



EMPLOYMENT TRIBUNALS

Claimant

Tyrone Bahar

Respondent

v
Royal Berkshire Fire Authority

(also known as Royal Berkshire Fire and Rescue Service)

Heard at: Reading Employment Tribunal
On: 11-14 September 2023
Before: Employment Judge Talbot-Ponsonby
Mr A Kapur
Mr F Wright

Appearances

For the Claimant: In person and, on request, in his absence
For the Respondent: Ms Shepherd (counsel)

JUDGMENT having been sent to the parties on 24 October 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim by the claimant, Tyrone Bahar, against the respondent, Royal Berkshire Fire and Rescue Service, in which the claimant alleges that he was unfairly dismissed and seeks compensation; he also seeks compensation for alleged discrimination on the grounds of race and disability and harassment.
2. The written reasons have taken longer to finalise than they should and for that I apologise to the claimant. They reflect the decision that was given orally at the conclusion of the hearing.

Claims and issues

3. The claimant was employed by the respondent with effect from 22 December 2003. After initial induction and training courses, the claimant was initially employed as a firefighter at the station at London Road, Langley. He was from time to time required to work at other locations.

4. The claimant was dismissed in 2021. This was as a result of a disciplinary process after he pleaded guilty to 12 charges including possession of handguns and of weapons for the discharge of a noxious liquid or gas, possession of stun guns, possession of ammunition for firearms without a certificate.
5. The claimant claims that, from the start of his employment, he was subjected to discrimination and harassment on account of his race. In his ET1, he gives a limited number of examples, summarised by EJ Salter in the case management order of 19 August 2022, as follows:
 - “(a) Racist abuse at training in 2004;
 - (b) Physical abuse during training and drills when his breathing apparatus was turned off;
 - (c) Being accused of physically assaulting another employee;
 - (d) 2015 his locker was urinated in;
 - (e) Around 2015 racist material being placed in his locker;
 - (f) Assaulted on a night out by a fellow employee;
 - (g) Being overlooked for promotion or courses; and
 - (h) Dismissing him.”
6. He further alleges that he became depressed and suffered PTSD as a result of work related issues and that the respondent failed to take this into account in the disciplinary process that resulted in his dismissal.
7. As a result of this, he states that his dismissal in 2021 was unfair.
8. The respondent did not admit that the claimant had been the subject of racial discrimination, either in respect of the incidents listed above or at all.
9. The respondent initially denied that the claimant had a disability, but has subsequently admitted that the claimant had a disability in respect of anxiety/depression and PTSD, at least since 17 December 2019. The respondent states that it became aware of this on 29 January 2020.
10. In relation to the dismissal, the respondent contends that the dismissal was fair for a reason that related to the conduct of the claimant, namely his arrest and conviction for various offences involving firearms, and his failure to notify the respondent that he had been charged with such offences or that he had been charged with offences under the Misuse of Drugs Act 1971.
11. In the case management hearing of 22 July 2022, Employment Judge Salter identified the following issues to be determined in the claim, which were then listed in the case management order (CMO) sent to the parties on 19 August 2022:

“1 Time/limitation issues

- (a) Given the date:
- (i) of receipt by ACAS of EC Notification: 27th July 2021
 - (ii) issue by ACAS of the certificate by email: 9th August 2021
 - (iii) the claim form was presented: 19th August 2021,
- any complaint about something that happened before 28th April 2021 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.
- (b) Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
- (i) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
 - (ii) If not, was there conduct extending over a period?
 - (iii) If it was conduct extending over a period, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - (iv) If it was not conduct extending over a period, or the claim was presented more than three months after the end of that period, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide.
- (a) Why were the complaints not made to the Tribunal in time?
- (b) In any event, is it just and equitable in all the circumstances to extend time?

2 Unfair dismissal claim

The Law

- (a) In relation to unfair dismissal, section 98(1) of the Employment Rights Act 1996 states that it is for the employer to show the reason for the dismissal and that that reason falls within subsection 2 or is some other substantial reason of a kind so as to justify the dismissal. In relation to the fairness of the dismissal section 98(4) states:

“where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) depends on whether in the circumstances (including the size of the administrative resources of the employer’s undertaking) the employer acted reasonably or

unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

(b) As is well known it is not for the Tribunal to substitute its judgment for that of a reasonable employer in deciding whether or not the employer acted reasonably for the purpose of section 98(4). Rather, the Tribunal should ask itself whether or not the decision to dismiss fell within the range of reasonable responses of a reasonable employer.

Qualification

(c) The Respondent accepts that the Claimant was an employee, that he was dismissed and that at the time of his dismissal he had sufficient continuity of employment to present a claim of unfair dismissal.

The Reason for the Dismissal

(d) What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for section 98(2) Employment Rights Act 1996.

Genuine Belief

(e) Did the Respondent have a genuine belief in the reason for the Claimant’s dismissal?

Reasonableness of Process

(f) Did the Respondent hold the belief in the Claimant’s misconduct:
(i) based on reasonable grounds and
(ii) following as reasonable an investigation as was warranted in the circumstances?

Procedural Fairness

(g) Did the Respondent conduct a process that was reasonable in the circumstances of the case.

Dismissal in Band of Reasonable Responses

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

3 Equality Act 2010 Claims

Protected Characteristic

(a) The Claimant relies on the Protected Characteristic of:
(i) Race;

- (ii) *disability*

Disability

- (b) *The relevant time for assessing whether the Claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is from 2018 until his dismissal on 6th June 2021.*
- (c) *Did the Claimant have a disability in accordance with the Equality Act 2010 (“EQA”) at all relevant times because of mental health issues including depression, anxiety, PTSD and autism.*
- (d) *Did/does the impairment have a substantial adverse effect on the Claimant’s ability to carry out normal day-to-day activities?*
- (e) *If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*
- (f) *Would the impairment have had a substantial adverse effect on the Claimant’s ability to carry out day-to-day activities without the treatment or other measures?*
- (g) *Is that effect long term? In particular, when did it start and:*
- (i) *has the impairment lasted for at least 12 months?*
- (ii) *is or was the impairment likely to last at least 12 months or the rest of the Claimant’s life, if less than 12 months?*

N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

4 *The Respondent’s position on Disability*

- (a) *The Respondent:*
- (i) *At the time of the CMO, the respondent denied the Claimant is disabled person in accordance with the Equality Act 2010 (“EQA”); it has subsequently admitted this as noted above.*

5 *Conduct Complained of*

- (a) *The Claimant’s ET1 contains the following allegations:*
- (i) *Racist abuse at training in 2004;*
- (ii) *Physical abuse during training and drills when his breathing apparatus was turned off;*
- (iii) *Being accused of physically assaulting another employee;*
- (iv) *2015 his locker was urinated in;*
- (v) *Around 2015 racist material being placed in his locker;*

- (vi) *Assaulted on a night out by a fellow employee;*
- (vii) *Being overlooked for promotion or courses;*
- (viii) *Dismissing him.*

6 Section 13: Direct Discrimination

- (a) *Did the conduct complained of occur?*
- (b) *If so, and pursuant to s39(2)(d) of the Equality Act, was this a detriment?*
- (c) *If so, did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators who are not in materially different circumstances? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was and therefore relies upon a hypothetical comparator.*
- (d) *For direct disability discrimination claims, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same skills or abilities as the disabled person (regardless of whether those skills or abilities arise from the disability itself).*
- (e) *If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic (i.e. it was a material factor in the decision)?*
- (f) *If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?*

