EMPLOYMENT TRIBUNALS

Claimants: **Mr G Mills**

Respondent: **South Western Ambulance Service NHS Foundation Trust**

Heard at: **Southampton (by video)**

On: **30, 31 October and 1, 2, 3 November 2023**

Before: **Employment Judge Dawson, Mr K Sleeth, Mr D Stewart**

Appearances
For the Claimants: Miss Mitchell, solicitor
For the Respondent: Ms Greenley, counsel

JUDGMENT

The claims are dismissed.

REASONS

Introduction

1. By way of brief overview, the claimant was employed by the respondent as a paramedic from 2000 until 27 July 2022. He was dismissed on the grounds of ill-health. The respondent provides ambulance services across south-west England. The claimant asserts that his dismissal was unfair and an act of discrimination and that a number of other actions by the respondent constituted either discrimination on the grounds of disability, indirect discrimination or a failure to make reasonable adjustments.

Issues

2. By a claim form presented on 6 February 2022 the claimant presented a claim of discrimination on the grounds of disability. It was considered that claim required further clarification and Particulars of Claim were sent thereafter, running to 8 pages of dense allegations. The claimant presented a second claim on 9 November 2022 alleging discrimination on the grounds of disability, unfair dismissal, arrears of pay and other payments. The grounds of claim attached ran to 3 pages.

3. The claim needed clarification and a case management hearing took place on 12 April 2023. A case management order was sent to the parties on 15 May 2023 containing a list of issues. The case management order stated that if either side thought the list was wrong or incomplete they must write to the tribunal within 14 days of the date of the order. Neither party raised any concerns about the list of issues.

4. That list of issues is set out in the annex to this judgment.

5. At the outset of the hearing the tribunal went through the list of issues with the parties in some detail. Certain amendments were made to the list of issues as follows:

    a. The respondent confirmed that it was not asserting that the claimant had contributed to his dismissal by culpable conduct.

    b. The respondent conceded that the claimant was disabled at all material times by way of chronic dysthymia as well as by way of PTSD.

    c. The respondent confirmed that it asserted that it did not have knowledge of the claimant's chronic dysthymia until 10 February 2020 and did not have knowledge of PTSD until 17 June 2021. It denied knowledge of substantial disadvantage at all.

    d. The claimant's counsel, having taken instructions, withdrew the claim of victimisation.

    e. It was noted that the question of remedy would not be dealt with at the same time as the liability hearing in accordance with the case management order dated 12 October 2023. The tribunal raised with the parties it's assumption that questions arising under *Polkey v A E Dayton Services Limited* [1998] ICR 142 and *Chagger v Abbey National Plc* [2010] IRLR 47 would be dealt with at the liability stage. Both counsel submitted that those questions should be left until the remedy stage of the hearing and the tribunal agreed to that. No further discussion took place at that time. That led to difficulty at the end of the hearing since counsel for the respondent submitted that such a decision did not preclude the tribunal from considering whether, for instance, a failure to make reasonable adjustments as alleged in paragraph 6.5.1 of the list of issues was

causative of the dismissal at the liability stage, whereas counsel for the claimant submitted that issue should be left to the remedy hearing. Having heard submissions it was agreed that the tribunal would determine which position was correct within its liability judgment and make findings accordingly. We have decided that if the issue is purely one of remedy, we would have left any questions under *Polkey* or *Chagger* to the remedy hearing. However in order to decide the questions of liability identified we have needed to make some findings which might be considered akin to the types of issue normally resolved under *Chagger*, such as whether the requirement to work nights caused the claimant's dismissal (issue 6.3.4). Where those types of issues arise within the liability part of the list of issues we have resolved them. We considered that was fair as both counsel explored those points with the witnesses in evidence.

6. Subject to those points the issues were confirmed as set out at the hearing on 12 April 2023.

7. In her written closing submissions, counsel for the respondent conceded that the application of the absence management procedures and the dismissal of the claimant were unfavourable treatment caused by the claimant's sickness absence which arose from his PTSD (paragraph 137).

8. In her closing submissions, counsel for the claimant clarified that insofar as the claim of reasonable adjustments asserts a PCP of requiring the claimant to work without regular management reviews, the period relied upon is from November 2019 through to dismissal. However she also acknowledged the claimant's evidence that his complaint was not about contact when he was absent but a lack of contact when he was at work.

9. Much of the evidence contained in the claimant's witness statement did not correlate to the list of issues. We were not invited to vary the list of issues (and would likely have been disinclined to do so in circumstances where the list of issues had been agreed by parties who were legally represented, it had been necessary to create a list of issues to properly understand the claims which the claimant was bringing and the respondent would have been prejudiced if it had been faced by a change to the case which it had to meet at the final hearing).

10. This judgment is based on the list of issues. It is inevitable, therefore, that we do not deal with every point made by the claimant, or the respondent's witnesses.

Conduct of the Hearing

11. Although the hearing had been listed in person, it had been converted to a fully remote hearing.

12. At the outset of the hearing, counsel for the claimant requested that a number of adjustments should be made to accommodate the claimant's disabilities (of PTSD and chronic dysthymia). Those adjustments were suggested on the basis

of certain paragraphs contained within the Equal Treatment Bench Book. They were as follows:

a. Mr Mills would need an explanation of the hearing and what to expect.

b. Mr Mills would need regular breaks.

c. The tribunal, and counsel, should demonstrate empathy and understanding, providing reassurance and keeping the hearing calm.

d. The respondent's counsel, when cross-examining Mr Mills, should ask open questions as opposed to tag questions or adopting other questioning styles which could appear accusatory.

13. Counsel for the claimant confirmed that she did not seek any changes to the remote nature of the hearing.

14. The respondent agreed to suggested adjustments a)-c) as did the tribunal and the judge explained the process to Mr Mills, who confirmed he had no questions and told Mr Mills that he could ask for breaks whenever he wanted them. As the hearing progressed the tribunal sought to take a break every hour or so in any event.

15. In respect of suggested adjustment d), counsel for the respondent objected. She submitted that the respondent was only put on notice of the request for such adjustments on the Friday before the hearing started on the Monday, at which point the case was prepared for the respondent. She submitted that to have to re-write her cross-examination would be unduly onerous and there was no obvious reason why such an adjustment was necessary.

16. The claimant's counsel asked the tribunal to consider medical evidence which was in the bundle and stated that the claimant's PTSD had been caused by cross-examination of Mr Mills in criminal proceedings in which he was a witness. Having considered that evidence, we considered that the point being made in the medical evidence was that it was the allegation which was put to Mr Mills in the Crown Court (that his treatment had been responsible for the death of a baby) rather than the style of cross-examination which had caused the PTSD. There was no evidence that an effect of the claimant's disability was that he could not satisfactorily deal with the normal style of cross-examination as long as it was carried out sensitively, nor was there any evidence that the normal style of cross examination would make the claimant's PTSD worse.

17. In circumstances where there was no evidence (of a medical or other nature) that Mr Mills would be put at a disadvantage by being asked questions of a closed type, the tribunal considered that it was not reasonable to put the respondent to the inconvenience of having to re-prepare cross-examination of the claimant and declined to order that adjustment to the proceedings. However, the tribunal did say to the claimant that if he was feeling distressed by the cross-examination he

could raise that with his counsel in private, notwithstanding that he would not normally be able to speak to his counsel about his evidence while in the process of giving it. His counsel could then raise any concern with us, to enable us to re-visit the question. To that extent the tribunal did adjust the process of cross-examination.

18. During the case, the claimant's counsel did not raise with the tribunal any concern that the claimant was distressed by the process of cross-examination or raise any other concerns as to the conduct of the hearing. We record that that the cross-examination of Mr Mills was sensitive and fair (as indeed was the cross-examination of the respondent's witnesses by the claimant's counsel).

19. The respondent sought to rely upon a supplemental witness statement from Emily Finch which was made in response to a statement relied upon by the claimant from Mr Crouch. The evidence of Mr Crouch had only been permitted following the case management order on 12 October 2023. The tribunal considered the overriding objective and having regard to the scope of the statement and the fact that it was only made in response to the evidence of Mr Crouch, decided that it should be admitted. We did not consider that there was any prejudice to the claimant since Ms Finch was simply rebutting evidence called by the claimant and any disputes could be dealt with in cross-examination.

20. A timetable had been set for the hearing within the case management order of 12 April 2023 and both parties were well able to complete their cross-examinations within the time anticipated. We were grateful to the representatives for their assistance in that respect.

21. For the claimant, we heard from himself and Stephen Crouch. For the respondent we heard from

    a. Mr Lee, Operations Manager – North Somerset at the relevant time,

    b. Mr Chance – Hyett, Operations Officer during the relevant time and line manager of the claimant for some of his employment.

    c. Mr Love, Operations Manager, who conducted a stage 2 sickness absence meeting with the claimant.

    d. Mr Curry, regional Supply and Delivery Manager, who chaired the claimant's stage 2 Attendance Management Appeal Hearing.

    e. Ms Bonser, line manager for the claimant whilst he was an Operations Officer and thereafter County Commander.

    f. Ms Finch, People Partner Manager.

22. We also received a statement from Ms D'Amico who did not give evidence. Having regard to the fact that she was not cross-examined we can only give her evidence limited weight.

23. We were provided with a hearing bundle running to 1056 pages and, hereafter, references to pages are to that hearing bundle unless otherwise stated.

The Law

Unfair Dismissal

24. Section 98 Employment Rights Act 1996 provides that it is for the respondent to show the reason for dismissal and that it is a potentially fair reason.

25. Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- 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 shall be determined in accordance with equity and the substantial merits of the case".

26. In *East Lindsey District Council v Daubney* [1977] I.C.R. 566 it was held

> "Unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done".

27. In *BS v Dundee City Council* [2013] CSIH 91 the tribunal was found to have made a number of errors. The case provides a guide for the factors which should be taken into account in a case such as this:

> (1) the tribunal had failed to directly address the essential question in a case in which the employee has been absent from work for some time owing to sickness of whether the employer can be expected to wait longer (para 28);
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> (2) the tribunal had failed as it was required to to take account of the employee's views as to whether he was in a position to return to work (para 30);
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> (3) the tribunal had failed to address properly the question of whether a reasonable employer in view of the medical evidence and the appellant's own views would have waited longer or whether the decision to dismiss which was

taken was within the range of reasonable responses open to the employer (para 31);

(4) the tribunal had erred in treating length of service as automatically relevant in dismissal cases such as the present (para 33)

28. In *McAdie v Royal Bank of Scotland* [2007] EWCA Civ 806, it was held that a dismissal of the claimant on the basis that she was indefinitely incapable of doing her job was fair, notwithstanding that the employer was culpable in bringing about that incapability.

