context of the section 15 complaints, we do not accept that being placed on modified duties was a particular disadvantage, either to the Claimant or to those with whom he shared the protected characteristic of disability by reason of depression.

183. It was not therefore necessary for us to consider whether the PCPs or any of them were a proportionate means of achieving one or more legitimate aims (justified for shorthand), but we would briefly note the following:

183.1. The Respondent's pleaded aims of, broadly speaking, protecting health and safety, fulfilling its duty of care and statutory duties, and taking measures to ensure firefighter fitness, were inarguably legitimate aims.

183.2. It was proportionate in fulfilling those aims to put a firefighter who could not do their firefighting duties on to modified duties under the MDP where the alternatives were considerably less beneficial for him as explored above.

183.3. It was proportionate also because the period on modified duties was only ever meant to be temporary, the Respondent clearly exercised flexibility in the application of the MDP to the Claimant (as the policy itself permitted at paragraph 6.6), significantly extending the standard maximum period of 6 months on modified duties and discounting from the period taken into account in subsequently reducing his sick pay, any period of time he spent on annual leave.

183.4. Albeit with the potential for sanctions, the heart of the Capability Policy was to assist the Claimant to return to full duties and put measures in place, after consultation, to enable that to happen.

184. Admittedly without having analysed the position in detail, the complaints of indirect discrimination would also have failed on the basis that the PCPs were a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

185. As set out above, we found that the Respondent knew or ought reasonably to have known that the Claimant was a disabled person by reason of depression by no later than June 2019. The Respondent accepts that it had the PCPs – they are the same PCPs as relied upon for the indirect discrimination complaints. The first question for us to consider therefore was whether any of the PCPs put the Claimant at a substantial (that is, more than minor or trivial) disadvantage in comparison with persons who are not disabled.

186. Regrettably this part of the Claimant's case was in many respects not as precisely pleaded as it should have been with professional representation. The

position was not wholly remedied by the further submissions prepared by his solicitors, although those submissions did specify – as we requested – precisely which alleged substantial disadvantages were said to arise from which PCP. It is those supplementary submissions therefore on which we have based our analysis.

187. The first PCP was the application of the MDP. The Claimant says it put him at a substantial disadvantage when compared with those who were not disabled, because its effect was to reduce his entitlement to OSP even though he was not on sick leave. We accept of course what is made clear in **Griffiths**, namely that persons who are disabled are more likely to take sick leave than those who are not disabled. It follows that persons who are disabled are more likely than those who are not to have the MDP applied to them. We do not accept however that the MDP "bites harder on the disabled", to use the language from **Griffiths**, for the reasons we have given in finding that the application of the MDP was not unfavourable treatment. The reverse is true, namely that it plainly benefits the disabled when looked at overall. We note that this was the conclusion of the Tribunal in the Walton case also.

188. The complaint about this PCP fails on that basis, but would also have failed on the basis that the step which the Claimant says the Respondent should have taken to avoid the disadvantage was in our view unreasonable. His case is that it should have extended the period during which he was entitled to full OSP. We note that **Powell** makes clear that in principle continuing payment to an employee when they are not performing their contracted (or in **Powell**, originally contracted) role can be a reasonable adjustment, but **Aleem** and **O'Hanlon** make clear that this would be an unusual case. Furthermore, as Ms Winstone points out, in the present case, as in **Aleem** but unlike in **Powell**, the Claimant was fully aware beforehand that the MDP could in time impact his pay. Given the overall payments made to the Claimant whilst he was on modified duties, we do not think it would have been reasonable to maintain his OSP any further. Whilst it is correct that he was performing work for the Respondent under the MDP, he was being paid substantially more than that work would usually be worth. Moreover, it is wholly unclear how extending his OSP would have assisted him in returning to effective service, which is what the duty to make reasonable adjustments is fundamentally intended to enable.

189. The second and third PCPs were the Respondent's Physical Fitness and Performance Policy and its Capability Policy. The Claimant says that these put him at the requisite disadvantage because he was unable to pass the fitness tests and was thus more likely than persons who are not disabled to have his pay reduced because of the MDP and be subject to capability proceedings. There is a conceptual difficulty in analysing this complaint on the basis that the Capability Policy was the PCP. It seems to us that, as the Claimant's supplementary submissions effectively say when read overall, that in fact the PCP was the requirement under the Respondent's Fitness Policy to reach and maintain a particular level of physical fitness, with the alleged substantial disadvantages being the eventual reduction in pay as a result of the Claimant being on modified duties, and his being subject to proceedings under the Capability Policy.