7 Section 26: Harassment related to Race or Disability

- (a) *Did the Respondent engage in conduct complained of?*
- (b) *If so, was the conduct unwanted?*
- (c) *If so, was the conduct related to the Claimant's race or disability?*
- (d) *Did the conduct have the purpose of:*
 - (i) *violating the Claimant's dignity; or*
 - (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*
- (e) *If not, did the conduct have the effect of:*
 - (i) *violating the Claimant's dignity; or*

- (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*
- (f) *In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*
- (g) *Any act of harassment cannot be direct discrimination s212(1).*

8 Remedies

- (a) *If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.*

Remedies for Unfair Dismissal

- (b) *If the Claimant was unfairly dismissed and the remedy is compensation:*

Basic Award

- (i) *What basic award is payable to the Claimant, if any?*
- (ii) *Has the Respondent shown, on the balance of probabilities that it would be just and equitable to reduce the amount of the Claimant's Basic Award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?*

Compensatory Award

- (iii) *What financial losses has the dismissal caused the Claimant?*
- (iv) *Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*
- (v) *If not, for what period of loss should the Claimant be compensated?*
- (vi) *if the dismissal was procedurally unfair, what adjustment, if any, should be made to any Compensatory Award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604;*
- (vii) *has the Respondent shown, on the balance of probabilities that the Claimant, by blameworthy or culpable actions, caused or contributed to his dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any Compensatory Award, pursuant to ERA section 123(6)?*
- (viii) *Does the statutory cap of the lower of fifty-two weeks' pay or £86,444 (until April 2020, £88,519 thereafter) apply?*

Discrimination or victimisation

- (ix) *Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?*
- (x) *What financial losses has the discrimination caused the Claimant?*
- (xi) *Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*
- (xii) *If not, for what period of loss should the Claimant be compensated for?*
- (xiii) *What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?*
- (xiv) *Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?*
- (xv) *Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?*
- (xvi) *Should interest be awarded? How much?*

9 Financial Penalty

If the Tribunal determines that the Respondent has breached any of the Claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996."

- 12. In addition to these elements, it appeared to the Tribunal that the claimant was bringing a claim pursuant to section 15 EqA in respect of his dismissal and accordingly the following additional issues arise:
- 13. Section 15 EqA
 - (i) Was the claimant treated unfavourably?
 - (ii) Was this as a result of his disability?
 - (iii) If so, was this a proportionate means of achieving a legitimate aim?
- 14. The respondent was given the opportunity to address the tribunal on these additional issues.

Procedure, documents and evidence

- 15. The claim was heard in the Reading Employment Tribunal on 11-14 September 2023, by Employment Judge Talbot-Ponsonby sitting with Mr Arkwell Kapur and Mr Frank Wright.

16. The claimant presented his application for ACAS mandatory conciliation on 27th July 2021, and the date of issue by ACAS of the certificate was 9th August 2021. The certificate was issued by email.
17. The matter was made the subject of some automatic directions and was listed for a five-day final hearing between 27th February and 3rd March 2023.
18. On 1 February 2022 the claimant was sentenced to five years imprisonment for the firearms offences.
19. On 18 July the Claimant, via his mother, supplied a 251-page witness statement. This did not appear to be an application to amend the claim, but contained a lot of information not contained within the claim form. There has not at any stage been any application to amend the claim. The witness statement also referred to exhibits and included a lot of argument as well as assertions of facts.
20. The case management hearing was heard by video conference on 22 July 2022 by EJ Salter. the respondent's representatives attended but the claimant did not. The record of the hearing and Case Management Order were sent to the parties on 19 August 2022.
21. In the Case Management Order, the claimant was ordered, by 19 August 2022, by cross referencing to the paragraphs on the Particulars of Claim, to provide full detail of the matters on which the claimant relies in the particulars of claim in support of allegations of discrimination on grounds of race or disability, including all incidents relied on and providing particulars including:
 - “(a) the date and time of the act or deliberate omission complained of;
 - (b) where it took place;
 - (c) by whom;
 - (d) the names of any witnesses to the same;
 - (e) the precise words and / or actions complained of;
 - (f) where the complaint is contained in a document, please identify the relevant document and provide a copy of the same (if available);
 - (g) dates and details of courses and promotions the claimant says he was overlooked for.
22. The claimant was also ordered to provide a schedule of loss.
23. Because of the timing of when the order was sent, the claimant applied for an extension of time to provide this information. The claimant subsequently provided 26 pages of handwritten information. This did provide some additional cross referencing with the witness statement but did not give significantly more detail in respect of dates, times and names.

24. By order dated 15 February 2023, the hearing listed on 27 February – 3 March 2023 was postponed. The hearing was subsequently listed to be heard on 11-15 September 2023, to be heard remotely.
25. The claimant had asked that the hearing go ahead in his absence and, on 1 September 2023, provided written submissions to the tribunal totalling 41 pages, and 6 further pages on 7 September 2023. The tribunal read these and have taken them into account.
26. On the first day of the hearing, despite having said that he would not attend the tribunal, the claimant sought to attend. The tribunal spent the morning reading the claimant's written submissions and the witness evidence, and he was able to attend in the afternoon.
27. At that time, the claimant confirmed that he did not wish to attend for the remainder of the hearing, and that he did not have the tribunal bundles. He did clarify that he considered that the respondent had racially discriminated against him throughout his employment, and that this continued to the conduct of the disciplinary proceedings that led to his dismissal.
28. The tribunal considered that it would not be fair for the claimant to be cross examined when he did not have reference to the documents, so he did not give oral evidence. He did not attend for the remainder of the hearing. In the light of the written submissions provided by the claimant, and his request that the hearing proceed in his absence, the tribunal considered it appropriate pursuant to rule 47 that the hearing proceed in the claimant's absence.
29. The tribunal had a hearing bundle of 3,487 pages, together with 301 pages of witness evidence, a further disclosure bundle from the claimant of 575 pages and a correspondence bundle of 439 pages (which included the claimant's written submissions, referred to above). In the light of the volume of material provided, the tribunal was not able to read all of this, but did read the claim and response, the written submissions, all the witness evidence, and such of the other material as was referred to in the submissions.
30. The claimant's evidence before the tribunal was the 251-page statement that was provided in advance of the case management hearing in July 2022.
31. The tribunal had statements and heard oral evidence from Ms Becci Jefferies (Head of Human Resources for the respondent), Mr Paul Binyon (who was the area manager for the respondent at the relevant time), Mr Mark Arkwell (who was assistant chief officer for the respondent at the relevant time) and Mr Wayne Bowcock (the Chief Fire Officer) on behalf of the respondent. They responded to questions put by the Tribunal but the claimant did not cross examine them. A lot of detail is given in the respondent's witness statements, all of which has been considered by the tribunal even if it is not all repeated in this decision.
32. The respondent was represented by Ms Shepherd of counsel, who also provided written submissions, and we are grateful to her for her assistance.

33. In the light of the absence of any application to amend the claim the tribunal considered primarily the instances of alleged discrimination identified by the claimant in his ET1 and enumerated by EJ Salter.