29. In *Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust* [2019] EWCA Civ 498 the decision in *McAdie* was clarified as follows "What he said was that the previous history was potentially relevant, as one of the 'circumstances' to which regard must be had when considering the reasonableness of the dismissal but it could not be dispositive. It certainly could not lead to the conclusion that an employer could never fairly dismiss an employee on grounds of capability because the employer itself had contributed to the lack of capability (for example because of an injury at work caused by the employer's negligence)."

Discrimination because of Something Arising from Disability

30. In respect of a claim of discrimination arising from disability, under section 15(1) of the Equality Act 2010 a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

31. Under section 15(2), this 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.

32. The proper approach to section 15 claims was considered by Simler P (as she then was) in the case of *Pnaiser v NHS England* at paragraph 31. She held:

> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
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> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

(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 (described comprehensively by Elisabeth Laing J in *Hall*), 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.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only,

> and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.
>
> (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.

33. In *Private Medicine Intermediaries Ltd v Hodkinson*, HHJ Eady QC held

> **[24]** The protection afforded by s 15 applies where the employee is treated "unfavourably". It does not necessitate the kind of comparison required by the use of the term "less favourable treatment" as in other forms of direct discrimination protection; neither is it to be understood as being the same as "detriment". "Unfavourable treatment" suggests the placing of a hurdle in front of, or creating a particular difficulty or disadvantage for, a person because of something arising in consequence of their disability. It will be for an ET to assess, but treatment that is *advantageous* will not be unfavourable merely because it might have been *more* advantageous.

34. In *Dr J Ali v Drs Torrosian, Lechi, Ebeid & Doshi t/a Bedford Hill Family Practice* Appeal No. UKEAT/0029/18/JOJ, HHJ Eady QC helpfully summarised the principles in relation to justification as follows.

> 15. Section 15(1)(b) thus allows that the unfavourable treatment relevantly identified for the purposes of section 15(1)(a) - here, the Claimant's dismissal - might be justified if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question has to be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (see *Chief Constable of West Yorkshire Police & Another v Homer* [2012] ICR 704 SC , and *Allonby v Accrington & Rossendale College & Other*s [2001] ICR 1189 CA).
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> 16. Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (see Ojutiku v Manpower Services Commission [1982] ICR 661 CA per Stephenson LJ at page 674B-C, Land Registry v Houghton & Others UKEAT/0149/14 at paragraphs 8 and 9, and Hensman v Ministry of Defence UKEAT/0067/14 at paragraphs 41, 42 and 44).

17. It is, further, common ground that when determining whether or not a measure is proportionate it will be relevant for the ET to consider whether or not any lesser measure might nevertheless have served the employer's legitimate aim (see the EAT's judgment in Naeem v Secretary of State for Justice [2014] ICR 472).

18. More specifically, the case law acknowledges that it will be for the ET to undertake a fair and detailed assessment of the working practices and business considerations involved, and to have regard to the business needs of the employer (see Hensman at paragraph 44). In that context, the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence will, no doubt, be a significant element in the balance that will determine the point at which their dismissal becomes justified, albeit, the evidence that may be required in this respect will be primarily a matter for the ET (see per Underhill LJ at paragraph 45 of O'Brien v Bolton St Catherine's Academy [2017] ICR 737 CA).

19. In O'Brien , a particular concern was raised as to what was said to have been the conflation by the ET in that case of the test applicable under section 15 of the EqA and that in the unfair dismissal claim, brought under section 98 of the Employment Rights Act 1996 ("ERA"). As Underhill LJ acknowledged in O'Brien , in carrying out the assessment required for the purposes of section 15 EqA , the ET is applying a different legal test to that arising in the context of an unfair dismissal claim under section 98 ERA . That said, Underhill LJ went on to deprecate the introduction of additional complexity where the substantive assessment is likely to be the same. Specifically, as he identified, where an ET is concerned with both such claims in the context of a dismissal for long-term sickness absence, the factors that are relevant for its determination of one claim are likely to be substantially the same as those to be weighed in the other (see paragraphs 53 to 55 of O'Brien).

20. As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied (see Trustees of Swansea University Pension and Assurance Scheme v Williams [2015] ICR 1197 EAT at paragraph 42). When the putative discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification (see Ministry of Justice v O'Brien [2013] UKSC 6 , see in particular the judgment of the Court at paragraph 48; although the test remains an objective one, see O'Brien at paragraph 47).

35. In *Buchanan v Commissioner of the Police of the Metropolis* [2016] IRLR 918, the Employment Appeal Tribunal made clear that the focus in a section 15 claim

is on the treatment complained of rather than the policy which gave rise to the treatment. The EAT held:

> 42 The starting-point must be the words of s.15(2)(b) of the Equality Act 2010. This requires the putative discriminator A to show that 'the treatment' of B is a proportionate means of achieving a legitimate aim. The focus is therefore upon 'the treatment'; and the starting point therefore must be that the ET should apply s.15(2)(b) by identifying the act or omission which constitutes unfavourable treatment and asking whether that act or omission is a proportionate means of achieving a legitimate aim.
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> 43 There will be cases where the A's treatment of B is the direct result of applying a general rule or policy to B. In such a case whether B's treatment is justified will usually depend on whether the general rule or policy is justified
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> ….
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> 49 As we have seen, the respondent's policies allowed for such an individual assessment; and (while they did not deal specifically with disability) so did the Regulations. The various steps which the claimant criticised were not mandated by the Regulations or the respondent's policies. It is therefore impossible to assess whether such a step was a proportionate means of achieving a legitimate aim simply by asking whether the Regulations or the respondent's policies were justified. The ET was required by s.15(2) to look at the treatment itself and ask whether the treatment was proportionate.

Indirect Discrimination

36. As for the claim for indirect disability discrimination, under section 19(1) of the Equality Act 2010 a person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision criterion or practice is discriminatory in these circumstances if A applies, or would apply, it to persons with whom B does not share the characteristic; it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts, or would put, B at that disadvantage; and A cannot show it to be a proportionate means of achieving a legitimate aim.

37. Section 6(3)(b) of the Equality Act 2010 provides "in relation to the protected characteristic of disability... a reference to persons who share a protected characteristic is a reference to persons who have the same disability"

38. In respect of a provision criterion or practice (PCP) in the case of *Ishola v Transport for London* [2020] ICR 1204 the Court of Appeal held:

> "In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be

treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one" (paragraph 38).

Reasonable adjustments

39. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the Equality Act 2010.

40. Section 20 of the Equality Act 2010 provides, in respect of the duty to make reasonable adjustments, as follows:

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

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with per-sons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Section 21(1) provides that a failure to comply with the first or second requirement is a failure to comply with the duty to make reasonable adjustments.

41. Paragraph 20 of Schedule 8 to the Equality Act 2010 provides

(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—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(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.

42. In *Environment Agency v Rowan* [2008] IRLR 20, the EAT gave guidance on how an employment tribunal should act when considering a claim of failure to make reasonable adjustments. The tribunal must identify:

> "(*a*) the provision, criterion or practice applied by or on behalf of an employer, or;
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> (*b*) the physical feature of premises occupied by the employer;
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> (*c*) the identity of non-disabled comparators (where appropriate); and
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> (*d*) the nature and extent of the substantial disadvantage suffered by the claimant'.'

43. The question of whether a one-off act can be a PCP is also answered by the decision in *Ishola*.

44. In *Bray v London Borough of Camden* [2002] All ER (D) 328 (Jul), the EAT held:

> "The logical consequences of the argument that an employer should exclude from consideration the entire part of an employee's sickness absence related to disability would be that an employee could be absent throughout the working year without the employer being in a position to take any action in relation to that absence. In our view, the tribunal was correct, as a matter of good sense, to take the point that if any such absences were to fall outside the sickness policy it would generate enormous ill-feeling and be a potential for unauthorised absenteeism." (As summarised by the All ER (D) report).

Knowledge of Disability

45. Knowledge of disability, whether actual or constructive, must be knowledge of the following matters: the physical or mental impairment; that it is of sufficient long-standing or likely to last 12 months at least and that it sufficiently interfered with the individual's normal day-to-day activities to amount to a disability. However, there is no need for the employer to be aware of the specific diagnosis of the condition that creates the impairment – see *Jennings v Barts and the London NHS Trust* EAT 0056/12.

46. Ignorance is not a defence under these sections. We have had to ask whether the respondent knew or ought reasonably to have known that the claimant was disabled. In relation to the second part of that test, we have had to consider whether, in the light of *Gallop v Newport City Council* [2014] IRLR 211 and *Donelien v Liberata UK Ltd* [2018] IRLR 535, the employer could reasonably have been expected to have known of the disability. In that regard we must consider whether the respondent ought reasonably to have asked more questions on the basis of what it already knew. We must also consider what the respondent would have discovered had asked the questions it should do *(A v Z* UKEAT/0273/18)

Time

47. In respect of the Equality Act 2010 section 123 provides

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

48. In *Matuszowicz v Kingston-Upon-Hull City Council* [2009] IRLR 288, the Court of Appeal held, in respect of when time starts to run for a reasonable adjustments claim "In terms of the duty to make reasonable adjustments that seems to require an enquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. Necessarily, the employer has not made the reasonable adjustments, since otherwise the complaint would not arise, but it has done nothing inconsistent with making them in future, since otherwise the matter would be within para. 3(4)(a). In this case, however, the person in question is to be treated as having decided upon the omission as a deliberate omission at the time when he might reasonably have been expected to have done the thing omitted."

49. In the same case Sedley LJ stated " The other is that, when deciding whether to enlarge time under para. 3(2), tribunals can be expected to have sympathetic regard to the difficulty para. 3(4)(b) will create for some claimants. As Lloyd LJ points out, its forensic effect is to give the employer an interest in asserting that it could reasonably have been expected to act sooner, perhaps much sooner, than it did, and the employee in asserting the contrary. Both contentions will

demand a measure of poker-faced insincerity which only a lawyer could understand or a casuist forgive"

50. In *Olufunso Adedeji v University Hospitals Birmingham Nhs Foundation Trust [2021] EWCA Civ 23* , Underhill LJ stated

> "It will be seen, therefore, that *Keeble* did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.

Findings of Fact

51. In this section we set out general findings of fact. Some findings of fact are more easily explained in the context of our conclusions on particular parts of the claim. Thus we set out some further specific findings of fact within the Conclusions section of this judgment.

