



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103735/2023

5 Held in Glasgow on 27, 28 and 29 February and 1, 5, 6 and 7 March 2024

Employment Judge: C McManus
Members: JS Anderson
AB Grant

10 Mr G Granger

Claimant
Represented by:
Mr J McHugh -
Barrister
(Instructed by
DLG Legal Services)

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Scottish Fire and Rescue Service

Respondent
Represented by:
Ms M MacDonald -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal is unsuccessful and is dismissed.
- 25 2. The claimant's claim of disability discrimination under section 15 of the Equality Act 2010 is unsuccessful and is dismissed.

REASONS

Background

3. The complaints before us were in respect of unfair dismissal and disability
30 discrimination only.
4. By the time of this Final Hearing (FH) the respondent had accepted that at the relevant time the claimant had the protected characteristic of disability. That was accepted both in respect of a physical and a mental impairment, arising

from the claimant's musculoskeletal condition and depression and anxiety.

5. Both parties were professionally represented before us. We were assisted by the expert way in which both parties were represented. We were particularly assisted by parties' representatives work to focus the issues in dispute and their agreement on matters which were not in dispute.

6. All documents relied upon were included in the Joint Bundle of Productions, which was presented numbered, ordered and paginated, with pages from 1 – 396. Documents in that Bundle are referred to in this Judgment by their page number (B1 – B396).

10 **Matters not in dispute**

7. The following was not in dispute:

- That in the relevant period the claimant had the protected characteristic of disability because of his physical impairment (musculoskeletal condition) and his mental impairment (anxiety and depression).

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- That the reason for the claimant's dismissal was either capability (ill health) or some other substantial reason (that he was accepted for ill health retirement at the higher level), both being potentially fair reasons for dismissal.

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- That the following arose as a consequence of the claimant's disability or disabilities:

(a) The claimant had a high sickness absence due to his conditions

(b) The claimant's conditions meant he could not always do his substantive role.

- That the following is a legitimate aim of the respondent:

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'Managing staff levels to ensure service delivery, which includes those in safety critical roles (such as Operational Firefighters) and ensuring that they are fit to undertake those roles.'

- That in the event of it being found that the claimant's dismissal was an unfair dismissal, he would be entitled to an unfair dismissal basic award in agreed sum, which would not be subject to any deductions.

Issues for determination

- 5 8. The issues for determination were agreed to be as set out below. These were the issues considered by the Tribunal.

Unfair Dismissal

- Was the claimant's dismissal an unfair dismissal in terms of the Employment Rights Act 1996 ('ERA') section 98(4), with regard to the
10 decision to dismiss and the procedure followed prior to that dismissal, including consideration of:
 - (a) Whether the respondent acted reasonably in considering the claimant was no longer capable of performing his duties
 - (b) Whether the respondent carried out a reasonable investigation
15 and / or followed a fair process, including finding out about the up to date medical position?
 - (c) Whether the respondent could reasonably be expected to wait longer before dismissing the claimant?
 - (d) Whether the respondent considered alternative posts prior to
20 dismissing the claimant.
 - (e) Whether there was any defect in the procedure followed.
 - (f) Whether any such defect was significant in the overall fairness of the dismissal.

Discrimination arising from disability (s15 Equality Act 2010)

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- Did the respondent treat the claimant unfavourably by:
 - (a) Terminating the claimant's employment due to ill health on 23 March 2023

- (b) Preventing the claimant from returning to his substantive role due to his conditions (June 2022 to 23 March 2023)
- (c) Failing to consider alternative roles (March 2023).

- If so, can the respondent show that the treatment was a proportionate means of achieving their legitimate aim.

Remedy

- Is the claimant entitled to a basic unfair dismissal award?
- Is the claimant entitled to a solatium (injury to feelings) award?

Proceedings

9. All evidence was heard on oath or affirmation. It had been agreed that the respondent's case would be presented first. For the respondent, evidence was heard from:

- Station Commander Chris Casey, who was the claimant's Station Commander at the point Stage 1 of the Capability process commenced.
- Station Commander Jim Logan, who took over management responsibility from Mr Casey and held the Stage 1 Review Meeting with the Claimant.
- Group Commander Gregg McKearney, who conducted the Stage 2 Capability meeting with the Claimant.
- Area Commander Joe McKay, who took the decision to terminate the claimant's employment.

10. Evidence was then heard from the claimant himself, and from Crew Commander Brian Pimley.

Findings in fact

11. This is not a full chronology or narration of events but sets out the facts which are material to the issues for determination. Minimum information is set out

here on the claimant's medical history, although there was considerable medical evidence before the respondent and the Tribunal.

12. The following material facts were not in dispute, were admitted or were proven.

13. The respondent provides fire and rescue services throughout Scotland, with a responsibility to ensure they provide an operational response. The respondent has a statutory duty under the Fire (Scotland) Act 2005 to ensure that it makes provision for fighting fires and providing assistance at road traffic accidents, which includes securing the provision of the personnel, services and equipment necessary to meet efficiently all normal requirements.

14. The claimant was employed as an Operational Firefighter. The role of Operational Firefighter requires a certain level of fitness, including cardiovascular fitness, agility, movement and physical strength. Testing is carried out throughout an Operational Firefighter's employment, to ensure that they meet the fitness standard. The equipment used can be heavy, such as hydraulic cutting equipment used for road traffic accidents. Team work is required. There is equipment which needs 2-4 people to lift it. Some equipment requires to be worked with above shoulder height. Operational Firefighters are required to pitch ladders, which weigh 115kg and are carried by 4 people. The work of Operational Firefighters includes working in extremely hazardous work environments. If entering a burning building to save life they do so in teams of 2. They may be required to rescue someone from a building by carrying that person on their back, e.g. from a third storey tenement building. It is imperative to be fit not just for the firefighter's own safety but for the safety of their crew and the public they are trying to save. On integration to the service, an Operational Firefighter requires to pass a full fitness test covering every aspect of the job, including carrying and pitching ladders, wearing breathing apparatus, and moving heavy equipment, including pumps, ladders and ropes. That full fitness test is more rigorous than the regular fitness test which must be passed by Operational Firefighters throughout their career. That full fitness test must be passed by Operational Firefighters as part of their reintegration to the service if returning to work after an absence of at least six months.