Fact finding

34. The claimant was employed as a firefighter by the respondent. He started his employment on 22 December 2003. After initial induction and training courses, the claimant was initially employed as a firefighter at the station at London Road, Langley. He was from time to time required to work at other locations.
35. The claimant was certified as a competent firefighter on 13 October 2011.
36. During this initial period of nearly 8 years, the claimant had 1019 days of absence, amounting to 2.79 years. The tribunal were not taken to any evidence of this being addressed by the respondent as a performance issue at the time. As well as leave, the claimant's absence was due to musculoskeletal issues and a significant period of absence recorded as "Sickness Mental Health - Stress", which was the period when the claimant was absent pending his trial for assault.
37. According to the claimant, there was an unhelpful atmosphere at his employment based on race: a number of things may have been said and remained unchallenged. In the absence of consideration of specific allegations which can be tested in evidence, the tribunal cannot make a general finding that this was the case.
38. Considering the specific instances complained of by the claimant in his ET1:

Racist abuse at training in 2004:

39. Neither the ET1 nor the witness statement give particulars of exactly what happened, or the exact dates, or who was involved.
40. A letter from Paul Southern, the Assistant Chief Fire Officer, was sent to the claimant and others on 8 June 2004 to say that he had been made aware of some events that had taken place at the training school and the resulting action, but that he was concerned as to a general perception that some matters were not dealt with adequately or at all. He was therefore writing to the individuals concerned to offer the opportunity to address any unresolved issues. The claimant did not respond to this nor to 2 further letters sent to him personally by Mr Southern.
41. Ms Jefferies gave evidence that the respondent has only very limited information about this as most of their records have been destroyed due to their age, and to comply with DPA, and the tribunal accepts that. The claimant asserts in submission that they do have the records and have chosen to withhold them, but the tribunal does not find that this is the case.
42. It is for the claimant to provide the evidence to support his case, in the absence of more specific information, the tribunal cannot find that this alleged event occurred.

Physical abuse during training and drills when his breathing apparatus was turned off

43. The claimant has given no particulars of exactly what happened, the exact dates, or who was involved.
44. It is not clear whether the claimant reported this at the time; the tribunal would expect the claimant to have done so, as it would appear to be a very serious incident carrying a potential risk to the claimant's life.
45. Again, it is for the claimant to provide the evidence to support his case, in the absence of more specific information, the tribunal cannot find that this alleged event occurred.

Being accused of physically assaulting another employee

46. The claimant's version of events is that he was woken up in the middle of the night on 12 February 2006 by another individual, who then accused the claimant of hitting him, and the claimant was arrested. The claimant was suspended on 1 March 2006 and remained off work until 30 July 2007 pending his trial for assault, in which he was eventually acquitted.
47. Despite his acquittal, the respondent took disciplinary action against the claimant and he was given a final written warning, to remain on his record for 18 months.
48. As before, Ms Jefferies' evidence was that the respondent has only very limited records for this. However, the day after he was accused and arrested, the claimant raised a complaint alleging discrimination and harassment. Ms Jefferies explained that this led to a detailed investigation by the respondent, with 2 individuals seconded to work on this full time; there were over 60 allegations and counter allegations. The tribunal was taken to the notes of a without prejudice meeting on 2 October 2007, at which a list of actions was agreed. The respondent agreed to support the claimant, to provide counselling and he was offered a mentor. The claimant alleges that the mentor was never offered, but the tribunal was referred to a letter dated 13 December 2007, which confirmed that, in a meeting on 5 December 2007, the claimant confirmed that he did not wish to have a mentor.
49. At or about the same time, the respondent also issued proceedings in the ET under claim reference 2701563/2006. No copy of these proceedings was available for the tribunal, but the respondent's evidence was that they were listed for a final hearing in late 2007. The recollection of Ms Jefferies was that, following the without prejudice meeting, the claimant withdrew the claim on the first day of the hearing and it was then dismissed on withdrawal. The tribunal finds that such proceedings did exist and were dismissed on withdrawal.

2015 his locker was urinated in

50. The contemporaneous evidence indicates that this incident was alleged to take place on 4 June 2016.

51. The respondent's records indicate that this was taken seriously by the respondent; the claimant's PT clothing was immediately bagged up and sent to Bureau Veritas to investigate.
52. On 11 July 2016, the respondent informed the claimant that Bureau Veritas had tested the clothing and that no trace of urine was found. The investigator did note that the clothing was damp and there was some odour, and postulated that this may have been as a result of sweat.
53. The claimant suggests that the respondent failed to follow up on this allegation and did not take appropriate action. We find on the balance of probabilities that there was no urine on the clothing and that the respondent followed this up appropriately.

Around 2015 racist material being placed in his locker

54. The claimant has given no particulars of this.
55. Again, it is for the claimant to provide the evidence to support his case, in the absence of more specific information, the respondent cannot respond and the tribunal cannot find that this alleged event occurred.

Assaulted on a night out by a fellow employee

56. There is a possible reference to this in the claimant's witness statement at page 53.
57. No details of any names are given, and there is no information that the respondent is able to respond to. In the witness statement, it is not even clear whether the alleged assault was by a colleague.
58. Again, it is for the claimant to provide the evidence to support his case, in the absence of more specific information, the respondent cannot respond and the tribunal cannot find that this alleged event occurred.

Being overlooked for promotion or courses

59. Considering promotions first, Ms Jefferies gave evidence that promotion opportunities would be advertised and then it would be up to individuals to apply for promotion. In order to ensure that they received appropriate support for this if needed, it would be discussed and recorded in their annual appraisal (referred to as Performance and Development Interview or Personal Development Review or "PDR").
60. Ms Jefferies in her WS gave the following summary of the relevant information from the claimant's PDRs:
 - “(a) In the PDR dated 10 December 2008 [542-550] Tyrone indicates he is possibly interested in promotion after achieving competence [546].
 - (b) (In the PDR dated 15 December 2009 [567-574], that in time he will look at Crew and Watch Manager promotion.

- (c) In the PDR dated 7 December 2010 [643-649], Tyrone indicates that would like to be a part of the training team in the future,
- (d) In the PDR dated 31 October 2011 [670-676], Tyrone confirms that he is happy in role, may look at promotion in the future [674].
- (e) In the PDR dated 9 October 2012 [681-687], Tyrone indicated he is happy in role may look to promotion in the future [685].
- (f) In the PDR dated 21 November 2013 [690-697], Tyrone indicated that he does not intend to apply for promotion in the next 12 months [694].
- (g) In the PDR dated 2015 [722-723], Tyrone indicated currently happy, would like to seek instructing in the near future.
- (h) In the PDR dated 22 May 2016 [762-763], refers to his long term sick leave preventing him from being able to demonstrate objectives and core competencies.
- (i) In the PDR dated 16 June 2017 [771-772], Tyrone states: Currently happy in role but will look to seek promotion in the future.
- (j) In the PDR dated 2018 [784-786], Tyrone confirms that he is happy in current role at this time and promotion indications are that would look to next level Crew Manager when opening arises in the future.”

- 61. On that basis, we find no evidence that the claimant was overlooked for promotion.
- 62. In relation to training, some was compulsory and the respondent would have arranged for the claimant to attend this as necessary. Voluntary training would be arranged by the claimant requesting this, either orally or in writing.
- 63. The claimant states that he regularly requested to go on a physical instructor course but was not permitted to, even though others junior to him did so.
- 64. The claimant has provided no documentary evidence in support of this and we find that this did not happen.
- 65. The claimant also referred to a forklift driving course. The tribunal was referred to a letter from Paul Jones dated 23 July 2010, in which Mr Jones appears to be responding to various complaints from the claimant. These include a complaint that the claimant was overlooked for forklift courses. Mr Jones explained that the claimant’s attendance was deferred because of an injury he had suffered to his finger, as it was not clear whether the claimant would be able to drive on his return (and Mr Jones states that he was not); a course was then cancelled due to leave and problems with the instructor, and had not yet been rescheduled, and that the claimant would be rescheduled as soon as crewing etc. allows.
- 66. The tribunal finds that, in the circumstances, it was reasonable for the claimant’s attendance on the course to be deferred and does not find that

this is evidence that the claimant was overlooked for the training course or that the rescheduling had anything to do with the claimant's race.