52. The claimant commenced employment with the respondent in June 2000.

53. According to his witness statement, the claimant has suffered from chronic dysthymia for 27 years. We accept that evidence and that the claimant has tried several medications throughout that period. Thus, it is a condition which he has been with throughout his employment with the respondent.

54. In 2005 the claimant qualified as a paramedic and in late 2015 he completed what he describes as an arduous and challenging assessment process to become an Operations Officer (OO). He states that he scored very highly and was commended on his successful outcome which occurred during a period of good mental health. We accept that evidence, it was not in dispute.

55. In 2016, the claimant attended a call where a three-month-old patient suffered a respiratory arrest. As a result thereof the claimant had to attend the Crown Court as a witness on more than one occasion. He found being cross-examined extremely distressing because it was put to him that he had caused or contributed to the death of the baby. We accept the evidence contained in the medical report of Dr Ornstein, sent following an interview on 17 June 2021, that since that time the claimant has suffered from PTSD which is attributable to the court case. As we understand it, there was no truthful basis for the allegation being made against the claimant in the criminal proceedings, but we do not need to, and do not, make any findings in that respect.

56. The claimant felt unsupported by the respondent as he went through that process and in a grievance process the respondent accepted that the claimant had not had sufficient support at that stage (as recorded in the stage 3 outcome letter at page 666). In the stage 3 outcome letter Ms Bonser recorded that she, also, acknowledged that the support received throughout the court case was not at the level she would have hoped for.

57. In 2018, the respondent went through a reorganisation referred to as a "reshaping operation". It decided to reduce the number of operating officers from 130 to around 80. That evidence was not in dispute.

58. The 130 post holders were required to apply for the available roles in the new structure. A competitive assessment process was arranged and all applicants had to go through that process.

59. The witness evidence of Ms Finch stated that every OO received an invitation to the assessment process which included the following paragraph ""Please let me know if you would like any reasonable adjustments to be made under the Equality Act 2010 in order that you can compete fairly for a position with the Trust or if you are unable to attend at any stage of the selection process."

60. The claimant disputed that evidence and said that a number of one-to-one meetings, which he should have had, were cancelled and that he was not able to make any request for reasonable adjustments in relation to the process.

61. It was put to Ms Finch that she was wrong about the paragraph and she replied that it was in an email. It was put to her that the email was not in the bundle and she replied that she did not know why, because the respondent had it.

62. Although the respondent has not produced a copy of the invitation, we found that the evidence of Ms Finch was credible in this respect. Her witness statement was apparently quoting from a document that she had seen (see paragraph 2.3) and she was able to tell the tribunal that she knew that the respondent still had the invitation. The claimant has not produced an alternative invitation without such a statement.

63. Although the failure to disclose the document is clearly unsatisfactory, on the balance of probabilities we accept the evidence of Ms Finch in this respect.

64. The claimant did not score as well as he needed to in respect of the interview part of the assessment and was not offered a permanent OO role.

65. The claimant says that he did not perform as well as he would have done because of his presentation in interview which was caused by his depression. That is borne out by the evidence of Dr Ornstein at paragraph 246 of his report (page 997) and we accept that evidence.

66. As a consequence, the claimant was not offered one of the permanent OO roles but was offered a six month development opportunity in the role of OO in Gloucester. The claimant was to be supported in that role and after six months would be reinterviewed to determine his suitability for a permanent OO position (page 959).

67. The claimant accepted that role. He was then off work with stress between 27 August 2018 and 3 September 2018 and between 18 September 2018 and 20 September 2018. Prior to that time, the most recent absence due to stress (or anything similar) had been between 19 June 2015 and 28 October 2015 (page 723).

68. Between 20th November 2018 and 31 December 2018 the claimant completed a career conversation. It was akin to an annual review/ appraisal. That required completion of an online book as appears at page 207 of the bundle.

69. On 18 April 2019, the claimant undertook reassessment for the OO role and was unsuccessful. He was then off sick with stress between 7 May 2019 and 20 October 2019.

70. In the meantime, in June 2019, the claimant raised a grievance about a lack of managerial support during the initial reshaping operations rollout, a lack of guidance in his role as developmental operations officer and other related matters.

71. By 10 June 2019 the claimant had reached a trigger point under the respondent's Health and Well-being policy and was told that if his absence continued to be of concern, or if there was no return to work within four months, a stage 2 Formal Attendance meeting would be arranged.

72. The respondent arranged an occupational health report, given the claimant's absence, which was provided on 27 June 2019. That report stated that the claimant had been on antidepressant medication for several years and in answer to the question whether the claimant was likely to meet the criteria for the Equality Act 2010 the writer replied "yes, this is not very likely in my view."

73. The claimant's grievance had progressed to stage 2 by 27 August 2019 and, on that day, the stage 2 outcome letter was sent. The claimant's complaint about

lack of appropriate managerial support during the reshaping operation was upheld (page 267); the remainder of the complaints were not upheld.

74. By 20 September 2019, the claimant's absence was such that he had reached the trigger point for stage 2 of the absence management process. At that point the claimant had been absent with stress for 121 days. The claimant was told that if he could not return to work in the foreseeable future then it may be necessary to arrange a stage 3 Formal Attendance meeting.

75. The claimant returned to work and a return to work meeting was carried out on the 25 October 2019. That was carried out by Ms Bonser who was, at that time, the claimant's line manager. She recorded, as a reasonable adjustment, that the claimant was making a number of applications, including for flexible working and it is not in dispute that she largely completed the application form for flexible working in that respect (page 963). That was approved on the 31 October 2019 (page 290). Thus it is clear that the respondent was able to approve applications for flexible working swiftly.

76. According to the witness statement of Mr Chance-Hyett, he became the claimant's line manager on 4 November 2019 and we accept that evidence which was not in dispute.

77. A further occupational health report had been sought and was received by the respondent on 25 November 2019. We find that it was received on that day partly because of the wording of the Chronology and Reading List that we were provided with and partly because that is the day that it was sent to the claimant and we presume that it would have been sent to the respondent on the same day (page 304).

78. That report contained the following statement

> "Assuming you are able to make adjustments I would recommend consideration is given to the following:
>
> Due to his underlying health condition and his compliance with his medical management regime I would advocate that he be excluded from night working on his relief week. It is possible that Mr Mills will be able to tolerate his night duties on his set line but this will need to be reviewed once he undertakes them. Should this working practice be incompatible with his treatment regime and side effects be problematic it may be reasonable to restrict his night working further or remove them altogether. I would suggest that this be reviewed with him at managerial level after a period of 2 months"

79. On 5 December 2019, Ms Bonser wrote to the claimant. In the letter headed "Stage 2 Formal Attendance Meeting Outcome" she wrote "Although you have reached Stage 2 within the Health & Wellbeing Policy due to the length of time that you were recently off sick, I will be placing you on a Stage 1, 12 month monitoring period from the date of your return to work - 21st October 2019. This

is due to the circumstances surrounding your absence and review of your attendance record. It is the expectation that all staff attend work regularly and in line with the Health and Wellbeing Policy. Moving forward, I expect you to remain within the triggers as detailed in section 9, which are pro rata within a 6 month period. Should your attendance fall below these expectations, the absence will be escalated through the policy as discussed." (Page 969)

80. The claimant was then absent in January 2020 and when he returned to work on 10 February 2028, a return to work interview was carried out with Ms Bonser.

81. The record of that interview appears at page 309 and shows in answer to the question "Do you consider yourself to have a disability?", "Yes" and in answer to the question "Do any reasonable adjustments need to be considered?", "To reduce increased night shifts during relief weeks." The word "yes" was also encircled which, on the face of the document, suggests that it was necessary to consider reasonable adjustments in that respect.

82. We find that the claimant raised a concern about working nights in that interview. Ms Bonser's evidence was that in fact the claimant did not want the recommendation of the occupational health report to be implemented because he had just reduced his hours to 18.5 per week which, inevitably, reduced the number of night shifts which he was doing. If that was the case it is difficult to understand why she circled the word "yes" at page 309. It would be much more logical to circle the word “no”. We consider that her recollection has changed over time and that, at the time, she was aware that the claimant wanted adjustments to be made to his night shift pattern whilst on relief work but, for some reason, that was never implemented.

83. It appears from the evidence of Mr Chance-Hyett that the process of dealing with return to work interviews and, in particular, the forms generated by them was somewhat haphazard. When he did not carry out return to work interviews (perhaps because he was not on shift), they would be done by a deputy OO. The deputy OO would only send the form to the respondent’s human resources team. That form would not be sent to the line manager. There was no formal process (at least so far as we were told) whereby a line manager would be told what was said in a return to work interview if the line manager did not conduct that interview. There is also no evidence that the HR team ever did anything with the return to work forms. It may be that was the reason why the reasonable adjustments suggested in the return to work form of Ms Bonser were never implemented.

84. In February 2020 a further career conversation took place which, again, involved the completion of a booklet (page 478).

85. The claimant was off work between 25 March 2020 and 30 March 2020 due to covid and when he came back, a return to work interview was carried out by Mr Mullalley, a deputy OO. That return to work interview is at page 314 and records that the claimant considered himself to have a disability, namely PTSD, and in answer to the question on reasonable adjustments Mr Mullalley wrote "avoid

nightshift due to medication, O/H advised this." Again we are entirely satisfied that the claimant was requesting an adjustment to his duties (which is why that was written) and again, the respondent did nothing about it.

86. The claimant was off sick between 1 and 2 June 2020 due to stress and a return to work interview was held on 13 June 2020 with Mr Kyte. In answer to the question "Do any reasonable adjustments need to be considered?" Mr Kyte wrote "OH advised look at taking night shifts out of relief" and circled the answer "yes". Again we find the claimant was asking for adjustments to be made and again nothing was done.

87. Matters continued and on 4 December 2020, the claimant went off work until 27th January 2021. The reason for the absence was stress (page 723).

88. As a consequence, on 12 January 2021 a stage I Attendance Meeting took place with Mr Chance-Hyett and the outcome letter reminded the claimant that if this absence continue to be of concern a stage 2 formal attendance meeting would be arranged.

89. On 26 February 2021 the claimant was off work with back pain and on 6 March 2021 a return to work interview was held. This interview was conducted by Mr Chance-Hyett who recorded, in answer to the question about reasonable adjustments, "OH report 2019 recommends no nights on relief week." Again nothing was done despite the claimant raising the matter.

90. A further stage I attendance meeting was held and an outcome letter was sent (page 380). In that letter Mr Chance-Hyett wrote "to ensure that your recovery isn't hindered, I think it is important that we have regular one to one meetings so that we discuss and overcome any negative issues that may arise." Again the claimant was reminded of trigger points under the relevant absence policy.