15. Firefighter crews normally consist of 5 firefighters, including a driver. The minimum crew level is 4. If a firefighter is absent, to ensure that minimum crew levels are maintained, cover is provided by overtime and / or detached duties from Operational Firefighters from other bases. Detachment of Operational Firefighters from their substantive role may lead to an appliance at a base being unavailable for operation, due to inability to meet minimum crew levels.
16. The claimant had a number of skills in his role as Operation Firefighter, including as a driver. Additionally, the claimant could drive specialist vehicles, such as height appliances. Driving fire appliances involves getting in and out of the vehicle. The steps to gain entry to the driver's cab in a fire appliance are around 3.5 feet off the ground, with handrails to assist stepping up.
17. In 2020 the claimant raised a complaint under the respondent's Dignity & Integrity policy, relating to behaviour which was alleged to have occurred from 1994 to 2018/2019. An officer from a different local authority area to the one where the claimant was then based (Area Commander Craig McGoldrick) was appointed as the Investigating Officer for this complaint. Although the time period within which the alleged behaviour was said to have occurred was historic, Mr McGoldrick agreed that the complaints should be investigated. The investigation found that there was no evidence of any conduct that would require there to be any further formal action taken. Those interviewed were reminded of expected behaviours. The SFRS values under their Dignity and Integrity Policy were reinforced to all staff. The claimant brought no further complaint or grievance throughout his service with the respondent. The claimant did refer to these historic bullying allegations during discussions with his line managers in managing his absence.
18. The claimant's absence record in his substantive role as Operational Firefighter from 2020 was absences from:
- 19/1/20 – 14/6/20 (stress);
 - 16/9/20 – 17/12/20 (re neck surgery);
 - 25/6/21 – 14/7/21 (COVID 19);

- 2/8/21 – 10/10/21 (musculoskeletal); and
- 12/1/23 – 23/3/23 (musculoskeletal).

19. In August 2021, the claimant was referred to the respondent's Occupational Health provider ('OH') due to his absence from work. There was a significant amount of input by that Occupational Health provider prior to the claimant's dismissal. The document at JB71 – 78 is a 'rolling update' Management Referral Report. It includes updates from Occupational Health to the respondent, including those following review appointments with the claimant. The updates to the respondent from OH were on 16/8/21, 27/9/21, 8/11/21, 8/12/21, 15/12/21, 14/2/22, 28/3/22, 6/4/22, 24/5/22, 28/6/22 and 25/8/22.
20. The position of the Occupational Health ('OH') assessor, following their review of the claimant on 16 August 2021 was that the claimant was not fit for full duties but "*..would be fit for a spell on modified duties in order to allow further healing to take place, if these were available to him. In terms of restrictions, this would also need to be for short spells only, due to his neck issues. He would need to be able to get up and move around freely as required. He would be fit to undertake these if suitable meaningful work could be found for him. Unfortunately I am unable to state ow long these would be required for at present.*" That position was set out under the section on 'reasonable adjustments' (JB73).
21. Station Commander Chris Casey was at that time the claimant's Station Commander. In October 2021, Station Commander Chris Casey arranged for the claimant to begin alternative duties. Station Commander Chris Casey noted the advice from OH (JB73). At that time, due to the period of lockdown and restrictions as a result of the Covid-19 pandemic there was a backlog of Home Fire Safety Visits. It was identified that the claimant could assist to work through this backlog for Dumbarton and Balloch. Station Commander Chris Casey discussed this with the claimant on 7/10/21. Written confirmation of the position with regard to the claimant's re-assignment to amended / alternative duties was sent to the claimant (JB79 – 80). That stated: "*Your duties will include primarily Community Safety duties but you may be asked*

to assist with OIs, High Rise Building Reviews, driving and other duties commensurate with your role, and will exclude all operational cover.” That was a temporary arrangement. It was stated that: “If you are unable to return to operational duties following your next review period, this arrangement will

5 *be reviewed again in order to determine whether there are still meaningful alternative duties available.*

I must emphasise the need for you to return to full operational duties as soon as possible.”

22. From 11/10/21 the claimant was allocated to those alternative duties, being

10 primarily community safety duties. The claimant was informed that if he did not return to his substantive duties he would be managed through the Capability Process. As part of these amended duties, during periods of lockdown as a result of the COVID 19 pandemic, the claimant carried out a number of duties which were required at that time but were not part of the

15 normal role of firefighters, such as prescription and food collection and delivery. The claimant was commended by the respondent for the excellent community work he carried out during those times.

23. While carrying out these amended duties, the claimant continued to be absent

20 from his substantive role as Operational Firefighter. His absence from that substantive role continued to be managed by the respondent. The claimant was invited to attend an Attendance Support Meeting (‘ASM’) on 26/1/22 (JB 81). The claimant chose not to be accompanied at that meeting. The letter at JB82 – 83 summarises the discussions at that meeting. At that time the claimant had had 107 days of absence from his substantive role, in the

25 previous 12 months. There was discussion on the absences and that the claimant had been carrying out alternative duties at Dumbarton Fire Station since 11/10/21. Normally, within the respondent’s service, alternative duties are for a temporary period of up to 12 weeks. The lockdown restrictions and backlog in home visits caused there to be alternative duties available for the

30 claimant a longer period. It was agreed that further ASMs would take place if the claimant continued to be absent from his substantive role.