190. We rely again on our conclusions as to the overall beneficial effects of the MDP, including in respect of the Claimant's pay. As to the requirement to be fit, resulting in the disadvantage of capability proceedings, our detailed analysis of

the section 15 complaints sets out why we conclude that, to use the language in **Griffiths**, the disadvantage did not arise out of the Claimant's disability. In other words, for the reasons we have set out in the section 15 context, the Claimant has not shown that the requirement to be fit bit harder on him as a disabled person, which is what the broad comparison under section 20 requires. We rely on that reasoning in this somewhat different context. Accordingly, the Claimant has not established a prima facie case that the PCP put him at a substantial disadvantage compared to persons who are not disabled.

191. The complaints which the Claimant founded on the second and third alleged PCPs, modified for proper analysis as above, fail on that basis, but for completeness we have briefly considered the steps which he says the Respondent should reasonably have taken to avoid the alleged disadvantages:

191.1. It is not clear how providing the Claimant with more notice of tests would have enabled him to reach and maintain the required level of fitness and thus avoid any disadvantage occasioned by the PCP. Furthermore, and in any event, as Ms Winstone points out in her supplementary submissions, the tests after June 2019 appear to have been taken on dates agreed with the Claimant, so that if this was a reasonable step, it was in effect taken.

191.2. To say that the Respondent could have given the Claimant more support to improve his fitness is very unspecific. In any event, and noting that this complaint relates to the period prior to Stage 3 of the Capability Process being instigated, we observe that the Respondent placed the Claimant on modified duties (on full pay), gave him access to fully-equipped gyms, gave him the option of training with colleagues, offered the support of Ms Prew and Mr Harrison-Edwards, and prepared fitness plans. Some of these things were available to others as well, but that does not mean that they were not supportive to the Claimant. Other than as set out at paragraph 5.5 of the List, he has not specified what further particular steps should have been taken.

191.3. The Claimant says that the Respondent should have provided him with exercise plans. This can only mean copies of the same, as it is accepted that such plans were compiled. The Claimant did not explain to us how not having copies created any difficulty for him – he effectively conceded that it did not – and therefore it is difficult to see how providing them would have addressed the PCP and avoided the disadvantages.

191.4. The Claimant did not explain – in the pre-dismissal context of this complaint – how further time would have been of assistance to him in reaching the required standard of fitness. In any event, whilst we will come separately to the question of whether in the unfair dismissal context the Respondent could reasonably have been expected to wait longer, it can readily be seen that before that stage it gave the Claimant a substantial period of time to achieve what was required.

191.5. It is unclear what the Claimant means by his reference to the provision of "more emotional support" beyond the provision of counselling (see the decision in **Butcher** referred to above).

191.6. It is difficult to see how treating the test on 15 January 2020 differently would have addressed the PCP.

192. More broadly, we note that it was not argued that the Respondent failed to take any of the steps recommended by OH in the period prior to Stage 3 of the Capability Policy being implemented.

193. The complaints related to the second and third alleged PCPs would thus also have failed on the basis that the Respondent took the reasonable steps the Claimant identified or such further steps as he identified were not reasonable for the reasons summarised above.

194. According to the Claimant's supplementary submissions, the reasonable adjustments complaints in Claim 2 were made on the same basis as the complaints based on the second and third PCPs set out above, with the PCPs being the requirement for the Claimant to be fit and pass the fitness test, and the substantial disadvantages said to be that he could not maintain his fitness and was thus liable to capability proceedings and dismissal.

195. These complaints also fail on the basis that the Claimant has not established a prima facie case that the PCP put him at a substantial disadvantage compared to persons who are not disabled. Moreover, whilst the Respondent has not indicated that it could not have provided more counselling, and we accept that this may well have helped (and a guarantee that it would is not required for a step to be reasonable), the Claimant conceded in evidence that he could not maintain that the provision of one-to-one personal motivational coaching and/or the use of a sports psychologist were reasonable steps for the Respondent to take. Further, as the Respondent points out, one-to-one coaching was given by Ms Prew and Mr Harrison-Edwards. No further adjustments were canvassed by or with us in the course of the evidence or submissions.

196. It is not necessary for us to consider the question of the Respondent's knowledge of disadvantage. Further, as none of the various forms of discrimination complaint have succeeded, it is not necessary for us to consider any time limit issues either.

Unfair dismissal

197. Turning finally to the complaint of unfair dismissal, we deal first with the Claimant's case that the reason or principal reason for his dismissal was that he had taken part in the activities of an independent trade union at an appropriate time.