91. The claimant's case is that on 14 March 2021 he received an email from Mr Chance-Hyett stating that he needed to fill out his career conversation booklet but that was inadequate. He felt that he should have been forwarded an appropriate invitation to discuss his health and well-being and that the career conversation had historically included a date and time whereby a staff member was stood down from duty.

92. Mr Chance-Hyett's version of events is somewhat different. He says that he and the claimant had a brief discussion about completing the career conversation booklet and the claimant made it abundantly clear that he was not interested in completing the form because it was simply a tick box exercise. In those circumstances, because the career conversation booklet is a process that must be completed, he sent an email to the claimant on 8 March 2021.

93. That email appears at page 384 and states "As discussed, here's the career conversation booklet for you to complete; could you fill it in and send it back to me as soon as possible please." A further email was sent on 14 March 2021

stating "could you return your career conversation booklet asap please… I'm being chased to get it completed!"

94. The claimant did not complete the booklet and it records "nothing submitted by Gary Mills" (page 396) but Mr Chance-Hyett did complete the sections for line managers (see pages 399 forwards). Mr Chance-Hyett appears to have completed the booklet with some care.

95. At no point does the claimant appear to have raised any concerns about needing to have protected time to complete the booklet or to carry out a conversation with Mr Chance-Hyett. The email at page 384 is more consistent with Mr Chance-Hyett's version of events. The claimant's evidence appears to suggest that the booklet came out of the blue, whereas the email clearly starts "As discussed…". It is apparent that Mr Chance-Hyett was prepared to take time to complete the booklet even when the claimant did not and did so conscientiously. In those circumstances we are not satisfied that the claimant's version of events is accurate.

96. However, the claimant's complaint in this respect ties into a more general complaint that he was not receiving sufficient support from Mr Chance-Hyett generally. He says that one-to-one meetings were not happening despite the fact that paragraph 6.1 of the Health and Well-being Policy puts the onus on line managers to support their staff.

97. Mr Chance-Hyett denies that there was a failure to be in contact with the claimant and points to a large amount of contact he made when the claimant was off. The claimant, in his oral evidence, accepted that the respondent contacted him when he was off sick in accordance with the policy, his complaint was that there was a lack of support when he was at work.

98. There are no records of one-to-one meetings between the claimant and Mr Chance-Hyett while the claimant was at work and Mr Chance-Hyett says that because the service was in REAP Black mode between 14 June 2021 and 18 January 2023 many welfare catch ups were cancelled, except for extreme cases. We will return to the question of REAP Black mode below but note that according to Mr Chance-Hyett it did not start until 14 June 2021.

99. In her evidence, Ms Finch agreed that promised one-to-one support from Mr Chance-Hyett was not provided. She said that that was counteracted by the fact that Ms Bonser continued to provide some support in that she took on a number of return to work meetings. We accept that Ms Bonser may have provided some assistance (she carried out the return to work meeting in February 2020) but given her more senior position by then, it is unlikely that she provided the level of support that a line manager should have done. Indeed, her own witness statement does not suggest that she gave a significant level of support during the period when Mr Chance-Hyett was the claimant's line manager.

100. Having regard to the evidence of Ms Finch, we accept that there was a lack of managerial support for the claimant whilst he was being line managed by Mr Chance Hyett.

101. The claimant then went off work due to sickness on 23 August 2021 and did not return to work again.

102. The claimant had worked relief night shifts on 5 January 2020; 16 May 2020; 17 February 2021 and 1 June 2021.

103. On 30 September 2021 a further stage I attendance meeting was held with the claimant (page 440) and the claimant was told that if his absence continued to be of concern or if no return to work date could be established within four months, a stage 2 formal attendance meeting would be arranged to review his continuing ill-health.

104. Under the policy, an OH report should have been obtained at that stage (see p788). That was not done. It is relevant to the question of whether the respondent made reasonable adjustments to consider what an OH report would have disclosed at that stage. As set out below, an OH report was obtained on 14 February 2022, it stated " Speaking to Gary today, it seems unlikely that he will return to his post due to his PTSD being triggered by ambulances and the NHS uniform. Gary confirmed he needs clarification about his medication from his consultant psychiatrists." It does not suggest that the respondent could be providing any additional support. A psychiatric report from Dr Ornstein prepared for the claimant's lawyer in June 2022 explains that the PTSD was caused by the Crown Court case and the lack of support at the time. However, it also suggests that the claimant may be able to continue working at the level he was doing (p999). It does not suggest that he should have been given any further support by the respondent at that time.

105. On the balance of probabilities, we find that had an OH report been obtained in September 2021, it is unlikely that it would have said anything different to the report in February 2022, there is no suggestion in any of the evidence that the claimant's condition changed in any material way between those two dates.

106. The stage 2 meeting took place on 5 January 2022 and was carried out by Mark Love, Deputy County Commander. In that meeting the claimant raised that one-to-one meetings with Mr Chance-Hyett had not happened and neither had the reduction in nightshift working.

107. Mr Love, according to the outcome letter, said to the claimant that the issue in relation to working nights would be easily resolved by filling in a flexible working application and submitting it to the panel. There was a discussion about the process and Mr Love confirmed that he would send the electronic application for the claimant to fill in and return to him. According to the outcome letter there was an agreement to wait on submitting the application until the claimant had an

appointment with his psychiatrist on 5 January and the claimant agreed to complete the application when he was ready (page 518).

108. In that meeting the claimant raised concerns that he would be dropping to half pay from 28th December 2021 and Mr Love explained to him that he could apply through the Work Related Absence Application Form process to stop the drop. Mr Love sent claimant a form in that respect as well as a flexible working application form.

109. Anticipating what we conclude below, we do not think that placing the onus on the claimant to fill out the form discharged the respondent's obligation to make reasonable adjustments. Nevertheless, the claimant did not take any action to complete the flexible working application form, despite completing the Work Related Absence Application Form.

110. The minutes of the meeting record that Mr Love said to the claimant that he would not be placing the claimant on a "stage 2" as the claimant had not returned to work "so the dates are not set but if say in 2 months, so by 6 months you have not returned to your substantive role or redeployed then you will be called for a stage 3 meeting with SB, whereby the outcome of the meeting can result in dismissal but we do look to support staff by looking to place them on redeployment on a temporary or permanent basis".

111. That statement is somewhat odd since it appears to be a description of what stage 2 was, despite saying that the claimant was not being placed on stage 2 (i.e. a meeting in which discussions took place to set an appropriate return to work date to be achieved within six months from the date of when sickness absence commences, and if that is not met then the process will move to stage 3 (Sickness Absence Policy, page 788)).

112. Nevertheless, the policy is explained in the outcome letter at page 520. The outcome letter was written on 5 January 2022 and, in the meantime, on 4 January 2022, an occupational health report was provided which referred to the claimant's PTSD and stated that at that stage the claimant was not fit to carry out all of his work activities.

113. On 6 January 2022 the claimant appealed against the stage 2 sickness sanction, setting out his grounds at some length. As we have said, he did not complete a flexible working request form but did complete a Work Related Absence Application to prevent his pay from dropping (page 595).

114. A further occupational health report was received on 28 January 2022 which confirmed that the claimant's PTSD was triggered by seeing or hearing ambulances and seeing the NHS uniform. The report confirmed that the claimant was fit to attend meetings but that he was not fit to carry out all of his current work duties.

115. The claimant's appeal in respect of the stage 2 outcome was heard and the outcome notified to him on 11 February 2022. The appeal panel took the view that the claimant had been properly supported through his periods of absence, except for a period of 33 days when the claimant did not receive a welfare call, and dismissed the appeal.

116. On 11 February 2022, the claimant was told that his Work Related Absence Application was successful (page 587). That was financially supportive of the claimant, because his pay was kept at 85%.

117. A further occupational health report was received on 14 February 2022 which stated that the claimant's depression was long-term and his PTSD had lasted at least four years but would hopefully continue to improve slowly over time. The claimant's thoughts were still dominated by events of the past and the writer could not foresee the claimant managing to recover sufficiently to return to paramedic work and to stay mentally well. They stated “Speaking to Gary today, it seems unlikely that he will return to his post due to his PTSD being triggered by ambulances and the NHS uniform. Gary confirmed he needs clarification about his medication from his consultant psychiatrists.” (page 593).

118. On 4 March 2022, the claimant's own psychiatrist, Dr Haynes, wrote to the respondent stating "I am of the opinion that because of PTSD, Mr Mills is permanently incapable of performing his role as a paramedic. Whilst he is capable of other work, I do not consider that he would be capable of other roles in the ambulance service because of PTSD" (page 980). That was a succinct summary of a longer letter sent to the claimant's GP on 15 February 2022 (page 974).

119. On 4 April 2022 the claimant was invited to a formal stage 3 Meeting which took place on 4 May 2022. The claimant was represented by a trade union representative and said, in the course of the meeting, that changing shifts or rotas or stations would not make him want to return to his role, nor would only doing day shifts with one crewmate and that to work for the respondent would cause him many problems. He said that his psychiatrist believed that the only way forward was to be away from the organisation. He said that leaving the trust was the only way he would get his life back (page 658).

120. The stage 3 appeal hearing was chaired by Ms Bonser. The outcome letter shows a thorough review of the matters that had led up to stage 3 meeting and recorded that "The panel asked you what you were hoping for as the outcome of the stage 3 and you confirmed that you wanted to be supported to pursue Ill Health Retirement as you did not feel that you could return to work in any capacity. You explained that this was not an easy decision for you as you had always wanted to be a Paramedic however you felt that the only way of getting your life back was to do something different." (Page 667). The claimant could not pursue ill-health retirement unless he was no longer to be employed by the respondent.

121. Having considered all of the matters, the panel concluded that there was no foreseeable return to work for the claimant, took into account the advice provided by occupational health, the claimant's own psychiatrist and his own wishes to pursue ill-health retirement. The dismissal letter stated that as a Trust, the respondent would be happy to support the claimant in finding another suitable role within the NHS or Trust if he wanted that. The claimant was dismissed on 12 weeks' notice. The claimant was given a right of appeal.