67. It is clear that this is an unusual workplace, with employees spending a lot of time in close proximity including sleeping in dormitories as necessary when on shift. In such cases, there is always a risk of friction due to difficulties with personalities.
68. In general, the documentation that the tribunal has seen indicates that, when concerns are raised, the senior management address them well: they are courteous, they address the issues, and they respond to the claimant. They may not always respond in his favour but nonetheless they appear to consider the matter fairly.
69. The claimant's case is that he perceives that there is institutional racism, and that he has suffered ongoing discrimination and harassment due to his race, which he feels is either tolerated or even condoned by management. The tribunal consider that, having regard to the pleaded case in the ET1, the claimant has not provided evidence to support this allegation.

The claimant's dismissal

70. On 5 November 2018, the National Crime Agency (NCA) made contact with the respondent as part of an ongoing investigation they were carrying out into the illegal purchase of firearms. As a result of that, on 8 November, they searched the claimant's locker at work. The claimant did not attend for his shift that day, although he gave no explanation at the time.
71. On 9 November 2018, Ms Jefferies spoke to the claimant. She told him that he had been booked as sick, but she was aware that he was not; he told her that he had been arrested on 8 November. Ms Jefferies asked the claimant if he was stressed, and the claimant agreed that he was; Ms Jefferies agreed with the claimant that, as he was likely to be unable to focus on his role, he should stay at home.
72. On 15 November 2018, the claimant told Ms Jefferies that he was still sick and had not eaten anything for a week.
73. On 22 November 2018, Ms Jefferies spoke to the claimant and told him that she had decided to suspend him on health and safety grounds, based on his arrest and its effects on his health while investigations were ongoing. He was sent a letter to this effect. Ms Jefferies reminded the claimant of the availability of the employee assistance programme.
74. Until the disciplinary investigation started, at which time Mr Doug Buchanan was appointed as a welfare officer for the claimant on 22 October 2019, Ms Jefferies continued to contact the claimant to check up on his welfare and offer support. She has given details of contact with the claimant as follows:
 - 74.1 Telephone calls on 22 November 2018, 30 November 2018, 18 December 2018, 7 February 2019, 2 July 2019, 26 July 2019, 30 July 2019

74.2 Emails on 10 March 2019, 21 March 2019, 26 April 2019, 28 May 2019, 30 May 2019, 2 July 2019, 24 July 2019

75 On 23 November 2018, NCA informed the respondent that they were investigating the claimant because he was suspected of importing and being in possession of restricted items; they had not found anything in his locker but, in his property and in vehicles to which he had access they had found:

75.1 5 x section 5 firearms,

75.2 9 x CS gas canisters,

75.3 3 x stun guns,

75.4 2 x machetes

75.5 1x ASP

75.6 ammunition of various calibres

75.7 A quantity of white powder which was concealed.

and that the claimant had been arrested for these offences and was now released while the investigation continued.

76 The NCA investigation continued during late 2018 and until September 2019. During this period the claimant's suspension was reviewed periodically, and he remained suspended on full pay. Ms Jefferies gave evidence that his records were left indicating his absence due to sickness rather than suspension from duty to maintain confidentiality and prevent others from knowing the reason for the absence.

77 On 2 May 2019, the claimant told Ms Jefferies that he was seeking support from his GP in respect of his mental wellbeing.

78 On 16 September 2019 the NCA informed Ms Jefferies by email that the claimant had been charged with 14 serious offences as set out in that email. In essence, these were possession of handguns and of weapons for the discharge of a noxious liquid or gas, possession of stun guns, possession of ammunition for firearms without a certificate, and possession of a controlled drug (cocaine). The claimant's first court appearance was scheduled for 4 October 2019.

79 The respondent therefore commenced disciplinary proceedings. In the first instance, on 27 September 2019, Ms Jefferies wrote to the claimant to inform him that an investigation would be carried out and, once complete, would be reported to Deputy Chief Fire Officer Steve Foye. In the event, Mr Foye left the respondent before the investigation was complete and so Mr Arkwell was appointed to hear the proceedings instead.

80 In October 2019, Mr Paul Binyon was appointed to conduct the disciplinary investigation and to prepare a report. Mr Binyon had started employment

with the respondent in May 2019. Mr Binyon has given evidence to the tribunal as to how this was conducted; the claimant was given a copy of the disciplinary policy and the criminal and traffic offences policy. On 11 October 2019, Ms Jefferies wrote to the claimant to inform him that Mr Binyon had been appointed to carry out the disciplinary investigation.

- 81 On 22 October, the claimant was informed that Mr Doug Buchanan would be the claimant's allocated welfare officer during the investigation.
- 82 On 28 October 2019, Mr Binyon wrote to the claimant to set out the next steps for the disciplinary process and invited the claimant to a meeting on 12 November 2019, after the claimant's scheduled court appearance on 31 October 2019.
- 83 The court hearing was adjourned until 6 January 2020. For some reason, the claimant appeared in Kingston Crown Court on 3 January 2020, and pleaded guilty to the 12 firearms charges and not guilty to the 2 drugs charges. The Tribunal has not been taken to any particular explanation of why the dates differ.
- 84 As a result of the adjourned court hearing, the claimant asked Mr Binyon whether the disciplinary investigation could be adjourned. Mr Binyon agreed to this, and the meeting was rescheduled for 28 November 2019.
- 85 There were a number of adjournments to this meeting. First, this was to allow the claimant's criminal proceedings to be completed; then, after the claimant pleaded guilty, there was an adjournment due to the absence on holiday of the claimant's union representative, Mr James Harris.
- 86 There were then further delays due to lockdown restrictions as a result of Covid-19, and the meeting was eventually held on 28 August 2000.
- 87 Meanwhile, on 17 December 2019, Dr David Fox prepared an occupational health (OH) report in respect of the claimant. Dr Fox stated that his view was that the claimant had an anxiety illness with features of OCD / PTSD. He recommended trauma focused therapy and stated that the claimant was fit to engage in the disciplinary proceedings but suggested they be deferred until after the claimant's court appearance on 6 January 2020. A copy of this report was sent by the claimant to the respondent and received on 29 January 2020.
- 88 In addition, as part of the criminal proceedings, a psychological report was prepared by Dr Bernard Horsford in respect of the claimant, dated 28 November 2019. The claimant states that a copy was provided to the respondent as part of the disciplinary process; the respondent's position at the trial was that they did not have the whole report. No copy was provided in the respondent's bundle and the claimant's bundle provided only limited excerpts from the report.
- 89 The executive summary of the report states:

“Obsessive-Compulsive Disorder

I conclude that the best way of describing Mr Bahar's disorder of collecting items is hoarding disorder rather than obsessive-compulsive behaviour.

Hoarding disorder could explain the behaviour exhibited by collecting several weapons

Depression

The assessment with me confirms that Mr Bahar suffers from major depressive disorder with anxious distress. I would classify the severity of his symptoms as severe. I conclude that, because he has a history of depression, that he is suffering from a recurrent episode.

Post Traumatic Stress Disorder

Mr Bahar has suffered from two serious assaults. This and other adverse experiences that he has been exposed to have resulted in him developing post-traumatic stress disorder."