24. A vacancy for a Community Firefighter ('CFF') role became available. At that time OH advice was that the Claimant should not be declared by them as fit for operational duties (i.e. his substantive role as an Operational Firefighter) until the specialist report was obtained from the claimant's treating Neurologist. Thereafter both OH and the claimant took steps to obtain that specialist report. Further, the advice to the respondent from OH (JB76 – 77) was that due to workplace stressors the claimant should not remain on Blue Watch at Dumbarton, and a change of work location was recommended. The claimant had been on amended duties since 11/10/21 and in that role had been carrying out CFF work, to a good standard. Station Commander Chris Casey therefore considered that that vacant role would be a good fit for the claimant.
25. In March 2022 there was discussion on that CFF vacancy with the claimant. As alternatives to moving to this CFF post, other options were given to the claimant, to continue in his role as an Operational Firefighter. Those options were for the claimant to remain as an Operational Fire Fighter in Dumbarton, but to change Watch there, or to remain as an Operational Fire Fighter but to change base station to either Helensburgh, or Knightswood. The claimant knew that if he wanted to take up the option of the Community Firefighter role, he would have to make a transfer request.
26. An ASM with the claimant took place on 8/3/22, with Station Commander Chris Casey. The claimant was provided with a written outcome of that ASM (JB86 – 87). It was noted that at that time the claimant was pursuing obtaining a report from his treating Consultant Neurosurgeon. The claimant was reminded of the need for regular attendance in his substantive role, for effective service delivery. The claimant's absence from his substantive role continued to be managed by the respondent.
27. The claimant decided that he did not want the Community Firefighter role because he wished to continue as an Operational Firefighter. The claimant's decision on the options available to him was that he wished to be transferred to Helensburgh as an Operational Firefighter. As the claimant continued to be assessed by OH as unfit for the role of Operational Firefighter, that transfer

was actioned only to the extent that from March 2022 the claimant's substantive role was as an Operational Firefighter based at Helensburgh. The claimant did not carry out any duties in that transferred substantive role. That transfer to Helensburgh as an Operational Firefighter was then 'on paper' only.

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28. As the claimant continued to be absent from his substantive role, he was invited to a meeting under Stage 1 of the Capability Process (JB88). That meeting took place with Station Commander Chris Casey on 22/8/24. The notes at JB 89 – 91 are an accurate record of discussions at that meeting. By that time, the specialist report from the claimant's treating Neurosurgeon had been received by OH and the claimant was due to be reviewed by OH, in light of that report. At that Stage 1 meeting, there was discussion on the transfer options which had been given to the claimant. It was the claimant's position that he ought to have been issued a written offer for the CFF role. It was the claimant's position that he wished to be transferred to Dumbarton, instead of Helensburgh, because of reason related to the grievance which had been determined in 2020. Station Commander Chris Casey explained that the role in Dumbarton had now been filled and there was no vacancy for the claimant there. The claimant was given a target of returning to his substantive role within 3 months (by 22/11/22), failing which he would progress to Stage 2 of the Capability policy. That position was confirmed to the claimant in letter to him of 23/8/22 (JB93 – 94).

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29. On 25/8/22, OH provided an update to the respondent following their review of the claimant and their receipt of the specialist report. That report (JB77 – 78) stated:

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"We are now finally in receipt of the specialist report from the neurosurgeon who confirms a diagnosis of cervical spondylosis with radiculopathy and neck pain. He also offers an opinion around prognosis "It is very unlikely that Mr Granger will ever have complete relief from pain arising from the neck, degenerative changes are irreversible and possibly even progressive. Further surgery is unlikely to address this".

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However, since this letter was dictated, Gavin advises me today that he has recently been reviewed by the orthopaedic specialist with regard to the pain and discomfort he has been experiencing in his shoulder. I understand from Gavin that he has been referred for a scan and has also been referred back to the neurosurgeon for further assessment.

Given the information provided by Gavin at assessment today, it would be appropriate to refer Gavin to the doctor at our partner provider Heales for opinion around future prognosis. I will make the referral at the earliest opportunity and review Gavin once he has been seen by the OHP.

Given the information available to me today, my advice remains unchanged if management can continue to accommodate this. I will offer management further advice once he has been reviewed by the OHP.”

30. That entry on 25/8/22 also notes a changed position re the entry on 15/12/21 (JB75), which included:

“I had informed Gavin that I wanted the specialist report before considering a return to full duties. However, the obstacle of his work stress and concentration issues also now stand in the way of a return as well as his chronic pain.”

31. On 25/8/22, OH noted “when this was discussed today he tells me his concentration is concerning him for a return to work. His work stressors need to be dealt with in the first instance.”

32. The claimant was assessed by an Occupational Health Practitioner (OHP) at Heales Medical on 21/9/22. That OHP’s report (‘the Heales’ report’) (JB95 - 97) noted the claimant “...has experienced long term pain and disability and has had several significant absences in relation to his shoulder, neck and leg issues. He has recently returned to work from a recent one, and is on amended duties, doing office work, full time.”. The stated position in respect of his current state of health was:

“Mr Granger is suffering from constant pain and disability. He told me that he struggles to sleep and finds it difficult to get up from his bed in the morning

5 due to his pain, stiffness and mobility issues. He takes anti-inflammatory medication pain relief. However this is limited, due to the fact that most of the stringer agents affect cognition, and Mr Granger is aware that this could prevent him from working, particularly doing a safety critical role such as firefighting. Mr Granger struggles to sit for long periods, get up and also to walk for any distance. He also finds it very hard to use a computer because of his neck and shoulder pain. Mr Granger can drive a car or van, but not for longer distances before he experiences pain. He told me that although he has driven the appliance at work, this also aggravates his neck and shoulder pain; he also finds it difficult to get in and out of the vehicle.

10 Mr Granger has chronic pain and disability which unfortunately, as he has some degenerative changes in his neck, is only likely to deteriorate as he becomes older. With arthritic conditions, it is very important that a person keeps mobile and does not stay in one position for a long time, as this aggravates the pain and stiffness. Mr Granger does regular exercises as advised by his physio. He might also benefit from taking a muscle relaxant type of medication to help to control his symptoms better. However, this could affect his cognition and lead to drowsiness; therefore it would not be recommended at work. Mr Granger also has been suffering from long term stress, and I consider that this is also affecting his well-being and how he copes with his pain.

15 Generally, although Mr Granger has returned to work in between absences, I consider that he is struggling with this. I do not currently consider that he is likely to be fit to undertake reliable, active or desk duties on a reliable basis full time, because of his pain and mobility issues.”

20 33. In that Heales report, in answer to the question “Will the employee be able to provide reliable and consistent attendance from now on?” is stated:

30 “Given Mr Granger's complex musculoskeletal and associated mental health issues, I consider that he is unlikely to be able to provide reliable and consistent attendance as an active firefighter. As he is also struggling with amended duties, he could be considered unfit for work, depending on his GP's

opinion.”