198. The first issue to briefly deal with in that respect is whether the IDRP pension disputes and the activity set out at paragraph 7.2.5 of the List were such activities, the Respondent accepting that was the case in respect of the remainder of paragraph 7.2. We can deal with this briefly. A request to discuss facility time is in our view plainly an activity the Claimant undertook in his role as a union official and not in a personal capacity, being a request to discuss something that would enable him to carry out activities on behalf of FBU members. It is clear that he would not have been writing to the Respondent regarding facility time if he had not been Brigade Secretary, and the letter in question did not link the request to the Claimant's personal circumstances. This, along with all of the activities in paragraph 7.2 of the List, was therefore participation in the activities of an independent union at an appropriate time.

That is not the case in relation to the IDRP pensions disputes activity however, as the Claimant's work in that respect appears to have been undertaken during a period when he was temporarily not in a union role.

199. We are in any event clear that the carrying out of these activities (as it happens, including the pensions disputes) was not the reason or principal reason for the Claimant's dismissal. He has not established a prima facie case, or in truth adduced any evidence, in support of his case in this regard. He said three things in evidence:

199.1. First, that the process under the Capability Policy was escalated once he became Brigade Secretary. In fact, that is not the case. He was invited to a Stage 3 hearing on 13 November 2020 and appointed as Secretary on 30 November 2020.

199.2. Secondly, he said that neither Mr Watts nor Mr Pryce recognised that he could have used his time as a union official to regain fitness. If that were right, it may go to ordinary fairness, but it plainly does not amount to either of them making a decision because or principally because the Claimant had undertaken any of the listed union activities.

199.3. The Respondent took unkindly to him as a more assertive union rep – but we saw no evidence that persuaded us of that assertion.

200. By contrast, and whilst the Respondent's evidence did not address all of the list of activities, we note the Respondent's statement in its standard contract that it is desirable for firefighters to be union members; Mr Watts' positive view of the activities of the FBU in representing its members; his being wholly unsurprised that the union raised the split pensions issue (because it was a national concern) and the issue about the removal of fire cover at another Station; the positive comments of Mr Jenkinson in the Claimant's appraisal on 23 September 2020 about the Claimant's union activities; the fact that the CFO agreed on 9 December 2020 that the Claimant could carry out his union duties full-time; and the fact that Mr Barber welcomed a discussion about Covid-19 issues raised by the Claimant, just two days before the latter's dismissal. Some of these matters show directly how Mr Watts viewed the Claimant's union activities – that is positively. Even those matters which are not directly attributable to him are demonstrative of a culture within the Respondent built on a similar view. We find that the dismissal was nothing at all to do with the Claimant's union activities. Mr Pryce is not likely to have had any material understanding of the Claimant's union activities, given that he worked in a different region.

201. We conclude that the Respondent has shown that the principal reason for the dismissal was the Claimant's failing to reach and maintain the required level of fitness, as Mr Watts said. As a subsidiary and related reason, he was also very concerned about what he saw as the Claimant not engaging with the capability process in order to reach and maintain that standard. This is what all the correspondence and minutes of the relevant meetings show. Mr Pryce clearly proceeded on the same basis. The principal reason for dismissal plainly falls within section 98(2)(a) ERA.

202. As we have already said in a different context, there can be no doubt about the importance of the fitness requirement for firefighters, which the Claimant

accepts. The remaining question is whether dismissal for this reason was fair in all the circumstances of the case (section 98(4) ERA). This requires consideration of all of the circumstances, including the (not inconsiderable in this case) size and administrative resources of the Respondent. We have set out the relevant law above, and remind ourselves of the fundamentally important points that first, we must not focus on what we would have done but assess what the Respondent actually did against the test of a range of reasonable responses, and secondly, that unless a particular step would have been utterly futile we should not say that it made no difference and so the dismissal was fair; whether it would have made a difference, and the likelihood of that, is usually a question for the remedy stage. It is helpful to break down the overall question in the way agreed with the parties at the start of the Hearing. We take each in turn.

203. We are satisfied that the Respondent genuinely believed the Claimant was no longer capable of performing his duties as a firefighter. The Claimant did not tell Mr Watts that he was able to pass the fitness test and acknowledged to Mr Pryce at the appeal hearing that he would not be able to do so at that point. We add that whilst there were differences of opinion between the parties as to the helpfulness of the DGA, there was nothing to suggest to us that it was an inappropriate measure of fitness.