122. On 30 June 2022 the claimant's ill-health retirement was agreed and his contract terminated on 27 July 2022.

123. As we have said above, according to the witness statement of Mr Chance-Hyett the respondent was in "REAP Black" between 14 June 2021 and 18 January 2023. That status is described in some detail by Ms Bonser as follows:

> 3.1 As do all NHS ambulance services in England, the Respondent operates a Resource Escalation Action Plan (REAP), which aims to maintain quality and patient safety. During much of the relevant period, and certainly at the time of the Claimant's dismissal, the Respondent was at REAP level Black. This is the most serious of the 4 levels of the REAP and means that the pressure on the service and local health and social care has increased to the point that patient care and safety is compromised. This is, of course, extremely serious and at these times we need 'all boots on the ground' to minimise the danger to the community we serve.
>
> 3.2 During periods of REAP Black, I, even as CC at the time, was 'booked on' and mobilised to deal with serious category 1 incidents such as cardiac arrests and category 2 incidents such as strokes, heart attacks and road traffic accidents. Responding to these types of incidents is necessary in such severe circumstances as we simply do not have the staff/resources to meet the community's demand

124. In her evidence, Ms Finch states:

> Managing attendance is a balancing act between caring for our staff and ensuring that both public funds are appropriately spent, and a high quality and constant level of service is provided to our community. This becomes an ever more challenging process when the Respondent is at its most severe Resourcing Escalatory Action Plan (REAP) level Black. This means that the Respondent's service is unable to cope with the community's demands and the safety of the community is thus compromised. At times such as this, the priority becomes minimising the risk to life and clinical staff at all levels are expected to respond to emergency call outs. This can impact staff availability to undertake welfare calls, return to work meetings, formal absence management meetings. This in no way means that staff welfare is not vitally important to the Respondent and all of our managers, but it does mean that it can be impacted by the demands of the incredibly important work our service does. The Respondent

was at REAP Black during the Claimant's final period of sickness absence prior to his dismissal.

125. We accept the evidence of both response and Ms Finch in that respect. There was no suggestion on behalf of the claimant that it was inaccurate.

126. The respondent had an established process for covering absence. In a 10 week shift cycle, each paramedic would have two weeks when he or she was on relief cover. That cover would be for other staff who were absent due to work or annual leave or for other reasons. Ms Bonser agreed, in her cross-examination, that the relief system was an effective system for covering absence but qualified that by stating that funding only allows for a certain percentage of absence. She agreed that, at the time of his absence, there was no specific need to get Mr Mills back to work imminently but said that a resolution was important for his well-being. It seemed to us that evidence was given spontaneously and was reasonable and we accept it.

127. Ms Finch pointed out, in her cross-examination, that whilst the respondent has an established system for absence (the relief system) if long-term sickness was lower, then relief staff could be used to cover other short-term sickness. In many respects that point is self evident and is one which we accept.

Conclusions

128. The claimant's submission on unfair dismissal was that the dismissal was unfair because the respondent was discriminating against the claimant, or had done so. In those circumstances we address the discrimination claims first.

Discrimination Arising From Disability

129. In his evidence, the claimant stated that he was not asserting that any delay in obtaining an occupational health report (issue 4.1.1), any failure to recognise his disabilities during the sickness absence management process (issue 4.1.2) and any failure to carry out his career conversation (issue 4.1.3) was because of his sickness absence (issues 4.2 and 4.3). We do not find (and it was not suggested) that the claimant had misunderstood the questions being asked of him or made a slip of the tongue. He explained that:

a. The delay in obtaining an occupational health report was because of miscommunication, not because he has been off sick.

b. The failure to recognise his disabilities during the sickness absence management process was because of a lack of understanding not because he was off sick.

130. We have, therefore, not needed to make findings on paragraphs a) and b) above, since, even if the claimant is right that there was a delay in obtaining an OH report or a failure to recognise his disabilities during the absence process

(which we doubt), on the claimant's own evidence, those failures were not because of his sickness absence.

131. The claimant said that he did not understand why it would be said that the failure to carry out his career conversation was because of his absence. Given our findings above, we do not find that there was a failure on the part of the respondent to carry out the career conversation but in any event there is also no evidence on which we could conclude that any failure was because of the claimant's absence.

132. The allegation in relation to demotion (issue 4.1.4) is that the claimant was not offered a permanent OO role in 2018 when was required to reapply for his role. His case is that he was demoted because he did not perform well in his interview (see paragraph 59 of the claimant's written submissions).

133. However the claimant's evidence was not that he did not perform well in his interview because he had been absent from work. Indeed the interview was in July 2018, at which point the claimant had not had any absence because of stress since 2015. The claimant's evidence was that he did not perform well in interview because of his chronic dysthymia and the effect that had on him.

134. In those circumstances, the case as identified in the list of issues, that the unfavourable treatment was because of sickness absence, is not made out. As we have said, there was no application to amend the list of issues. That should not be read as any criticism of the way the claimant's counsel presented the case (which she did with a great deal of care). It is difficult to see how any application to amend the list of issues at the trial would have been anything but prejudicial to the respondent.

135. In respect of issues 4.1.5 and 4.1.6, the respondent accepts that the application of the absence management procedure and the claimant's dismissal was unfavourable treatment arising from sickness absence arising from disability.

136. The issue, therefore, is one of justification.

137. We accept that the respondent was providing critical emergency services to the public. It is a legitimate aim to ensure appropriate attendance levels amongst employees to ensure that it can do so. It is also a legitimate aim to maintain public trust in the service and to manage staff on periods of prolonged absence, both to ensure that appropriate levels of service to the public can be maintained and also to ensure that appropriate welfare support is provided to those who are sick. It is further a legitimate aim to ensure that staff are consistently managed to ensure the efficient and proportionate use of public funds.

138. Those aims were having to be achieved at a time of particular difficulty for the respondent which was in a REAP black situation for most of the time when the absence management process was being applied.

139. The next question, then, is whether the treatment of the claimant under the sickness absence policy, was a proportionate means of achieving those aims.

140. The list of issues is in very broad terms and refers to the application of the whole policy. The policy has, built into it, dates for review and three stages. It can be seen from page 788 that at each stage managers are to consider and discuss supportive measures and reasonable adjustments and at the third stage, when dismissal is considered, dismissal is only one of the possible suggested outcomes, the alternative being to extend the review period. However, it is clear that even the suggested possible outcomes are not exhaustive (they referred to as “possible outcomes”).

141. Paragraph 4.9 the policy expressly allows for adjustment to the process to hold more than one stage I sickness meeting as a reasonable adjustment for people who are disabled.

142. It is good industry practice for any organisation to have a sickness absence policy, that is the most proportionate way of ensuring that employees are treated consistently and fairly and receive the support they should. Having a policy, of itself, is not discriminatory.

143. However, we must consider the treatment of the claimant under that policy as per *Buchanan*

144. In reality what the claimant complains of is that the respondent did not hold additional stage I meetings for him before proceeding to stages 2 and 3 of the process, which in the various stages outcome letters were referred to as sanctions.

145. Thus at paragraph 54 of the claimant’s written submissions, it is asserted that the application of the stage 2 sanction rose in consequence of the claimant’s absence duties PTSD and caused such stress and anxiety that it constituted unfavourable treatment.

146. We find that phrase “sanction” does not adequately describe what happens at stage 2 of the policy. The policy provides for a stage 2 sickness absence meeting after a period absence. It requires the line managers, at that stage, to discuss supportive measures and reasonable adjustments with an employee and an occupational health referral and to set an appropriate return to work date (within six months). Most of those things are supportive. It is likely, however, that setting a return to work date within six months will cause an employee stress since they know that if they do not return within such period stage 3 may bring about dismissal.

147. The claimant has not produced any evidence to suggest that there was a good reason to decline to set a return to work date within six months at stage 2 (i.e. to go back to stage I). The claimant's counsel points to paragraphs 197-203 of the claimant's witness statement but those paragraphs do not suggest that it would have achieved anything to revert to stage I. The claimant is not suggesting that he might have recovered and been able to come back to work if he had been given longer than six months. He was not suggesting that at the time. It is right to say that in the stage 2 review meeting the claimant raised concerns about the lack of one to one meetings, the failure to remove him from night shifts when on relief and the failure to carry out a career conversation. In some respects the fact that he was able to raise his concerns at a stage 2 meeting illustrates the importance of having such a meeting. However, it was not suggested that the six-month return to work target did not allow time for those things to be corrected or, indeed, that those things were preventing his return to work.

148. In this case, the application of stage 2, including the setting of a six-month return to work date before moving to stage 3, was a reasonably necessary way of achieving the aims which we have already concluded were legitimate. The claimant could not, reasonably, be allowed to remain off sick indefinitely. It was proportionate to move matters forward and the six-month return to work date was generous. There was no suggestion that the claimant needed longer for any therapeutic reason.

149. Returning to stage I would have done nothing to achieve the respondent's aims. In the claimant's case it would merely be a way of disapplying the management part of the policy. We are unable to see any less discriminatory way of achieving the respondent's aims than progressing to stage 2. Applying stage 2 appropriately balanced the needs of the claimant and the respondent.

150. In respect of the decision to dismiss the claimant at stage 3, for the reasons we have given we accept that the respondent had legitimate aims, which included ensuring appropriate attendance levels amongst employees, providing critical emergency services to the public, which can often mean the difference between life and death, maintaining public trust in the service, consistent management of the teams which employees are absent at ensuring the efficient and proportionate use of public services.

151. At the point of the stage 3 meeting the claimant was clear that he could not return to work and could not be redeployed. His view in that respect was supported by his psychiatrist. There was nothing which could be done to achieve the claimant's return to work.

152. If the claimant remained off sick indefinitely, that was bound to have a negative effect on the legitimate aims which we have noted. Staff absence clearly affects the level of service which can be provided to the public and causes difficulty for staffing – both in terms of arranging cover and the use of public funds.

153. The point had been reached where there was no alternative way of achieving the aims of the respondent, other than dismissing the claimant and, in the circumstances, that was a proportionate means of achieving the respondent's legitimate aims. Dismissal of the claimant also, to some extent, met his needs. He was not able to return to work, he wanted an ill-health retirement. Dismissal allowed him an ill health pension, thus dismissal balanced the needs of the claimant and the respondent.

Indirect Discrimination

154. The first alleged PCP is the respondent's absence management policy. It is accepted that is a PCP which the respondent applied to the claimant and to those who did not share the claimant's disability (issues 5.2 and 5.3)

155. There is some force in the respondent's argument that the absence management policy did not place people with the same disability as the claimant at a disadvantage compared with people without that disability. Whilst we accept that such people are probably more likely to be absent from work due to sickness (although we were provided with no evidence to that effect), a large part of the sickness absence policy is to ensure that such people are supported. However, it is also the position that the sickness absence policy provides a route to dismissal for those people who are off work due to sickness. For that reason we find that it did put people with the claimant's disability at a disadvantage compared to those without (issue 5.4).