34. And in answer to the question “*Should alternative employment or ill health retirement be considered at this point?*” is stated:

5 *“Redeployment could be considered if a suitable role is available, however, given the long term nature of Mr Granger's condition and his age, ill health retirement could be an option for him to consider. We would need to obtain medical reports for this assessment.”*

35. The conclusion was:

10 *“Please can you provide Mr Granger with further information about ill health retirement. I have advised him that is only an option if he is off sick, and he would need to contact his GP for a sick note if he wishes to pursue this.”*

36. That Heales report was sent to the claimant and the respondent. The claimant discussed the Heales report with his GP. His GP records (JB318) record on 19/10/22:

15 *“Came in to discuss occ health report which is supportive for ill health retirement. Advised we will support this as well. Has a meeting on Friday to find out ongoing plan. Currently on half pay. Stressed ++ and feels mental health has suffered.”*

- 20 37. By that time, Station Commander Jim Logan had taken over management responsibility for the claimant. As the claimant continued to be absent from his substantive role, he was invited to attend a review meeting under Stage 1 of the respondent’s Capability process. That Capability Stage 1 Review Meeting with the Claimant took place on 21 October 2022. The Heales report was discussed. The claimant did not take issue with the content of the Heales
25 report. Discussion at the meeting was cut short because the claimant raised that he wanted to pursue the option of ill health retirement (‘IHR’), which had been suggested in the Heales Report. The claimant’s position at that meeting was that he accepted that he would never be fit for operational duties. Station Commander Jim Logan agreed to request a review by the Independent
30 Qualified Medical Practitioner.

38. At that Stage 1 Review meeting, Station Commander Jim Logan discussed with the claimant what duties could be carried out by him while the IHR application was being progressed. Alternative working arrangements were discussed with the claimant. Given the position in the Heales report, Mr Logan was concerned that the claimant should not be put in a position where his work duties may affect his health. On the basis of the Heales report, Station Commander Jim Logan took the view that there were no meaningful duties available at that time which would not be likely to have a negative effect on the claimant's musculoskeletal condition. Station Commander Jim Logan considered whether the claimant was fit for any office based, driving or other role. Station Commander Jim Logan considered the medical evidence in the Heales report to be that the Claimant was not fit for any operational duties, and that any desk duties would have had a detrimental effect on him. The claimant did not dispute that position at that time. Station Commander Jim Logan informed the claimant that he would seek further guidance from HR on any suitable alternative duties for the claimant.
39. Given Station Commander Jim Logan's position on the Heales report, and the claimant's position that he wished to pursue IHR, the Claimant was placed on authorised paid leave (referred to as 'garden leave'), pending the outcome of the ill health retirement process. From 11/10/22, while the claimant was on 'garden leave' he was not attending work or carrying out any duties for the respondent. The claimant's physical and psychological health improved in this period when he was not working.
40. Following that meeting, Station Commander Jim Logan wrote to the claimant (JB99 – 100). In that letter Station Commander Jim Logan reminded the claimant that his absence from his substantive role was affecting the service and could not be sustained in the long term. He noted that it was likely that the agreed Stage 1 attendance targets would not be met by the claimant. He stated that if the claimant did not return to his substantive duties by 22/11/22 a meeting under Stage 2 of the Capability Process would take place.
41. The respondent's ill health retirement process involves input from an appointed Independent Qualified Medical Practitioner (an 'IQMP'). The IQMP

Arrangements are set out as part of the respondent's Health, Safety and Wellbeing Policy (JB367 – 381). With reference to the pension scheme applicable to the claimant, the decision of the IQMP may be that the employee does not qualify for ill health retirement, that the employee qualifies for ill health retirement at the lower rate ('the lower tier') or that the employee qualifies for ill health retirement at the higher rate ('the higher tier') (JB373). In terms of that policy, an appropriate IQMP was appointed to assess the claimant.

42. As the claimant remained absent from his substantive role, on 22 December 2022, the claimant was invited to attend a meeting under Stage 2 of the Capability Process, to take place on 5 January 2023 (JB103).

43. On 4 January 2023, Station Commander Jim Logan spoke to the claimant, in his role as the claimant's Welfare Officer. The claimant's position then was that that he no longer wished to pursue ill health retirement. Station Commander Jim Logan sought advice from Rachael Saunders (HR Business Partner). She replied by email on 4/1/2023 (JB101) stating:

"Hi Jim, just had a chat with my manager. It's no longer an option to pull out of the IQMP process (which I was unaware of). It's now in the H + W practitioner's hands to make the decision and it's not Gavin's decision to return to duty. - if he is deemed unfit, then he will be medically retired.

Did he say why he doesn't want to pursue it anymore?"

44. Following that advice, Station Commander Jim Logan informed the claimant that the IQMP process could not be stopped now that it was underway. Station Commander Jim Logan continued to support the Claimant as his welfare officer and kept in contact with him by phone call every few weeks.

45. The meeting under Stage 2 of the Capability Process took place on 5 January. The claimant was represented at that meeting by a trade union representative from the Fire Brigade Union ('FBU'). Group Commander Gregg McKearney conducted the Stage 2 Capability meeting with the Claimant. The claimant's position at that meeting was that he felt his symptoms had improved. Group

Commander Gregg McKearney considered that a factor in that improvement was likely to have been that the claimant had not been carrying out any work duties since October 2022. Following that meeting, Group Commander Gregg McKearney wrote to the claimant. Group Commander Gregg McKearney's letter to the claimant of 18 January 2023 (JB104 – 107) summarised discussions at Stage 2 Capability meeting and set out the outcome. That letter summarises the discussions with the claimant on the Heales report and the claimant's position on what was stated in that report, particularly in relation to the effect on him of carrying out work duties for the respondent. The claimant did not substantively disagree with the position in the Heales report, although it was his position that both his physical symptoms and stress and anxiety had improved in the period while he had not been attending work. The claimant had discussed the Heales report with his GP and had informed Station Commander Jim Logan at the meeting that his GP found that report to be supportive. That letter also confirmed the discussions at the meeting on the support mechanisms available to the claimant. The claimant was offered treatment at the Firefighters Charity Centre rehabilitation centre at Jubilee House. He was given information on the Service's Mental Health Champions and on how to access the Health Assured Wellbeing Portal in the Employee Assistance Program. It confirmed that Station Commander Jim Logan continued to be the claimant's appointed Welfare Officer.