- 90 As a result of Dr Fox's recommendation, on 10 February 2020 the respondent authorised 10 sessions of trauma focussed therapy treatment for the claimant.
- 91 On 28 August 2020, the first investigatory meeting was held. The claimant accepted that he had pleaded guilty to possessing firearms. He asserted that he had thought they were legal and would not have bought them if he had realised they were illegal. The claimant asserted that he bought them as a result of his depression. The claimant also raised historic allegations of harassment and bullying that he believed had not been dealt with correctly.
- 92 After the meeting, a copy of the notes was sent to Mr Harris. Mr Harris sought to amend the notes to include issues that Mr Binyon considered had not been discussed.
- 93 A second meeting, by video conference, was arranged for 9 October 2020, to consider whether the claimant had a formal diagnosis of the conditions he had raised in the first interview, and to discuss his work in the community. On that day, Mr Harris emailed Mr Binyon in relation to historic investigations and correspondence that was alleged to show discrimination experienced by the claimant. Mr Harris also said that the claimant may have Asperger' syndrome.
- 94 Following the meeting, Mr Harris submitted further historic allegations that were said to have affected the claimant, going back to 2006 and 2007. Mr Binyon reviewed the claimant's personal development record to see if there was reference to this on the record.
- 95 The disciplinary report was completed on 17 November 2020.
- 96 On 9 December 2020, the claimant was invited to a disciplinary hearing with Mr Arkwell on 9 January 2021. Mr Arkwell had joined the respondent in May 2019. A copy of the report was enclosed with the invitation. Mr Harris asked that the hearing be put off until late January because of his commitments

and, by a letter dated 16 December 2020, it was rescheduled for 19 January 2021.

- 97 By a report dated 12 January 2021, Dr Fox recommended further therapy for the claimant's PTSD.
- 98 On 20 January 2021, the disciplinary hearing was rearranged to 28 January 2021.
- 99 By a report dated 27 January 2021, Dr Fox gave his view that the claimant was not fit to engage in formal meetings with management (including the disciplinary process) and recommended further treatment, and engagement with the claimant's union representative to identify when he would be fit for this.
- 100 As a result of this, the hearing on 28 January 2021 was postponed, pending a follow-up mental health review.
- 101 On 18 March 2021, Dr Fox provided another report, noting that a further 12 sessions of therapy had been scheduled, starting on 15 March 2021. He considered that the claimant was better, but that the claimant needed to commence the further therapy before engaging with meetings; he recommended that the respondent keep in touch with the claimant's union representative to identify when the claimant would be able to attend a meeting.
- 102 By letter dated 6 April 2021, Mr Arkwell wrote to the claimant to say that a hearing could not be postponed indefinitely, and that he would shortly suggest a date. If the claimant felt unable to attend, arrangements could be made for him to make written submissions. By email dated 9 April 2021, Mr Harris responded and said, inter alia, that he hoped the respondent would honour its commitment to allow the claimant to finish the course of therapy before any hearing.
- 103 By letter dated 6 May 2021, Mr Arkwell wrote to invite the claimant to a meeting on 2 June 2021 on the basis that Mr Harris had said that the claimant wished to attend the meeting, and put forward a date of 2 June. In response, Mr Harris confirmed that the claimant would attend the meeting, and did not suggest that it needed any further delay for the claimant to complete the therapy. By the time of the meeting, the claimant had attended 10 out of the 12 therapy sessions.
- 104 At the meeting, Mr Arkwell listened to the submissions from Mr Binyon and from the claimant and also received written submissions from Mr Harris on the claimant's behalf. There were several breaks to allow the claimant to discuss matters with Mr Harris.
- 105 While it was accepted that the claimant had committed the offences, Mr Harris argued that the claimant's mental health had affected his judgment and this should be taken into account.
- 106 The decision was considered at a meeting on 3 June 2021 and the decision letter was sent to the claimant on 9 June 2021.

- 107 On 13 June 2021, the claimant appealed the decision.
- 108 Mr Wayne Bowcock was appointed to hear the appeal. He had joined the respondent on 7 June 2021.
- 109 The claimant appealed on the basis that there were mitigating circumstances that had not been properly considered by the disciplinary panel, that the sanction was too severe, and that new evidence had come to light since the hearing.
- 110 The hearing date was moved several times to allow preparation time for the claimant.
- 111 Mr Bowcock, having heard the appeal, concluded that the sanction was appropriate, that the mitigation had been fully considered, there was no substantive new evidence, and that the procedure had been fair. The appeal was therefore dismissed.
- 112 On 1 February 2022, the claimant had his sentencing hearing in respect of the criminal proceedings and was sentenced to 5 years' imprisonment, which was ongoing at the time of the hearing of this claim.

Law

Time limits: discrimination

- 113 Under the Equality Act 2010, section 123, there is a primary time limit of 3 months from the date of the relevant act, or if there is a continuing act, the end of the period of discrimination.
- 114 It is important to note that one must look at the act, not the consequences; this was made clear by the decision of the House of Lords in Barclays Bank plc v Kapur and ors [1991] ICR 208, which drew a distinction between a continuing act and an act that has continuing consequences. They held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time. Thus in Sougrin v Haringey Health Authority [1992] ICR 650, CA, the Court of Appeal held that a decision not to regrade an employee was a one-off decision or act, even though it resulted in the continuing consequence of lower pay for the employee who was not regraded. There was no suggestion that the employer operated a policy whereby black nurses would not be employed on a certain grade; it was simply a question whether a particular grading decision had been taken on racial grounds.
- 115 The tribunal has jurisdiction to extend time under section 123(1)(b) if it is just and equitable to do so.
- 116 This is a broad discretion. In Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now

S.123(1)(b) of the Equality Act 2010, “there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.” However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable, as per the decision in Pathan v South London Islamic Centre EAT 0312/13.

- 117 The fact that a claimant has awaited the outcome of his or her employer’s internal grievance procedures before making a claim is just one matter to be taken into account by an employment tribunal in considering whether to extend the time limit for making a claim: Apelogun-Gabriels v London Borough of Lambeth and anor [2002] ICR 713, CA.
- 118 The principles set out in section 33(3) Limitation Act 1980 can also be useful for a tribunal to consider, by analogy, although they are not binding and should not be used as a prescriptive list. Section 33(3) provides:

- “(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
- (a) the length of, and the reasons for, the delay on the part of the [claimant];
 - (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the [claimant] or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A, by section 11B or (as the case may be) by section 12;
 - (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the [claimant] for information or inspection for the purpose of ascertaining facts which were or might be relevant to the [claimant]’s cause of action against the defendant;
 - (d) the duration of any disability of the [claimant] arising after the date of the accrual of the cause of action;
 - (e) the extent to which the [claimant] acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
 - (f) the steps, if any, taken by the [claimant] to obtain medical, legal or other expert advice and the nature of any such advice he may have received.”

Time limits: unfair dismissal

- 119 Under s. 111 ERA, any claim for unfair dismissal must be brought within 3 months of the dismissal, unless the tribunal finds that it was not reasonably

practicable to do so, in which case it must be brought within such further time as the tribunal considers reasonable.

Unfair dismissal generally

120 In relation to unfair dismissal, section 98(1) of the Employment Rights Act 1996 states that it is for the employer to show the reason for the dismissal and that that reason falls within subsection 2 or is some other substantial reason of a kind so as to justify the dismissal. In relation to the fairness of the dismissal section 98(4) states:

“where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) depends on whether in the circumstances (including the size of the administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case”

121 As is well known, following British Homes Stores v Burchall, it is not for the Tribunal to substitute its judgment for that of a reasonable employer in deciding whether or not the employer acted reasonably for the purpose of section 98(4). Rather, the Tribunal should ask itself:

- 121.1 whether R genuinely believed the facts on which it relied;
- 121.2 had reasonable grounds to sustain that belief,
- 121.3 carried out a reasonable investigation,
- 121.4 whether the process was fair, and
- 121.5 whether dismissal was within a reasonable range of responses

122 Further, if the tribunal finds that the claimant has been unfairly dismissed, it must consider what remedy is due.

123 The remedy is split into 2 elements:

124 Under section 119 ERA, there is a basic award, determined by reference to the number of years the claimant has worked and his age. This is subject to adjustment under section 122 ERA, if the tribunal finds that the claimant’s actions contributed to his dismissal.