156. The sickness absence policy put the claimant, himself, at a disadvantage because he was on a track which might lead to his dismissal. That was bound to cause stress and anxiety (issue 5.5.1.1) and ultimately did lead to his dismissal (issue 5.5.1.4). We have not, however, been provided with any evidence to suggest that the sickness absence policy caused any exacerbation of the claimant's disability (5.5.1.2) or caused him to be further absent from work (5.5.1.3) and we do not find that it did so.

157. For the reasons we have given in respect of the claim of discrimination because of something arising from disability, however, we are satisfied that the sickness absence policy was a proportionate means of achieving a legitimate aim. The respondent needed to manage its absence levels in a fair and consistent manner, the application of the sickness absence policy did that. It allowed for support of the claimant and so balanced his needs against that of the respondent.

158. The second PCP alleged is that staff were required to reapply for their jobs in 2018.

159. Again that PCP is accepted by the respondent.

160. In respect of this PCP we are much less confident that people who shared the same disability as the claimant were put at a disadvantage compared to

others. The claimant contended that he was less able to perform well in the interview because of the effects of his chronic dysthymia and there is no reason to doubt that evidence. However, that is not the same as saying that everybody with chronic dysthymia or PTSD will be unable to perform well in an interview. It is unhelpful to make generalisations unless there is clear evidence to support them (and often generalisations are unhelpful even when there is such evidence). We consider that a tribunal should be slow to reach a conclusion that people with chronic dysthymia or PTSD will generally be unable to perform well in interviews when compared to people without such disabilities. Ultimately, however, we have not found it necessary to reach a firm conclusion on this point and assume for the purposes of this judgment that they are.

161. As we have said above, we accept that the claimant was put at a disadvantage in his interview because of his chronic dysthymia and, therefore, he scored less well in the interview. It is likely, therefore, that he suffered stress and anxiety (issue 5.5.1.1). There is no evidence, however that being required to reapply for his job cause the claimant exacerbation of his disability, further absences or dismissal.

162. We must, therefore, consider whether the requirement that people reapply for their jobs was a proportionate means of achieving a legitimate aim. We note that the respondent was reducing the number of OO roles from 130 to 80 which was a substantial reduction.

163. The aims advanced by the respondent are that the PCP was necessary to ensure that suitably skilled people were placed within the roles available, to ensure fairness and consistency of the assessment of all candidates and to ensure the efficient and proportionate use of public funds.

164. Where there is to be a reduction in the number of roles available, it is legitimate for an employer to want to ensure that suitably skilled people are placed within those reduced roles and it is in the interests of both the employer and employees to ensure that there is a fair and consistent way of deciding which candidates will be appointed.

165. Ms Finch, for the respondent, asserts that each invitation for interview included a paragraph stating that reasonable adjustments would be made to the process if they were asked for. We have accepted that evidence.

166. The claimant did not ask for any adjustments to be made to the process to accommodate his disability at the time. Although, in these proceedings, he has argued that he was disadvantaged because he could not express himself well in interview, he has not brought a claim of failure to make reasonable adjustments in respect of the interview process.

167. In terms of the issues identified in the list of issues, we are entirely satisfied that the requirement for the claimant, along with other staff, to reapply for an OO role was an appropriate and reasonably necessary way to achieve the

respondent's aims of fairness, consistency and ensuring that suitably skilled people are placed within the roles available. Because the process anticipated making reasonable adjustments for people's disability, there was no less discriminatory way of achieving the respondent's aims.

168. The process, accompanied by the willingness to make reasonable adjustments, balanced the needs of the claimant and the respondent.

Reasonable Adjustments

Removal of Night Shifts

169. The first PCP relied upon in respect of the claim of failure to make reasonable adjustments is the requirement to work night shifts. Notwithstanding the way that the PCP is drafted, the claimant only complains about this PCP to the extent that he was required to work night shifts whilst on relief weeks.

170. The respondent accepts that the claimant was required to work night shifts when on a relief shift. He worked a relief shift on two weeks out of a 10 week rota.

171. The occupational health report of 25 November 2019 makes clear that working night shifts is disadvantageous to the claimant because of his need to comply with a medical management regime.

172. The claimant worked 4 night shifts on relief weeks after November 2019. He told us that took holiday to avoid working others and we accepted his evidence in this respect. He worked on 5 January 2020; 16 May 2020; 17 February 2021 and 1 June 2021

173. We must consider the question of disadvantage.

174. If we were to consider the PCP as it is written, there is no evidence that the claimant was disadvantaged by working night shifts on occasions when he was not on relief cover. The OH report of 25 November 2019 says that it is possible that the claimant will be able to tolerate his night duties on his set line and the claimant has not given any evidence that working such night duties was to his detriment.

175. In respect of working night shifts on relief weeks, the position is different. It is self-evident that if the claimant has to pursue a medical management regime to manage his underlying health condition and is prevented from doing so because he works nights on his relief weeks, the claimant is put at a disadvantage. We see no reason to doubt the OH report. Although the respondent says that the claimant had managed for the previous 20 years, that proves nothing. The claimant's mental health had clearly fluctuated over the course of his employment and we must consider the position as at November 2019.

176. Of the disadvantages listed at issue 6.3 it is more likely than not that the claimant would suffer stress and anxiety as a result of the PCP and we find that he did. The fact that the claimant had to take holiday in order to avoid night shifts was also likely to make him suffer stress because it is stressful for a person to feel they have to keep back holiday for a particular purpose, rather than to use it for rest and recuperation as they would wish.

177. We do not, however, go as far as finding that the requirement to work night shifts, exacerbated the claimant's current condition or caused further absences or his dismissal. There is no satisfactory evidence to that effect. Ms Mitchell pointed us to paragraphs 197 –203 of the claimant's witness statement, but they do not give that evidence.

178. The medical report of Dr Haynes dated 21 February 2020 (page 629) does not refer to the effect of working night shifts, nor do his letters dated 15th February 2022 and 4 March 2022 (pages 974 and 980). A medical report was written for the claimant's solicitors on 17 June 2021, extracts of which appear at page 991 of the bundle. At paragraph 219, the report, referring to a diagnosis of underlying chronic recurrent depression on top of dysthymia states that "it is likely at times this has been worsened by the index event as well as other stressful events that were occurring at that time including his divorce and the traumatic events that he had witnessed at work." It does not refer to the effect of working night shifts.

179. The occupational health report of November 2019 refers to removing night working, but does not state what the adverse effects of failing to do so would be. The occupational health reports of 4 January 2022, 28 January 2022 and 14 February 2022 are silent on the question of working nights..

180. Thus there is no medical evidence which would support an argument that a PCP that the claimant had to work night shifts exacerbated his condition or caused further absences or his dismissal.

181. The claimant was cross examined on the point, it was put to him that Mr Haynes said that his PTSD was triggered by working for the ambulance service, concern about future court cases and seeing the uniform and that working night shifts was not the reason for his dismissal. The claimant's answer was that the night shift issue formed part of a complex welfare package that could have been put in place. That is the highest that the claimant can put his claim in that respect but there is no evidence to indicate whether such a package would have had any effect on the claimant's situation. We are satisfied that the claimant could not continue to work because of his post-dramatic stress disorder. There is no evidence that inability was influenced, even to a limited extent, by a PCP that he had to work night shifts.

182. It is then necessary for us to address the question of knowledge.

183. Given the content of the occupational health report of 25 November 2019, it is clear that, from the receipt of that report, the respondent had knowledge of disadvantage in respect of the requirement to work night shifts.

184. The respondent concedes that it had knowledge that the chronic dysthymia amounted to a disability from 10th February 2020.

185. It is not in dispute therefore, that for most of the period in question the respondent had the requisite knowledge.

186. It is necessary for us, however, to make a finding as to whether or not the respondent had, or ought to have had, knowledge of the claimant's disability between the end of November 2019 and 10 February 2020.

187. There is no doubt that the respondent was aware that the claimant was struggling with mental health. Mr Chance-Hyett confirmed that he had had discussions about the claimant's mental health during the time he was his manager and it is apparent from paragraph 1.6 of the witness statement of Ms D'Amico that she was aware of the fact that the claimant had mental health struggles. The occupational health report sent on 27th June 2019 stated that the claimant had been prescribed antidepressant medication on a continuing basis for several years and since then he had pursued normal daily activities. In answer to the question "In your medical opinion is the employee likely to meet the criteria for the Equality Act 2010?" the writer somewhat unhelpfully replied "yes, this is not very likely in my view." That ambiguous answer required clarification.

188. The occupational health report of 25 November 2019 is also surprisingly ambiguous. In the section headed "Specific Questions" the writer states "Mr Mills has a long-standing history of depression which is well managed." In the section headed "In your medical Opinion is the employee likely to meet the criteria for Equality Act 2010?", he writes that at present he did not anticipate substantial and long-term impairment and as such it is his opinion that disability legislation is unlikely to apply" but he goes on "this is my medical opinion; a legal opinion would be needed for a definitive answer."

189. Given that two occupational health reports had stated that the claimant had a long-standing history of depression, the first of which referred to medication and the second of which referred to the condition being managed, the reader of the report of November 2019 should have asked (at least rhetorically) how the writer of the report could properly say that she did not anticipate a substantial and long-term impairment. That should have led the reader to seek the suggested legal opinion for a definitive answer.

190. We have concluded that at the point of receiving the second occupational health report the respondent knew (or at least should have known) that the claimant had a mental impairment, that it had lasted more than 12 months, that it interfered with the claimant's normal day-to-day activities and, therefore, that the claimant was disabled.

191. In those circumstances we conclude that the respondent had the requisite knowledge from the date it received the report of 25 November 2019.

192. The next question is what adjustments could have been made to avoid the disadvantage. The respondent does not suggest that it could not have removed night relief work, but simply asserts that the claimant never applied for it when he knew how to. That is an insufficient answer in this case. The respondent knew from a number of return to work interviews that the claimant was raising the question of working night shifts and knew from the occupational health report that relief night shifts were to the disadvantage of the claimant. A reasonable adjustment would have been to remove the night shifts; in shrugging its corporate shoulders and saying that it would do nothing until the claimant made an application for flexible working or applied to change rota lines, the respondent failed to make reasonable adjustments.

193. The respondent argues, further, that for it to unilaterally remove the claimant's nightshift duties might render it vulnerable to criticism, since the claimant might complain that he was being treated unfavourably because of something arising from his disability because he would lose pay. If the respondent was truly concerned about that, a quick conversation with the claimant would have resolved any concern. Given the number of return to work meetings that took place in which the claimant requested reasonable adjustments to be considered, we do not consider that this is a serious point.