46. That letter confirmed the outcome of the discussions at the Stage 2 Capability Meeting as:

"You are now under Stage 2 of the capability process and this will continue for a period of three months or until either a decision from IQMP is received granting ill health retirement or you are able to return to your operational role within this time.

I will schedule a review meeting with you approximately halfway through your stage 2 process to review the progress being made towards at return to your operational role, if required."

And:

5 *“If you are unable to return to your substantive role as an operational firefighter within the time scales detailed above, your attendance will be considered under Stage 3 of the capability process. You should be aware that progression towards Stage 3 may ultimately lead to your employment being terminated on the grounds of absence capability, and that a decision regarding your employment will be made at a Stage 3 capability meeting, taking all relevant factors into account.*

10 *I would also remind you that during your Stage 1 review meeting in October, you requested Station Commander Logan to refer you to an Independent Qualified Medical Practitioner (IQMP) to determine whether the criteria of ill health retirement (IHR) is met. I can now confirm following discussion with Health and Wellbeing, that there are no matters outstanding and an outcome is expected from the IQMP within the next few weeks.*

15 *The SFRS will continue to support you to achieve the targets detailed above, and if you feel that further support mechanisms may be of assistance to you, please do not hesitate to contact me.”*

47. As set out in that letter, at that meeting there was discussion on the possibility for redeployment, if the claimant was unable to return to his substantive role and if a suitable position could be found. The claimant was asked to complete and return a Skills Profile form. He subsequently did so (JB108 – 113) and was added to the redeployment register on that basis. The redeployment register is maintained by HR and is part of the redeployment process. In the event of any vacancy arising which may be suitable for the claimant, HR would discuss this with the Area Commander, and the claimant would then be informed. No suitable vacancy then became available for the claimant.

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48. The claimant’s position in his completed Skills Profile (JB109 – 113) was that he would consider any duties but that his *‘...first choice would be to return to my substantive Operational Firefighter role, if I am allowed to sit and pass the relative fitness standard.’* At section 11 of that Skills Profile form, the claimant set out his position in respect of having both a musculoskeletal skeletal condition and mental health problems. That included him stating *“I accept*

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that there are 2 issues going on but feel the work related stress has had the biggest effect on my mental health and well being.

49. On 12/1/23, the claimant sent an email to Rachael Saunders (JB115) stating:

5 *"I received a telephone call from Station Commander Logan today and he has explained a fit note is required for the IQMP process. Can you confirm to me if the IQMP process can be removed, stopped as I do not want to proceed down this path. My understanding now is that I have been referred back to occupational health for a face to face assessment to determine my fitness to return to work, as this has always been my intention."*

10 50. The claimant was certified by his GP as unfit for work from 12/1/23.

51. On 13 2/1/23, Rachael Saunders sent an email to the claimant (JB114) stating:

15 *"The process of referral for ill health retirement can't be stopped once started. It is a medical decision as to your level of fitness and your ability to carry out any form of work based on medical evidence; we now need to wait for that decision from the IQMP to determine whether they grant you ill health retirement and if so on what tier, or, if you are not a candidate, in which case we will await feedback from Occupational Health as to whether they can see a route back to work for you or not.*

20 *OH will base their views on medical evidence available to them as well, including your specialist report and the independent report from Heales, and you need to take into consideration that the service has a duty of care to you to ensure we do the right thing for you and your health. You have been informed you need to take sick leave now as you have been on amended*
25 *duties for 15 months - amended duties are not a long term solution and are usually a temporary fix for four to six weeks. You have exhausted this now and there is no more meaningful work available, and as - based on current medical evidence - you are not fit for full duty, sick leave is now the only option. You will remain on full pay for up to six months, so you will not be at a financial*
30 *detriment.*

I understand that during your review meeting in October you had stated you wanted to proceed with the IHR process and when asked you stated you did not see yourself returning to full duty - can you advise why you now believe you are fit to return to full duty?"

5 52. On 2/2/23 Station Commander Jim Logan had a phone call with the claimant, in his role as his Welfare Officer. The email from Station Commander Jim Logan to Group Commander Gregg McKearney of 2/2/23 (JB116) is an accurate update on what was discussed then. The claimant provided an update on his health. He informed that he was receiving counselling, related
10 to the issues which had been the subject of his grievance determined in 2020. He informed that he was receiving steroid injections and physio in relation to a shoulder tear. The claimant's position was that he wished to return to his substantive operational duties. Logan suggested that the claimant seek advice from the FBU on all the options.

15 53. The opinion of the IQMP on the claimant was provided to the respondent. That report ('the IQMP report') is at JB 117 – 139 and is dated 10/2/23. It is a comprehensive report, including review of the claimant's GP records and Fire Service records, totalling review of 42 separate records and reports, listed at JB125 – 126. The appointed IQMP was suitably qualified to prepare the
20 report. The IQMP did not physically examine or meet with the claimant. From JB 126 – 134 is a comprehensive review of the records and reports made available to the IQMP. From JB 134 – 137 is the 'Discussion' section. The 'Opinion' section is at JB119 – 120. That Opinion section records that the IQMP considered the duties appropriate to the role of the claimant, the
25 medical history of the claimant held by the respondent, the claimant's GP records (which were provided redacted) and the reports as listed. The Opinion section (JB119 – 120) records that the claimant:

- Is suffering from the incapacity stated in Section B of the report ('*stress related to personality traits and chronic pain*' – JB117);
 - Is disabled from engaging in firefighting;
 - Is disabled from performing the duties of a regular firefighter additional
- 30

to engaging in firefighting;

- The disablement is likely to be permanent (with reference to the Firefighters Pension Scheme);
- The disablement has not been brought about or contributed to by the firefighter's own default (in a medical context); and
- The firefighter is not capable of undertaking any regular employment. (meaning employment of 30 hours a week on average over a 12 month period).