204. As to whether the Respondent provided reasonable support to the Claimant to achieve the required standard, we have already set out in the discrimination context that we think it did so in the period prior to Stage 3 of the Capability Policy, including by operation of the MDP, time to work on fitness during working hours, the use of gym facilities, the offers of training support from colleagues, and the adjustment of the DGA. We will return to questions focused on Stage 3 itself below.

205. Did the Respondent adequately consult the Claimant? We are satisfied that it did. Although using largely standard letters, it kept the Claimant informed of what was happening at each stage, met with him to obtain his views, and set out the possible consequences in advance of each key meeting/hearing. It has to be said that the status of the meetings was not always made clear to the Claimant, for example the Stage 2 meeting arranged in October 2020, and the first meeting with Mr Watts which strictly speaking was not a meeting under the Capability Policy as such. Of itself however, we do not think that these omissions took the consultation process outside the range of reasonable responses. The Claimant understood the October 2020 meeting to be at Stage 2 because of the seniority of the manager involved, and the eventual Stage 3 meeting was clearly set up as such.

206. The next question is whether the Respondent carried out a reasonable investigation, specifically by finding out about the up-to-date medical position, as the Capability Policy requires (paragraph 4.6). Again, our focus must be on the dismissal stage (we will come to the appeal separately). Mr Watts did not see or take account of an OH report obtained a few days before he dismissed the Claimant, a report which said that the Claimant's mental health was more stable "and things are resolving" and which also supported a fitness programme to achieve the necessary fitness level over several months. Mr Watts cannot be said therefore to have been medically up to date when he made his decision. Similarly, whilst aware that the Claimant had been having chest issues over a period of 2 to 3 months, he took no steps to ascertain the true medical position in

relation to that. Further, the Respondent had been given some indications that the Claimant's mental health may have impacted on his ability to get fit (we note Ms Prew asked a question about this more than a year before the dismissal). We have set out above in analysing the discrimination complaints that these were no more than broad indications and that they were not sufficiently clear to establish the relevant complaints before us, but the Respondent did not at the point of deciding to dismiss the Claimant consider with OH whether this was a factor that ought to be taken into account. The OH report Mr Watts seems to have relied on in this regard was written almost eighteen months before the dismissal. All of this meant that the decision to dismiss was taken without a reasonable investigation and assessment of the medical position. It might also be noted that the Claimant's last fitness test was more than a year before his dismissal when Mr Watts had acknowledged (page 697) that his decisions and actions would be informed by the Claimant's progress in this regard. The Claimant did not arrange a test, but that did not prevent the Respondent doing so.

207. Could the Respondent reasonably have been expected to wait longer before dismissing the Claimant? Of course, the overall period during which the Claimant had been on modified duties, and the period over which the Respondent had sought to make progress under the Capability Policy, fell to be considered, the Claimant being aware of what was required of him and there having been improvements in his fitness, for example his improving his DGA times, without them being sustained. We acknowledge too that the MDP typically envisaged 6 months of modified duties.

208. Again, however our primary focus has to be on Stage 3. We conclude that the Respondent did not act within the range of reasonable responses in failing to wait longer, for the following reasons:

208.1. The Claimant had, it was widely acknowledged, properly engaged with the support offered by Mr Harrison-Edwards – Mr Harrison-Edwards himself and Mr Jenkinson made clear this was the case, as did OH in its report of 10 November 2020, planning to see the Claimant again two months thereafter. The fitness work with Mr Harrison-Edwards was due to continue until late December 2020.

208.2. The Claimant made clear that his progress had stalled because of his chest complaint. OH acknowledged that this was an issue, as did Station Manager Bourne (see pages 723 and 731 to 732) who was clear that the Claimant was doing well until this arose. Mr Watts simply did not accept that was the case, but as we have said, without medical support for his conclusion, proceeding on the basis that the Claimant had inexcusably made no contact with Mr Harrison-Edwards between the Stage 3 meetings in December 2020 and January 2021.

208.3. There is also the fact that the Claimant had been granted a full-time union role until at least the end of January 2021, it being said at the hearing on 11 December 2020 that the Claimant had found new motivation to get fit as a result, as Mr Watts seemed to accept.

209. It sent decidedly mixed messages to the Claimant, as he clearly felt, to commence, during the period when he was working with Mr Harrison-Edwards, proceedings that could lead to dismissal (we note Station Manager Bourne told Mr Watts he felt that this had hampered the Claimant's progress (see pages 731

to 732)) and when the CFO had agreed the union role and this had given him a renewed focus. Objectively assessed, the Respondent's approach was not at all well joined up or consistent.