125 Under section 123 ERA, there is a compensatory award, of such amount that the tribunal considers just and reasonable, but subject to adjustment in the following circumstances:

- 125.1 under section 123 ERA, if I find that the claimant’s actions contributed to his dismissal;

125.2 in accordance with the case of Polkey v AE Dayton Services Ltd, if and to the extent that, regardless of any procedural flaw, there is a chance that the claimant would still have been dismissed in any event; and

125.3 the extent to which the respondent complied with the ACAS code.

126 The award can also be reduced if the claimant has failed to mitigate his loss.

127 Finally, there is a statutory cap, currently £93,878, that is applied to each of the basic and the compensatory awards. This cap is applied after any other adjustments.

Discrimination generally

128 Section 13(1) Equality Act 2010 provides that (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

129 Under section 9, race is a protected characteristic and includes colour, nationality and ethnic or national origins.

130 In order to claim direct discrimination under section 13, the claimant must have been treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant.

131 In the pivotal case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, (a sex discrimination case), Lord Scott explained that this means that “the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class”.

132 In Watt (formerly Carter) and ors v Ahsan [2008] ICR 82, HL, (a race discrimination case), Lord Hoffmann opined that it is “probably uncommon” to find an individual who qualifies as a statutory comparator. Furthermore, where such an individual is identified, there is likely to be disagreement over whether his or her circumstances are materially different. However, Lord Hoffmann thought that in most cases “it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator.”

133 The definition of direct discrimination in the Equality Act 2010 requires the complainant to show that he or she received less favourable treatment “because of a protected characteristic”. The protected characteristic must be an “effective cause” of the treatment.

Burden of proof

134 Section 136 of the Equality Act 2010 provides that, once a claimant proves facts from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, the tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate.

135 Further guidance was given by Lord Justice Mummery in Madarassy v Nomura International plc [2007] ICR 867, CA, where he stated: "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

Conclusions

136 The tribunal has reached the following conclusions on the issues.

1 Time/limitation issues

(a) *Given the date:*

(i) *of receipt by ACAS of EC Notification: 27th July 2021*

(ii) *issue by ACAS of the certificate by email: 9th August 2021*

(iii) *the claim form was presented: 19th August 2021,*

any complaint about something that happened before 28th April 2021 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

(b) *Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*

(i) *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?*

137 In relation the claim of harassment and race and disability discrimination (except in connection the dismissal), the claims were not made within the 3 month period.

138 In relation to allegations of racial and disability discrimination in connection with the dismissal, the claim was brought in time.

(ii) *If not, was there conduct extending over a period?*

139 Considering first harassment and discrimination:

140 The claimant alleges that there was continuing conduct over a period up to the time of his dismissal. The specific allegations raised by the claimant are in fact intermittent rather than continuing and tribunal does not find that there was conduct over a period.

141 In addition, having found (as below) that there was no racial or disability discrimination in his dismissal, the dismissal and the disciplinary investigation could not form part of any continuing act of discrimination or harassment.

(iii) *If it was conduct extending over a period, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*

142 To the extent that any conduct was continuing, it did not continue beyond the period at which the claimant was suspended in 2018 and accordingly the tribunal claim was not brought within 3 months of then (together with early conciliation extension).

(iv) *If it was not conduct extending over a period, or the claim was presented more than three months after the end of that period, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide*

(a) *Why were the complaints not made to the Tribunal in time?*

(b) *In any event, is it just and equitable in all the circumstances to extend time?*

143 The claimant stated that the claims were not made in time because he was suffering from mental health issues including depression and PTSD. There is very little evidence of this prior to the reports of Dr Horsford dated 28 November 2019 and Dr Fox dated 17 December 2019. The tribunal also noted that the claimant had not provided in these proceedings the entirety of Dr Horsford's report, but only extracts from it together with commentary.

144 Many of the claimant's allegations are historic and, considering (by analogy) the issues listed in section 33(3) of the Limitation Act 1980, the balance of prejudice is such that it is not realistic for the respondent to be able to address these allegations so long after the event. Ms Jefferies explained that the respondent no longer had its records for this period and could therefore provide only limited evidence in response to this. The tribunal has regard to its discretion (noted above) and the burden of proof being on the claimant to persuade to persuade the tribunal to extend time.

145 Further, the claimant had previously brought tribunal proceedings and was therefore aware of the possibility of this and has advanced no good reason for waiting for so many years before seeking to bring such a claim.

146 Further, the claimant did previously bring a claim in or about 2006 (number 2701563/2006). The tribunal does not have a record of how the claim was ultimately disposed of, although the recollection of Ms Jefferies was that the claim had been dismissed on withdrawal following the without prejudice meeting between the claimant and the respondent in October 2007. Any issues prior to that were either included in the earlier claim and are therefore res judicata, or (if they were not included) they should have been,

and it is an abuse of process for the claimant to seek to raise these in these proceedings following the decision in Henderson v Henderson.

- 147 Accordingly, in all the circumstances, it is not just and equitable to extend time for the claimant to bring the claims for anything other than those connected with his dismissal.

2. Unfair dismissal claim

Qualification

- (c) *The Respondent accepts that the Claimant was an employee, that he was dismissed and that at the time of his dismissal he had sufficient continuity of employment to present a claim of unfair dismissal.*

The Reason for the Dismissal

- (d) *What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for section 98(2) Employment Rights Act 1996.*

- 148 The tribunal accepts that the reason was that the claimant had pleaded guilty to five counts of possessing an illegal firearm, two counts of possessing illegal ammunition and five further counts of possession of an illegal weapon, which was confirmation that he had been in possession of items not compatible with the behaviours and standards expected of an individual occupying the role of a firefighter whose duties include protecting the public to make the communities of Berkshire safer. The respondent considered that this amounted to gross misconduct and was its reason for dismissal. In addition, the claimant had failed to keep the respondent informed that he had been charged with these offences.

- 149 The tribunal finds that this was the reason for the dismissal.

Genuine Belief

- (e) *Did the Respondent have a genuine belief in the reason for the Claimant's dismissal?*

- 150 It is clear that they did, having been notified by NCA, having attended the hearing at which the claimant pleaded guilty, and as a result of their own internal investigation, in which the claimant accepted that he had pleaded guilty to these offences.

Reasonableness of Process

- (f) *Did the Respondent hold the belief in the Claimant's misconduct:*

- (i) *based on reasonable grounds and*

- 151 Yes, as above

(ii) *following as reasonable an investigation as was warranted in the circumstances?*

152 Yes: the respondent considered a reasonable investigation into the fact of the conviction and the underlying and background circumstances to it. Considerable detail is given by Mr Binyon in his witness statement.