194. This part of the claim, therefore, succeeds subject to the question of the time for presentation of the claim, which we will return to at the end.

Requirement to work without Regular Management Reviews

195. The second PCP relied upon is that the claimant was required to work without regular management reviews (issue 6.2.2).

196. We have had regard to the guidance in *Ishola*, and asked ourself whether lack of managerial review "is the way in which things generally are or will be done".

197. As we have found above, there was a failure by Mr Chance-Hyett to carry out sufficient management reviews with the claimant while he was at work. That extended over a period from November 2019 to August 2021.

198. The claimant accepted that that was not the policy of the respondent, his point was that what had happened to him was the reverse of the policy. The respondent's policy clearly did require regular contact (see for instance paragraph 4.2 of the Sickness Absence Policy and paragraph 6.1 of the Wellbeing policy).

199. As we have said, when Mr Chance-Hyett failed to carry out the contact that he should have done, Ms Bonser stepped in, although only to a limited extent and deputy OOs conducted return to work meetings when Mr Chance-Hyett was

not available. The fact that those things happened is not only indicative of the fact that lack of managerial review is not the policy of the respondent but also that it is not the way that things generally were done or would be done in the future. The failure here appears to have been a failure by a manager in his role rather than the way in which things generally were, or would be done.

200. The respondent generally appears to consider managerial review to be important. Return to work interviews are carried out whenever someone is off and career conversations are taken seriously each year. The respondent's policies make clear the importance of the line managers making contact with their reports. Further, the failure by Mr Chance-Hyett was not a total failure, he did conduct a return to work interview with the claimant and he did conduct a career conversation as best he was able in March 2021. He made contact with the claimant when he was off work.

201. We have not found the decision on this point is not entirely easy, since Mr Chance-Hyett's failure extended over a long period and for that period the claimant's experience was that there was insufficient managerial support while he was at work. Thus, for the claimant, that was the way that things were being done. Moreover, we have reminded ourself that a PCP can apply to a single employee.

202. Ultimately, however, we do not find that the failure by Mr Chance-Hyett to give support to the claimant when he was at work, even over a prolonged period, was a PCP in the context of this case. It was not what the respondent intended, it was the opposite of the respondent's express policy and it was not a wholesale failure. It was unlikely to be the situation if the claimant had a change of line manager and had not been the case under previous line managers. Thus we do not find, overall, that such lack of contact was the way in which things generally were or would be done.

203. In those circumstances, the failures alleged do not amount to a PCP and this part of the claim fails.

The Sickness Absence Policy

204. It is accepted that the Sickness Absence Policy was a PCP which applied to the claimant.

205. We must, therefore, consider whether the claimant was put at a substantial disadvantage compared to somebody without his disability by the application of the Sickness Absence Policy. Again, we note that the purpose of the policy was, in part, to give the claimant support in returning back to work. It was, however, also a route to dismissal and therefore would inevitably have caused the claimant some stress and anxiety (issue 6.3.1). The application of the policy also caused his dismissal as per issue 6.3.4. Again, there is no evidence that the Sickness Absence Policy exacerbated the claimant's condition or caused him further absence. There is nothing to that effect in the medical evidence.

206. It would not have been a reasonable step for the respondent to decide not to apply the sickness absence procedure in this case. We have set out our reasons as to why the sickness absence policy is a proportionate means of achieving a legitimate aim and in those circumstances, disapplying it would not have been a reasonable step.

207. The claimant's case is, again, that it would have been a reasonable step to refuse to progress to stage 2. For the reasons we have given in respect of the claim of discrimination because of something arising from dismissal, we do not agree.

208. Further, it would not have been a reasonable step to decide not to dismiss the claimant. Not only was it apparent that the claimant would not be able to return to work in the future, a refusal to dismiss the claimant would have meant that he could not access his ill-health retirement pension.

209. We must then consider, to the extent that this PCP put the claimant at a substantial disadvantage, whether there were any other steps that the respondent should have taken to remove the disadvantage. We conclude that there were no steps that the respondent could have taken that it did not take. Whilst we have found that the respondent did not provide sufficient managerial review, or remove the claimant's relief night shifts, we are not satisfied that doing so would, or might have, have removed the disadvantage. Given the medical evidence that we have seen, the claimant could not return to work because of his PTSD which was caused by the Crown Court case. There is no evidence that more managerial reviews or the removal of the relief night shifts would have reduced the disadvantage of being subject to the sickness absence policy. The respondent obtained sufficient medical evidence under the policy and there was nothing further that it could do to assist the claimant in a return to work.

Unfair Dismissal

210. It is accepted that the claimant was dismissed and we find that the reason for the dismissal was that the claimant was incapable due to ill health.

211. Considering the issues in paragraph 2.3 of the list of issues, we are satisfied that the panel which decided to dismiss the claimant genuinely believed that he was no longer capable of performing his duties as a paramedic. The claimant was telling it that was the case.

212. The respondent did consult with the claimant, it had a stage 2 meeting and a stage 3 meeting. The claimant had the opportunity to say everything that he wanted to.

213. The respondent was aware of the up-to-date medical position, it had obtained reports from occupational health and was in receipt of the medical evidence supplied by the claimant.

214. The respondent could not reasonably be expected to wait longer before dismissing the claimant, he had been off work for a period of 8 ½ months and there was no expectation that the claimant's position would change. The respondent's position that it could not wait longer is fortified by the near crisis state it was in having regard to the fact that it was in REAP black, but even without that, it could not be said that the respondent should have waited longer having regard to the need for it to provide critical emergency services to the public.

215. The process which the respondent followed was fair.

216. The claimant challenges the fairness the dismissal because he argues (as per paragraph 116 of his counsel's submissions) that "if the Respondent had made reasonable adjustments; had medical position being sought earlier on in his final sickness absence; had sickness been properly recognised as one arising out of disability and had the absence management policy been disapplied or applied more proportionately, then Claimant would not have been left with ill-health retirement as his only option."

217. We asked Ms Mitchell, in the course of her oral submissions what evidence she relied upon in support of the assertion that if the respondent had done those things the claimant would not have been left with ill-health retirement as his only option. She referred to paragraphs 198, 199 and 203 of the claimant's witness statement. We regret that we do not read those paragraphs as supporting a submission that if the respondent had done the things referred to in the written submissions, the claimant would have had alternative options. Those paragraphs show that the claimant felt aggrieved by the fact that he was being required to progress through the Sickness Absence Policy but do not go further than that.

218. In reaching those conclusions it should not be assumed that we agree with Ms Mitchell that the claimant's medical position should have been sought earlier, or that his sickness was not properly recognised as arising out of disability or the absence management policy was not applied proportionately. As we have said we think that the respondent did make sufficient enquiries as to the medical position and at the point of dismissal it was fully aware of the claimant's disabilities. We do not think that there was a disproportionate application of the sickness absence policy.

219. The decision to dismiss was well within the range of reasonable responses and it is not suggested that, in any other way, the respondent failed to adopt a fair procedure.

220. In those circumstances, the claim of unfair dismissal fails.

Time

221. The question of time only arises in relation to the claim of failure to make reasonable adjustments in respect of night shifts. The respondent never refused

to remove the claimant from relief night shifts, it simply said that the burden was on the claimant to make an application for it to do so.

222. In those circumstances the question is that identified in *Matuszowicz*, namely, when might the respondent reasonably have been expected to amend the position.

223. We think it reasonable for the respondent have taken some time to consider the report and discuss it with the claimant before starting the process of changing the claimant's shift. The first time that the respondent discussed the occupational health report with the claimant was on 10 February 2020. Thereafter, it would have taken the respondent some time to implement the necessary changes, we think it may have taken three months and, therefore, the date when the respondent might reasonably be required to have made the adjustment would be 10 May 2020. That analysis is, perhaps, somewhat generous to the claimant given that when the respondent considered his previous flexible working request in October 2019, it was dealt with within a week. By then, the claimant ought reasonably to have realised that the adjustment was not being made.

224. At no time did the respondent do anything inconsistent with the duty to make adjustments. It did not refuse to make them, indeed the return to work forms suggested that it would make them. Asking the claimant to fill out a flexible working form was not an act inconsistent with the duty (Mr Love said that the issue in relation to working nights would be easily resolved).

225. Thus any claim should have been presented by 9 August 2020. In fact the claim was not presented until 6 February 2022.

226. That delay in presenting the claim, is of course, substantial. In the claimant's written submissions, his counsel states

> 121. If the Tribunal is not satisfied that the relevant claims were made in time, the Tribunal is alternatively invited to extend limitation on just and equitable grounds so that the claims are within time. The Tribunal is invited to consider the merits of the claims in its consideration as to whether to extend time on just and equitable grounds, particularly the failure to implement no night shifts on relief weeks. The Claimant gives an explanation in his Particulars of Claim [43] as to why the claims were not submitted earlier "*The claimant makes clear that further formal processes to rectify the situation were avoided by him at all costs due to the further detriment to his mental health this would cause. Mainly a reminder of the arduous three stage grievance process he had already endured in 2019. The claimant sought to address the issues amicably through informal processes on many occasions. It is only by way of an extended absence from work, removal of the continuing and unresolved stressors and through self- initiated recovery processes that the claimant feels able mentally to initiate formal proceedings*." This explanation is well supported by the medical evidence.

122. Further, the Tribunal is invited to conclude from the presentation of the First Claim and Particulars of Claim that the Claimant was unrepresented at the early stages of his claim which goes some way to explain why certain claims were not brought earlier.

227. In considering whether we should find that the claim was presented within such period as was just and equitable, we have taken account of the following factors:

a. The explanation given in counsel's submissions (and the Particulars of Claim) is not repeated in the witness statement of the claimant. In his evidence the claimant has not told us why he did not present a claim earlier than he did.

b. It is clear from the fact that the report of Dr Ornstein was sent to "Premex Services on behalf of Slater & Gordon" and is described as a medicolegal report, that the claimant had solicitors acting for him as early as June 2021. We accept that was in respect of a personal injury claim (see paragraph 139 of the claimant's witness statement).

c. There is no medical evidence that the claimant could not present a claim in 2021.

d. Parliament has given a deliberately short period of time for the presentation of discrimination claims.

e. The respondent has not suggested that it has suffered any forensic prejudice as a result of the delay in presenting the reasonable adjustments claim.

228. Weighing all of those matters, given in particular;

a. the length of the delay, and

b. the absence of an explanation for the delay in the claimant's witness statement,

we do not consider that it is just and equitable to extend time to 6 February 2022. We have considered the lack of any prejudice to the respondent but we do not find that outweighs the other points we have considered.