54. The IQMP report references, among other factors, that the claimant

- Had treatment at the River Centre, over a 7 month period;
- Has short term relief from physiotherapy;
- Has chronic pain from his musculoskeletal condition; and
- Pain medication to manage the musculoskeletal condition could affect cognition and cause drowsiness.

55. On the basis of the position in the IQMP report, the claimant qualified for ill health retirement under the applicable pension scheme, at the higher tier rate.

56. As the claimant continued to be absent from his substantive role, he was invited to attend a Stage 2 Review meeting. That invitation letter (JB140) referred to the meeting on 5/1/23 held under Stage 2 of the Capability Process and stated:

"Following the meeting, I confirmed that you are now under stage 2 of the Capability Process and that this would continue for a period of 3 months from the date of our meeting or until either a decision from IQMP is received, granting ill health retirement, or you are able to return to your operational role within this time.

We agreed to schedule a review meeting approximately halfway through your stage 2 process to review the progress being made and I would therefore now

invite you to attend a Capability Stage 2 Review meeting at EWDAB Area Headquarters on Thursday 9 March at 1100 hours.

If you wish, you may be accompanied at this meeting by your trade union representative or a work colleague of your choice. Please note that it is your responsibility to arrange any such representation should you wish to be accompanied.

The SFRS will continue to support you to achieve the targets detailed above and if you feel that further support mechanisms may be of assistance to you please do not hesitate to contact me.”

10 57. The respondent received the IQMP report on the claimant. The claimant was sent that report on 9/3/223 and invited to attend a meeting with Area Commander Joe McKay on 23 March 2023. That letter (JB 365) informed the claimant that the IQMP report “...provides the opinion that you are permanently unfit to carry out your role as a as firefighter. This opinion is binding on all parties.”. It went on to state: “*The purpose of this meeting will be to discuss the medical report and to allow full discussions on the next steps. Please, however, note that, taking into account the IQMP report, this meeting may result in terminating your contract of employment. On the grounds of capability due to ill health.*” The claimant was advised of his right to be accompanied or represented by a trade union official or work colleague at the meeting.

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58. The claimant attended the meeting on 23/3/23 and was accompanied to it by a workplace colleague (Crew Commander Brian Pimley). The notes of that meeting are at JB141 – 143 and accurately record the main points of discussion. The claimant confirmed that he had received the IQMP report. Those minutes record that the purpose of that meeting was to discuss the outcome of the IQMP report and the opinion in that report that the claimant was permanently unfit for the duties of an Operational Firefighter and therefore had been awarded ill health retirement at the higher tier (JB141). Area Commander Joe McKay informed that claimant that he accepted the decision in the IQMP report and ‘...had also considered the possibility of

medical redeployment however, this is not a viable option as <the claimant> has been deemed permanently unfit for any role within the SFRS.” (JB142). The claimant said he was ‘*..unclear on a number of findings in the IQMP report.*’ The claimant was advised to seek professional medical advice. The claimant stated that he “*...found the report insulting..*” he referred to the IQMP not having met him face to face and that he “*..found his report to have lots of inaccuracies.*”. The claimant was advised to “*... take this up with a medical practitioner.*” There followed discussion on the payments due to the claimant on the termination of his employment. The claimant was given information on the appeal process both in relation to the decision to dismiss, and separately, in relation to the decision of the IQMP. The claimant stated that he “*...feels disappointed in the position he finds himself in.*” He referred to the allegations which had been investigated in 2020. The claimant was directed to address any queries re his pension with the pension provider.

59. On the basis of the position in the IQMP report, Area Commander Joe McKay took the decision to terminate the Claimant’s employment on the basis of the claimant’s incapacity being such that the claimant qualified for ill health retirement. In taking that decision, Area Commander Joe McKay’s took into account the position in the IQMP report and the respondent’s duty of care to ensure all Operational Firefighters are suitably fit. He took into account the arduous physical duties required of an Operational Firefighter. He considered it to be significant that the claimant was deemed to qualify for ill health retirement at the upper tier. In Area Commander Joe McKay’s experience, qualification at the upper tier was rare, and it was not something he had seen before. Area Commander Joe McKay’s understanding was that it was more usual for a firefighter to be assessed as qualifying at the lower tier. The higher tier qualification is more financially beneficial to the recipient than qualification at the lower tier. Area Commander Joe McKay had never before dealt with a situation where an employee had begun the ill health retirement process but had later sought to withdraw from the process. In his experience, an employee was likely to welcome an assessment of qualification at the higher tier. He attached weight to the IQMP report, which he considered to include a comprehensive review of the claimant’s medical history. Area Commander

Joe McKay considered the report to be binding on him insofar as he could not overturn the medical opinion. Area Commander Joe McKay took into account that the claimant had had various health issues, that the claimant had chronic widespread pain and that his issues were degenerative and so only going to get worse. Area Commander Joe McKay also took into account the opinion in the IQMP report with regard to the Claimant's thought processes. He considered that the Claimant had a history of those types of traits since he had known him, which he confirmed was some time. Area Commander Joe McKay accepted the position in the IQMP report that the claimant's physical and mental health issues were such that the claimant was not fit to return to his operational role. Area Commander Joe McKay decided that because of that incapacity and the claimant's qualification for ill health retirement, the claimant's employment with the respondent would be terminated. Area Commander Joe McKay took into account his own knowledge of the Claimant, the impact of the claimant's absence on service delivery, and the requirements of the operational role. Area Commander Joe McKay took into account the position in the Heales Report and the IQMP report, and the summary he received from HR on the Capability Process which had been followed re the claimant. Area Commander Joe McKay had not had sight of the OH reports.

60. Area Commander Joe McKay wrote to the claimant on 24/3/23 confirming the position. That letter (JB144) included the following:

"As discussed during the meeting., the IQMP has stated that in his opinion, you have a permanent underlying health condition that is causing your inability to return to the full duties of your substantive post. Therefore, it is his view that your current level of impairment precludes you from operating safely and effectively as a firefighter, and that you are permanently unfit to carry out the role for which you were employed to do."

And:

"In view of our discussions, the medical advice received and no suitable alternative roles available, it is with regret that my decision is that your contract

of employment with the Scottish Fire and Rescue Service should be terminated on the grounds of incapability due to ill health.”