Procedural Fairness

(g) *Did the Respondent conduct a process that was reasonable in the circumstances of the case.*

153 Yes. The tribunal notes the comments made by Ms Shepherd at paragraphs 2-14 of her skeleton argument. For ease of reference, these were as follows:

- “2. The dismissal was procedurally fair. R was at pains to ensure that C was able to participate fully in the disciplinary proceedings. R did not commence its disciplinary investigation until C had been charged with criminal offences in September 2019, despite the fact that it was made aware by the National Crime Agency (‘NCA’) in November 2018 that C was being investigated for serious offences and would have been at liberty to commence its own investigation at that stage.
3. An independent investigator who had no prior knowledge of C, Paul Binyon, was appointed to conduct the investigation. R also did not proceed with the investigatory interviews until after C had pleaded guilty to 12 charges in January 2020. This created significant delay during which C was suspended on full pay but this demonstrates that R was keen to ensure the fairness of the process by ensuring that the criminal investigation had concluded and C had an opportunity to enter his plea before the disciplinary investigation commenced.
4. C was represented by his union representative at the two investigatory meetings on 28 August 2020 and 9 October 2020 and it is clear from the notes of those meetings that he had a full opportunity to provide all relevant information for the purposes of the investigation.
5. Mr Binyon prepared a full and comprehensive investigation report (pg 1451 – 1458). He made reference in the report to C’s mental health issues and C’s assertion that he was on the autistic spectrum and suffered from PTSD, although C confirmed during the second investigatory interview that he had not been diagnosed with those conditions. Mr Binyon also made reference to the allegations of racial harassment made by C and his assertions that he had not been provided with adequate support.
6. In conclusion, Mr Binyon determined that C had pleaded guilty to five counts of possessing an illegal firearm, two counts of possessing illegal ammunition and five further counts of possession of an illegal weapon, which was confirmation that he had been in possession of items not compatible with the behaviours and standards expected of an individual occupying the role of a firefighter whose duties include protecting the public to make the communities of Berkshire safer. He had also not informed R of having been charged with criminal offences, there was therefore sufficient evidence to proceed to a disciplinary hearing.

7. Mr Arkwell was appointed to deal with the disciplinary in around November 2020 and C was initially invited to attend a hearing on 8 January 2021. His union representative requested a postponement and a further date was set for 28 January 2021. An occupational health report was subsequently received that indicated that C was not well enough to attend the hearing which resulted in a further postponement.
 8. Occupational health ('OH') reviewed C again on 10 March 2021 and noted that he was scheduled to commence 12 sessions of therapy with PsycheHealth funded by R on 15 March 2021. It was the doctor's impression that C was better than in his previous OH appointment but that C should commence support from PsycheHealth before engaging in meetings with management in order that he could develop strategies to better cope with the demands of a meeting with management. R therefore agreed to schedule the hearing for 2 June 2021 by which time C had been unable to undergo a number of those therapy sessions.
 9. C attended the hearing and was again represented by his union representative. They had a full opportunity to put forward any matters relevant to the disciplinary charges. During the hearing breaks were offered, opportunities were given for C to be able to confer privately with his representative, and Mr Arkwell ensured that the proceedings were flexible, for example allowing for additional responses from C and his representative after they had finished the summing up.
 10. Mr Arkwell took some time to consider his decision and it was communicated to C the following day. He was notified of his right of appeal and exercised that right.
 11. The appeal hearing took place before Mr Bowcock on 7 September 2021 and C was again able to put forward all relevant information he wished to rely upon.
 12. The appeal hearing was also postponed on a number of occasions to accommodate C and his new representative and the venue for the hearing was moved closer to C's home and away from fire service premises to reduce any potential anxiety. Regular breaks were taken and there were adjournments when required.
 13. C submitted on appeal that the sanction had been too harsh, that there had not been enough consideration of the mitigation offered and that there was no direct link between the criminal charges and C's ability to perform his role.
 14. Mr Bowcock made relevant further enquiries with HR following the hearing and prior to reaching his decision. He subsequently upheld the decision."
- 154 There were delays in the disciplinary proceedings, first to allow the Crown Court case to take place, then because of Covid, and then to allow treatment.
- 155 The disciplinary hearing was deferred in accordance with recommendations of Dr Fox.

- 156 The claimant says that he wanted it delayed to allow the final therapy sessions, but Dr Fox says the claimant needed to start (rather than complete) the treatment, the correspondence suggested that the claimant offered the hearing date as one he could attend and Mr Harris's response accepts the date and does not ask for further delay to allow the last 2 therapy sessions. It is not completely clear exactly how many sessions the claimant had attended at the time but appears to have been 20 out of a total of 22 (10 authorised in 2020 and a further 12 authorised in 2021).
- 157 The claimant says that the respondent did not take into account his mental health in considering its decision, but it is clear from the contemporaneous documents and from the evidence of the respondent at trial, such as that of Mr Arkwell, that it did. Mr Arkwell referred for example to inconsistencies in the claimant's evidence – the claimant had referred to collecting the guns, but also to obtaining CS canisters for potential use on his neighbour's dog. Mr Arkwell gave detailed evidence in his witness statement of the matters that were available at the hearing and taken into account. He also gave evidence about the adjustments that were made to ensure that the claimant could participate in the hearing.
- 158 The claimant alleges that the respondent has not complied with ACAS requirements but has not given specific details about how this is the case. On this basis, the tribunal finds that the respondent did comply with ACAS and there was no lack of procedural fairness there.

Dismissal in Band of Reasonable Responses

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

- 159 Yes. This was a serious offence, for which the claimant was in fact subsequently imprisoned for 5 years.
- 160 Being convicted of an offence will not of itself necessarily lead to dismissal.
- 161 The claimant was employed as a public servant in a role in which he is entrusted with safeguarding the safety of members of the public. He was required to comply with the Nolan principles. A conviction for possession of illegal firearms, weapons and ammunition is contrary to those principles and conflicts with his duties to members of the public as a firefighter.
- 162 The respondent's code of conduct is clear as to the expectations of its firefighters to behave in a professional manner, to offer the highest standards of service to the public, and to promote and maintain public confidence and trust in the Service. It states that firefighters must never place themselves in a position where their honesty and integrity may be questioned and to avoid conflicts of interest between their private interests and public duties. It requires that firefighters should never act in a way that could discredit the Service or bring it into disrepute whether on duty or not.

163 The claimant gave examples, at pages 200 and, 206 in his witness statement bundle where he states:

“201 – examples of police officers who had not been dismissed.

206 – examples of others at the respondent organisation.”

164 The difficulties with these examples are that the police officers list was as a result of a freedom of information request and was reported with some concern that these officers had not been dismissed. This is not a reason for the respondent to be lenient in respect of the claimant’s behaviour in this instance.

165 As for the examples given of the respondent’s own employees, each case is decided on its own merits and no details of the relevant circumstances were provided so tribunal cannot consider whether they are in any way comparable.

166 Therefore, the tribunal considers that dismissal is within the range of reasonable responses.

3. Equality Act Claims

Protected Characteristic

(a) *The Claimant relies on the Protected Characteristic of:*

- (i) *Race;*
- (ii) *disability*

Disability

(b) *The relevant time for assessing whether the Claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is from 2018 until his dismissal on 6th June 2021.*

(c) *Did the Claimant have a disability in accordance with the Equality Act 2010 (“EQA”) at all relevant times because of mental health issues including depression, anxiety, PTSD and autism*

(d) *Did/does the impairment have a substantial adverse effect on the Claimant’s ability to carry out normal day-to-day activities?*

(e) *If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*

(f) *Would the impairment have had a substantial adverse effect on the Claimant’s ability to carry out day-to-day activities without the treatment or other measures?*

(g) *Is that effect long term? In particular, when did it start and:*

- (i) *has the impairment lasted for at least 12 months?*
- (ii) *is or was the impairment likely to last at least 12 months or the rest of the Claimant's life, if less than 12 months?*