Overall Conclusions

229. We are sympathetic to the position that the claimant found himself him following the criminal case and the effect that case had on him. It was clearly a harrowing time which left him with substantial difficulties. The respondent accepts that, in that respect, he was afforded a lack of support. Notwithstanding our sympathy for the claimant, we must try the case which has been presented to us

and that is what we have endeavoured to do. Given our analysis above, the claims of the claimant must fail.

230. We express our gratitude to both counsel for the professional way in which they presented their cases.

Employment Judge Dawson
Date: 13 November 2023.

Sent to the Parties: 05 December 2023

For the Tribunal Office:

APPENDIX
LIST OF ISSUES

The Issues

1. The Employment Judge discussed the issues with the parties and has reviewed the draft list of issues agreed by the parties. Having done so, the matters which will fall to be determined by the Tribunal are as follows;

1. Time limits

1.1. The Claimant's first claim form was presented on 6 February 2022. The Claimant commenced the Early Conciliation process with ACAS on 7 January 2022 (Day A). The Early Conciliation Certificate was issued on 2022 (Day B). Accordingly, any act or omission which took place before 8 October 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2. The Claimant's dismissal took effect on 27 July 2022. The Claimant's second claim form was presented on 9 November 2022. The Claimant commenced the Early Conciliation process with ACAS on 9 August 2022 (Day A). Accordingly, any act or omission which took place after 6 February 2022 (the issuing of the first claim form) and before 10 May 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

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

1.3.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
1.3.2. If not, was there conduct extending over a period?
1.3.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.3.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.3.4.1. Why were the complaints not made to the Tribunal in time?
1.3.4.2. In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1. The Respondent accepts that the Claimant was dismissed.

2.2. What was the reason for dismissal? The Respondent asserts that it was a reason related to capability, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

2.3. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.3.1. The Respondent genuinely believed the Claimant was no longer capable of performing their duties;
2.3.2. The Respondent adequately consulted the Claimant;
2.3.3. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
2.3.4. Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;
2.3.5. Dismissal was within the range of reasonable responses.

2.4. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

2.5. Did the Respondent adopt a fair procedure?

2.6. If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

2.7. There is no contention that the Claimant contributed to his dismissal by culpable conduct.

3. Disability

3.1. Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Respondent admits that the Claimant is disabled by reason of PTSD. The Claimant assets that he was also disabled by reason of Chronic Dysthymia, which is not admitted by the Respondent. Accordingly, in relation to the Chronic Dysthymia the Tribunal will decide:

3.1.1. Whether the Claimant had a physical or mental impairment.
3.1.2. Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?
3.1.3. If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
3.1.4. Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
3.1.5. Were the effects of the impairment long-term? The Tribunal will decide:

3.1.5.1. did they last at least 12 months, or were they likely to last at least 12 months?
3.1.5.2. if not, were they likely to recur?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1. Did the Respondent treat the Claimant unfavourably by:
- 4.1.1. Between November 2019 and December 2021 delaying in obtaining a report from OH;
- 4.1.2. not recognising his stated disabilities during the sickness absence management process;
- 4.1.3. From December 2020, not carrying out the 'career conversation' to an adequate standard;
- 4.1.4. In or around May 2018, demoting him;
- 4.1.5. Applying its absence management procedures; and/or
- 4.1.6. Dismissing him.

4.2. Did the Claimant's sickness absence arise in consequence of the Claimant's disability?

4.3. Was the unfavourable treatment because of any of the Claimant's sickness absence?

4.4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:
- 4.4.1. Ensuring appropriate attendance levels amongst its employees;
- 4.4.2. Providing critical emergency services to the public, which can often mean the difference between life and death;
- 4.4.3. Operating a consistent service (alongside other blue light services) with a rota system to ensure consistency and fairness to all staff and a sufficient level of paramedic coverage for the whole geographical region at the height of the global pandemic and its aftermath when pressure on the NHS was, and still is, extreme, with the service being in 'REAP Black', which denotes high risk to life;
- 4.4.4. Maintaining public trust in the service;
- 4.4.5. Consistent management of staff on periods of prolonged absence or repeated short term absence;
- 4.4.6. Ensuring staff on such periods of absence receive appropriate and proportionate welfare support, OH referrals and counselling;
- 4.4.7. Consistent management of the teams from which these employees are absent; and
- 4.4.8. Ensuring the efficient and proportionate use of public funds.

4.5. The Tribunal will decide in particular:
- 4.5.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2. Could something less discriminatory have been done instead;
4.5.3. How should the needs of the Claimant and the Respondent be balanced?

4.6. Insofar as the alleged discrimination arises from the Claimant's Chronic Dysthymia, did the Respondent know or could it reasonably have been expected to know that the Claimant had a disability in respect of Chronic Dysthymia? From what date?

5. Indirect discrimination (Equality Act 2010 s. 19)

5.1. A "PCP" is a provision, criterion or practice. The Respondent accepts that it had the following PCPs:
5.1.1. The Respondent's absence management policy;
5.1.2. Requiring staff (including the Claimant) to reapply for their jobs in 2018;

5.2. The Respondent accepts that it had and applied both PCPs to the Claimant.

5.3. Did the Respondent apply the PCP to persons with whom the Claimant did not share the same protected characteristic (disability) or would it have done so?

5.4. Did the PCP put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom he did not share the characteristic?

5.5. Did the PCP put the Claimant at that disadvantage:
5.5.1. In relation to absence management, the Claimant alleges that the disadvantage(s) is(are):
5.5.1.1. Stress and anxiety;
5.5.1.2. exacerbation of disability;
5.5.1.3. further absences,
5.5.1.4. dismissal.
5.5.2. In relation to the application process, the Claimant avers that he scored less highly?

5.6. Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:
5.6.1. In relation to absence management:
5.6.1.1. Ensuring appropriate attendance levels amongst its employees;
5.6.1.2. Providing critical emergency services to the public, which can often mean the difference between life and death;
5.6.1.3. Operating a consistent service (alongside other blue light services) with a rota system to ensure consistency and fairness to all staff and a sufficient level of paramedic coverage for the whole geographical region at the height of the global pandemic and its aftermath when pressure

on the NHS was, and still is, extreme, with the service being in 'REAP Black', which denotes high risk to life;

5.6.1.4. Maintaining public trust in the service;

5.6.1.5. Consistent management of staff on periods of prolonged absence or repeated short term absence;

5.6.1.6. Ensuring staff on such periods of absence receive appropriate and proportionate welfare support, OH referrals and counselling;

5.6.1.7. Consistent management of the teams from which these employees are absent; and

5.6.1.8. Ensuring the efficient and proportionate use of public funds.

5.6.2. In relation to the application process:

5.6.2.1. Ensuring that suitably skilled people are placed within the roles available in the new structure;

5.6.2.2. Ensuring a fair and consistent assessment of all of the candidates as part of a restructure process; and

5.6.2.3. Ensuring the efficient and proportionate use of public funds.

5.7. The Tribunal will decide in particular:

5.7.1. Was the PCP an appropriate and reasonably necessary way to achieve those aims;

5.7.2. Could something less discriminatory have been done instead;

5.7.3. How should the needs of the Claimant and the Respondent be balanced?

6. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

6.1. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6.2. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

6.2.1. Requirement to work night shifts – the Respondent accepts that this is a PCP that it applied to the Claimant from 25 November 2019;

6.2.2. Requirement to work without regular management reviews (as recommended by Occupational Health)

6.2.3. The Respondent's sickness absence policy (stage 1 meeting on 30 September 2021 to dismissal) – the Respondent accepts that this is a PCP that it applied to the Claimant;

6.3. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? The Claimant alleges the following disadvantages:

6.3.1. Stress and anxiety;

6.3.2. exacerbation of his condition;

6.3.3. further absences;

6.3.4. dismissal

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

6.5. What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:
6.5.1. The Claimant avers that the Respondent should have stopped him working night shifts;
6.5.2. The Claimant avers the Respondent should have provided more line management support; and
6.5.3. The Claimant avers the Respondent should have disapplied the sickness absence procedure.

The Respondent says that it took all reasonable steps including:
6.5.4. In October 2019, granting his flexible working request to reduce his hours from full to part time;
6.5.5. Holding regular welfare meetings;
6.5.6. Building a supportive plan to enable his return to work;
6.5.7. Obtaining OH advice;
6.5.8. Considering redeployment;
6.5.9. Offering EMDR treatment and access to the Staying Well service ('SWS'); and
6.5.10. Supporting his application for ill health early retirement.

6.6. Was it reasonable for the Respondent to have to take the steps contended for by the Claimant and when?

6.7. Did the Respondent fail to take those steps?

7. Victimisation (Equality Act 2010 s. 27)

7.1. Did the Claimant do a protected act as follows:
7.1.1. On 11 July 2018 – complaining to William Lee about his line manager Sue d'Amico regarding a comment concerning "happy pills";
7.1.2. On 1 April 2021 – issuing of a personal injury claim against the Respondent;
7.1.3. On 30 September 2021 – writing a letter to the Claimant referring to the PI claim and the "mental burden" the proceedings had added to him;
7.1.4. On 6 January 2022 – appealing against Stage 2 sickness;
7.1.5. On 6 February 2022 – issuing his first Employment Tribunal claim alleging discrimination.

7.2. Did the Respondent do the following things:
7.2.1. Dismiss the Claimant (it is admitted that the Claimant was dismissed);

7.3. By doing so, did the Respondent subject the Claimant to detriment?

7.4. If so, was it because the Claimant had done the protected acts?

8. Remedy

Unfair dismissal

8.1. The Claimant does not wish to be reinstated and/or re-engaged.

8.2. What basic award is payable to the Claimant, if any?

8.3. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

8.4. If there is a compensatory award, how much should it be? The Tribunal will decide:

- 8.4.1. What financial losses has the dismissal caused the Claimant?
- 8.4.2. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 8.4.3. If not, for what period of loss should the Claimant be compensated?
- 8.4.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 8.4.5. If so, should the Claimant's compensation be reduced? By how much?
- 8.4.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
- 8.4.7. If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his compensatory award? By what proportion?
- 8.4.8. Does the statutory cap of fifty-two weeks' pay apply?

Discrimination or victimisation

8.5. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

8.6. What financial losses has the discrimination caused the Claimant?

8.7. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.8. If not, for what period of loss should the Claimant be compensated for?

8.9. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

8.10. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

8.11. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8.12. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

8.13. Should interest be awarded? How much?