210. As to procedural matters, in no particular order:

210.1. We are satisfied Mr Watts was not compromised in his ability to be appropriately impartial as the dismissing officer by his previous dealings with the Claimant – we have dealt with his views of the union's role above.

210.2. Whilst we were not told that Mr Watts had a separate conversation with the union about the Claimant being potentially liable to dismissal, as the Capability Policy required, it is clear that the union was involved at the dismissal and appeal stages and so this did not render the dismissal unfair.

210.3. The decisions not to progress the grievances the Claimant had presented at a late stage to CFO Bryant and DCFO Barber were entirely understandable and again did not make the dismissal unfair – the points being raised could perfectly adequately be dealt with in the Stage 3 capability process and it was not an absolute requirement to pause the process as the Respondent had done before.

210.4. It was a notable omission not to share Fiona Prew's report to Mr Watts with the Claimant, given Mr Watts plainly took it into account in reaching his decision, although this is not something the Claimant drew to our attention in the course of this Hearing and so we would not have found the dismissal unfair on this basis alone.

211. It is the question of alternatives to dismissal that we deem took the Respondent in a further respect outside of the range of reasonable responses. We note:

211.1. As the Claimant says, the onus was on the Respondent as the employer to explore such alternatives. The Capability Policy requires it. There were references to the subject of other roles during the Stage 3 and appeal hearings, but there was no clear consideration or explanation of such options by the Respondent.

211.2. Whilst a search for Green Book roles was apparently put in train during the appeal period, we were not given any evidence of what, if any, such roles were identified. Mr Watts clearly seems to have proceeded on the basis that the Claimant was explicitly offered an alternative role, when he plainly was not.

211.3. Whether or not Mr Emery's position was genuinely and sufficiently parallel to the Claimant's, the fact that redeployment opportunities were explicitly identified for him and that he was granted (or at least given the opportunity to apply for) IHER raises questions about the efforts made to discuss these options with the Claimant. We do not regard as satisfactory Mr Watts' explanation that the Claimant and OH said he could get fit, in contrast to Mr Emery, when the fact was that Mr Watts had reached the decision to dismiss and it was incumbent on the Respondent to properly consider alternatives to that course of action.

211.4. Whilst the Claimant accepts that he would have been required to reach the fitness standard had he remained in the full-time union role, there appears to have been no consideration by the Respondent as to whether that requirement could be waived (CFO Bryant had agreed to the Claimant doing the role knowing he was not fit) or whether the union role could be carried out by the Claimant holding another position.

211.5. Mr Watts' dismissal letter seems to have assumed that a warning was in place (see page 833), when it was not, which is another example of the Respondent's uncoordinated and somewhat confused approach. Mr Watts' explanation as to why a warning was not an appropriate sanction, namely that the Claimant would appeal it, is plainly unsatisfactory and demonstrates that alternatives to dismissal were not properly considered at all.

212. In summary, the combination of Mr Watts not being properly updated on the Claimant's medical position, the various grounds on which we have concluded that the Respondent could reasonably have waited longer and its failure properly to address alternatives – particularly when one weighs in the balance the important fact that the Claimant had 28 years' service and (unlike Mr Emery) had not been given any formal warning – rendered the dismissal unfair. It is a separate question, as already noted, whether the elimination of those failures on the Respondent's part which we consider outside of the range of reasonable responses would have made a difference to the eventual outcome, how likely it is that this would have been the case and from when. That is a matter for assessment of compensation.

213. We deal finally with the appeal and can do so briefly. Whilst we are satisfied that the hearing itself was conducted fairly, giving the Claimant the chance to put forward his grounds of appeal, it plainly did not cure any of the issues we have identified above. Mr Pryce did not have either the November 2020 or January 2021 OH reports and may well not have seen any OH report at all. He did not know the Claimant was in the middle of working through a fitness plan when the Stage 3 process was instigated. He too accepted the Claimant had chest issues and had until they arose been making an effort to get fit, but told us he focused on the overall period of modified duties. Whilst as we have said this was of course relevant to consider, Mr Pryce thus did not properly apply his mind to the question of whether the Respondent could reasonably have been expected to wait longer. Redeployment was not discussed, because Mr Pryce says the Claimant did not raise it; as we have said, this was a responsibility on the Respondent.

214. The Claimant's dismissal was therefore unfair and his complaint of unfair dismissal is accordingly well-founded. The question of compensation for unfair dismissal will be considered at a separate hearing.

Employment Judge Faulkner
Date: 3 May 2023