61. The claimant was not dismissed for incapability under the respondent’s Capability Process. He was dismissed because he had been assessed as qualifying for ill health retirement. He was medically retired on that basis. The position in both the Heales Report and the IQMP report is that the claimant was unfit for work as an Operational Firefighter. The claimant was on the respondents’ redeployment list. No suitable vacancies had arisen for the claimant. Had the claimant not been medically retired on his qualification for ill health retirement, the claimant would have continued to have been absent from his substantive role as Operational Firefighter and would have continued to be managed under the respondent’s Capability Process. A Stage 3 Capability Hearing would have been arranged. On the basis of the substantial medical evidence available to the respondent as at the time of the claimant’s dismissal, it was likely that the claimant would have been dismissed at that Stage 3 Capability Hearing.
62. As the claimant had been absent from work for more than 6 months, prior to return to an operational role, he would have to undertake a full reintegration process. That process includes a fitness test covering every aspect of the job, including carrying and pitching ladders, wearing breathing apparatus, and moving heavy equipment including pumps, ladders and ropes.
63. The claimant’s GP records record for 16 March 2023 states:
- “TC with patient, he has been offered early retirement through ill health and he will leave the service with a full pension, he was not happy about all that what’s written in the report from IQMP, reassured him that leaving was probably his best option and <with> it he will now be able to move on with life and enjoy his retirement.”*
64. In April 2023, the claimant initiated an appeal both of the decision to dismiss (JB146) and, separately, the findings of the IQMP report (JB150). The appeal on the IQMP report was an appeal of the decision not to award the claimant an injury award (JB151). The appeal grounds did not set out disagreement

with the conclusion that the claimant was unfit for service with the respondent. Both appeals were subsequently withdraw (JB147 & JB152) . Both appeal processes were being actioned by the respondent at the stage when they were each withdrawn.

5 **Relevant Law**

Unfair Dismissal

65. The law relating to unfair dismissal is set out in the Employment Rights Act 1996 ('the ERA'), in particular Section 98 with regard to the fairness of the dismissal and Sections 118 – 122 with regard to compensation.

10 ERA Section 98 states:

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

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

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

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

20 (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,...*

(3) *In subsection (2)(a)—*

25 (a) *“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

(b) *“qualifications”, in relation to an employee, means any degree,*

diploma or other academic, technical or professional qualification relevant to the position which he held..”

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

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

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

66. That determination includes a consideration of the procedure carried out prior to the dismissal and an assessment as to whether or not that procedure was fair.

15 *Disability Discrimination*

67. The claimant relies on section 15 of the Equality Act 2010 (discrimination arising from disability). The provisions of section 15 are as follows:

“(1) *A person (A) discriminates against another (B) if –*

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

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

68. Following *City of York Council v Grosett [2018] ICR 1492, CA*, section 15 requires an investigation of two distinct causative issues:

- Did A treat B unfavourably because of an identified ‘something’; and
- Did that something arise in consequence of B’s disability.

69. The first issue involves an examination of the putative discriminator's state of mind – did the unfavourable treatment occur because of A's attitude to the relevant 'something'. That may be a conscious or unconscious state of mind. The second issue is an objective matter, whether there is a causal link
5 between B's disability and the relevant 'something'. There is no further requirement that A must be shown to have been aware, when choosing to subject B to the unfavourable treatment in question, that the relevant 'something' arose in consequence of B's disability. The test of justification under section 15(1)(b) is an objective assessment by the ET. The 'something'
10 must 'more than trivially' influence the treatment but it need not be the sole or principle cause (e.g. in *Pnaiser v NHS England [2016] IRLR 170, EAT*). The Tribunal should determine, was the claimant's disability the cause, or a significant (more than trivial) influence on or for that unfavourable treatment? If so, the question is, has the respondent established that it had a legitimate
15 aim? Then, if so, has the respondent established that the treatment of the claimant by the respondent was a proportionate means of achieving that legitimate aim?

70. The EHRC Code of Practice provides guidance on what is unfavourable treatment. At para 5.7 it states:
20 *"For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job denied a work opportunity or dismissed from their
25 employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."*

Codes of Practice

71. In determining the claims under the Equality Act 2010, the Tribunal had regard
30 to the Equality and Human Rights Commissions Code of Practice on Employment ('the EHRC') (2011).

Submissions

72. Both representatives helpfully exchanged and provided written submissions, which they each then spoke to. The decision section below sets out where the submissions were accepted or not.

5 73. The claimant's representative relied on the following authorities:

- *Spencer v. Paragon Wallpapers Ltd [1977] ICR 301*
- *DB Schenker Rail (UK) Ltd v. Doolan (UKEATS/0053/09/BI – Unreported East Lindsey*
- *District Council v. Daubney [1977] ICR 566*
- 10 • *Liverpool AHA (Teaching) Central and Southern District v. Edwards [1977] IRLR 471*
- *Chrystie v. Rolls Royce (1971) Ltd [1976] IRLR 336*
- *Pnaiser v. NHS England [2016] IRLR 170 (EAT)*
- *Trustees of Swansea University Pension and Assurance Scheme v. Williams [2019] 1 WLR 93*
- 15 • *O'Brien v. Bolton St Catherine's Academy [2017] IRLR 547*
- *York City Council v. Grosset [2018] IRLR 746*
- *Iceland Foods Ltd v. Stevenson UKEAT/0309/19 (13 February 2020, unreported)*
- 20 • *Department for Work and Pensions v. Boyers [2022] IRLR 741*

74. The respondent 's representative relied on the following authorities:

- *British Home Stores Ltd v Burchell 1980 ICR 303, EAT*
- *DB Schenker Rail (UK) Ltd v Doolan EATS 0053/09*
- *Liverpool Area Health Authority (Teaching) v Edwards 1977 EAT*

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- *BS v Dundee City Council [2013] CSIH 91*
- *Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)*
- *Merseyside and North Wales Electricity Board v Taylor 1975 ICR 185, QBD*
- *First West Yorkshire Ltd (t/a First Leeds) v Haigh [2007] UKEAT/0246/07*

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75. On 18 March 2024, correspondence was sent to both parties' representatives inviting them to provide comment on the recent EAT decision in *Rentokil Initial UK Ltd v Miller [2024] EAT 37*, if they wished to do so. Representatives for both parties subsequently submitted their representations, which are referred to in the decision section below. The representations made at that stage for the claimant were from the Mr McHugh's instructing solicitor, Ms Likulunga of DLG Legal Services.