N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

4. Disability

- 167 The Respondent now accepts that the claimant suffered from a disability with effect from 17 December 2019 and became aware of this on 29 January 2020 when the respondent received the report from Dr Fox. The respondent accepts this in relation to mental health issues including depression, anxiety and PTSD, but not in relation to autism. The issues accepted by the respondent are those set out in the executive summary of Dr Horsford's report at page 394 of the claimant's disclosure bundle.
- 168 The medical evidence does not indicate when the claimant's mental health issues first arose. He asserts that they date further back.
- 169 The annual report forms do not include any assertion by the claimant of any mental health issues or any other disability – see Ms Jefferies para. 12.
- 170 In relation to autism, there is no formal diagnosis but rather a suggestion that this should perhaps be investigated.
- 171 There was a suggestion by Dr Horsford that the claimant may suffer from some form of hoarding disorder but it is not clear from his executive summary to what extent he actually does so suffer, and there is no evidence of whether this would have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities. Accordingly, in the absence of sufficient evidence to show that the claimant does suffer from a hoarding disorder and, if he does, that it amounts to a disability, the tribunal finds that he does not suffer from a disability based on any apparent tendency to collect things.
- 172 The claimant's sickness record includes large periods of absence recorded as "mental health". There are two in particular: one from 2006-2007, when the claimant was absent following the allegation of assault, when the respondent considered that the stress may distract him from being able fully to attend to his work. The second was for similar reasons, after his arrest in 2018, at which time the respondent also did not wish to prejudice the investigation by NCA. The claimant is not claiming that there was any discrimination against him due to these.
- 173 The report from Dr Fox in 2019 says it was alright for the respondent to investigate, and that the claimant's disability does not stop the claimant from participating in the investigation.

174 The tribunal do not find that there is adequate evidence to support a finding that the claimant had a disability prior to Dr Horsford's report of 28 November 2019, and there is evidence to contradict it, such as the claimant's annual report forms. So the tribunal finds that the claimant did not have a disability prior to 28 November 2019, and that it is limited to mental health issues including depression, anxiety and PTSD, but not autism or any form of hoarding disorder.

5. Conduct Complained of

- (a) *The Claimant's ET1 contains the following allegations:*
- (i) *Racist abuse at training in 2004;*
 - (ii) *Physical abuse during training and drills when his breathing apparatus was turned off;*
 - (iii) *Being accused of physically assaulting another employee;*
 - (iv) *2015 his locker was urinated in;*
 - (v) *Around 2015 racist material being placed in his locker;*
 - (vi) *Assaulted on a night out by a fellow employee;*
 - (vii) *Being overlooked for promotion or courses;*
 - (viii) *Dismissing him.*

6. Section 13: Direct Discrimination (race)

- (a) *Did the conduct complained of occur?*

175 As set out in the findings of fact, the claimant has not made out the balance of probabilities that the items complained at (i) to (vii) occurred. It is agreed that he was dismissed.

- (b) *If so, and pursuant to s39(2)(d) of the Equality Act, was this a detriment?*

176 Being dismissed is clearly a detriment.

- (c) *If so, did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators who are not in materially different circumstances? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was and therefore relies upon a hypothetical comparator.*

177 In relation to race, the claimant states that he was treated more unfairly than a hypothetical comparator in that the respondent quickly sought to escalate the disciplinary process to the highest level, and would not have done so if he were white. Note that the claimant chose to make submissions and the proceedings to be conducted in his absence and did not cross examine the respondent about this at all.

178 On the evidence, clear that the respondent did not leap to judgment; they deferred the proceedings both to allow the criminal investigation to proceed and until after the claimant had pleaded guilty to the relevant offences, and then further deferred it on account of the claimant's mental health.

179 The claimant's broad assertion here is that the respondent is institutionally racist and therefore treated him this way; however, (i) the tribunal has not found that there was institutional racism, and has also found that any such claim by the claimant is out of time; (ii) all the individuals involved in the disciplinary process were relatively new to the respondent at the relevant time and could not be said to be "infected" by any past history of dealings with the claimant.

(e) *If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic (i.e. it was a material factor in the decision)?*

180 The tribunal does not find that there are primary facts from it could conclude that that there was racial discrimination in the conduct of the dismissal proceedings.

(f) *If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?*

181 Even if there were primary facts from which tribunal could conclude that the decision to dismiss was unnecessarily harsh, the tribunal accepts the respondent's explanation as to the reason for dismissal and has found that this is within the range of reasonable responses open to the respondent.

7. Section 26: Harassment related to Race or Disability

(a) *Did the Respondent engage in conduct complained of?*

182 As set out in the findings of fact, the claimant has not made out the balance of probabilities that the items complained at (i) to (vii) occurred. In any event, tribunal has found that claim is out of time and it does not have jurisdiction to hear this. Further, as previously noted, anything before October 2007 cannot be considered as it would be an abuse of process.

8. Section 15 EqA

In relation to disability, the claimant's complaint appears not be of direct discrimination but a complaint under s. 15 EqA, in that he was treated unfavourably as a result of his disability in that, as a

result of his mental health he unwittingly committed the offences he did, and that this led to his dismissal.

(a) *Was he treated unfavourably?*

183 Yes – dismissal is unfavourable

(b) *Was this as a result of his disability?*

184 No: the tribunal has not found adequate evidence that the claimant bought the guns etc as a result of a disability. He sought to argue that he did, but there was very limited medical evidence provided in relation to this either to this tribunal or to the disciplinary panel; largely, this was his submission both to the panel and to this tribunal. The tribunal has not found that he has any disability in relation to autism or hoarding, only anxiety / depression and PTSD.

185 The claimant further argues that the disciplinary panel and the appeal failed to take his mental health into account and therefore dismissed him as a result. It is clear from the contemporaneous notes of the panel, and from the oral evidence before the tribunal, that this was taken into account and therefore he was not dismissed as a result of his disability.

(c) *Was this a proportionate means of achieving a legitimate aim*

186 Even if the dismissal was as a result of the disability, it is a legitimate aim of the respondent to protect the public and to ensure that it is seen to do so, to maintain the public trust in its services, and the dismissal of the claimant in circumstances where he had committed the offences he had was proportionate means of achieving that aim

6. Section 13: Direct Discrimination (disability)

(a) *Did the conduct complained of occur?*

187 The tribunal has not found that there was any disability prior to November 2019, so considers this only in relation to dismissal.

188 It is agreed that he was dismissed

(b) *If so, and pursuant to s39(2)(d) of the Equality Act, was this a detriment?*

189 The tribunal accepts that being dismissed is a detriment

(c) *If so, did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators who are not in materially different circumstances? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone*

else would have been treated. The Claimant says he was treated worse than [Claimant to identify the comparators or the characteristics of the hypothetical comparator relied upon] The Claimant has not named anyone in particular who he says was treated better than he was and therefore relies upon a hypothetical comparator.

- (d) *For direct disability discrimination claims, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same skills or abilities as the disabled person (regardless of whether those skills or abilities arise from the disability itself).*

190 A hypothetical comparator here would be a person who was suffering from similar anxiety, depression and PTSD conditions to the claimant, but arising from other causes (not being diagnosable as anxiety, depression or PTSD).

191 It is clear from the way in which the respondent identified the issues and took them into account even where there was not necessarily any formal diagnosis that any person with such conditions would have been treated in the same way as the claimant.

- (e) *If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic (i.e. it was a material factor in the decision)?*

192 The tribunal does not find that there are primary facts from it could conclude that that there was disability discrimination in the conduct of the dismissal proceedings.

- (f) *If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?*

193 Even if there were primary facts from which tribunal could conclude that the decision to dismiss was unnecessarily harsh, the tribunal accepts the respondent's explanation as to the reason for dismissal and has found that this is within the range of reasonable responses open to the respondent.

194 On the basis that the claimant's claims are not well founded, no question of remedy arises.

Employment Judge Talbot-Ponsonby

Date: ...21 March2024.....

Judgment sent to the parties on
25 March2024

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For the Tribunal office

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>