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Burden of Proof

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76. As noted by Lord Hoffman in *Re B (Children) [2008] UKHL 35* "If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof."

77. The standard of proof applied in Employment Tribunal cases is the civil standard of proof of 'on the balance of probabilities'.

78. The burden of proving that the dismissal was a fair dismissal lies with the respondent.

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79. For claims under the Equality Act 2010 ('EqA'), the approach to the burden of proof is as set out in s136 of Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. –v- Wong and others 2005 ICR 931, CA* (as approved by the Supreme Court in *Hewage –v- Grampian Health Board [2012] IRLR 870*).

80. We required to consider the strength of all the evidence and decide whether

the claimant has made out his case, on the balance of probabilities.

81. The only claim under the EqA which we required to determine was under section 15. We made our findings in fact and considered the complaint made under that section 15. The claimant did not prove facts from which we could decide, in the absence of any other explanation, that the respondent contravened the relevant provision. As we did not accept that the claimant had established a prima facie case of disability discrimination, the burden of proof did not move to the respondent in respect of the section 15 claim.

Comments on evidence

82. Generally, there are a number of factors taken into account when making findings in fact. These factors include:

- internal consistency (i.e. that the individual's version of events does not change throughout their evidence);
- consistency of oral evidence with contemporaneous documentary evidence;
- consistency of oral evidence with written case (e.g. the position of a claimant in their oral evidence in comparison with their ET1 particulars of claim);
- consistency with evidence from other witnesses;
- openness in answering questions;
- any evasion or avoidance in answering questions;
- willingness to make appropriate concessions; and
- demeanour and character (both to be approached with caution).

83. Consistency is an important aspect in the assessment of evidence. In making our findings, we took into account the guidance in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 2560 (Comm). There, following comments that:

5 “.. *The effect of this [litigation] process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.*

And that:

“...*such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.*”

It was concluded that:

10 “*In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations*
15 *and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.*”
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84. It is well established that ‘*contemporary documents are always of the utmost importance*’ (*Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd’s Rep 403*, at para 431). Applying the above guidance, greater significance was
25 placed on the position in relevant contemporaneous documents, rather than versions of events presented from memory.

85. Station Commander Chris Casey, Station Commander Jim Logan and Group
Commander Gregg McKearney, were each impressive witnesses. They each
30 gave their evidence in a straightforward manner. They were open in their

answers to questions. They did not seek to avoid questions and gave full answers. All made appropriate concessions. All of their evidence was consistent with the documentary evidence which was drawn to the Tribunal's attention. They were consistent throughout their evidence and their evidence was consistent with the documentary evidence. There was no evidence of collusion between them. All three of these witnesses were found to be genuine, credible, consistent and plausible in their evidence.

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86. We accepted the respondent's representative's position that Station Commander Logan's letter of 22 October 2022 (JB 99) accurately records the claimant's position at that meeting. That was that the claimant did not think he would ever be fit for full operational duties. We accepted Ms Macdonald's submission that the claimant saying that he did not recall saying what is stated that letter, sent to him after the meeting, is not credible. We accepted her submission that if the claimant had not said that at that meeting, he would at the time have challenged what is stated in that letter. The claimant was represented by a trade union representative at that time. We accepted Station Commander Logan's evidence that what is set out in that letter is accurate.

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87. Area Commander Joe McKay was not an impressive witness. At the start of his examination in chief, when asked if the IQMP opinion was '*binding on all parties*' his response was that it was '*set in stone*'. In cross examination, he initially denied that he had used that phrase. We accepted that what he regarded as being '*set in stone*' was the medical position in that IQMP, which he could not change but required to take into account. His evidence in examination in chief that he was the decision maker and had to "*review all the evidence*" was undermined by his position in cross examination that he had not had sight of the OH reports when making his decision. Had the dismissal been a dismissal under the Capability Process, that failure would have been significant. The claimant's dismissal was however because he had been assessed as qualifying for ill health retirement. In fact, the claimant was medically retired on that basis. In his evidence, Area Commander Joe McKay did not appear to appreciate that distinction. We appreciated that the circumstances of this case were unusual in that normally a Firefighter would,

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at least to some extent, welcome an IQMP decision that they qualified for ill health retirement at the higher tier, on the basis that that would be beneficial to them financially. We accepted Area Commander Joe McKay's position in examination in chief that the claimant's circumstances were '*unique*', and that any disagreement with the IQMP's assessment is more likely to be on the basis of qualification for pension at the lower tier rather than the higher tier.

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88. We accepted Area Commander Joe McKay's position in examination in chief that when making his decision he took into account the IQMP report, and the respondent's '*duty of care to make sure people are suitably trained and fit for the arduous role as a Firefighter.*' We accepted his evidence that the respondent has a duty of care in respect of the fitness assessment process and "*...needs to make sure that a Firefighter is fit for the arduous role.*" We did not accept that at the time of the dismissal Area Commander Joe McKay considered whether the claimant should be put forward for a full fitness test, as part of the reintegration process. The contemporaneous documentary evidence does not suggest that he considered that. The contemporaneous documentary evidence supports the claimant's position that there was no discussion on alternatives at the time of his dismissal, on the basis that the position in the IQMP report was accepted by Area Commander Joe McKay.

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89. Under cross examination, Area Commander Joe McKay denied that he had made up his mind on review of the IQMP report that the claimant's employment would be terminated. We accepted the claimant's representative's position that he had done so. The minutes of the meeting in March 2023 support that position. In the context of the reason for the dismissal being that, following a comprehensive review of the medical position, the claimant had been assessed as qualifying for ill health retirement, and where there was a process for the medical position in the IQMP to be challenged on appeal (separate from an appeal in respect of the dismissal), that position was reasonable. That failure would not have been reasonable in a decision to dismiss on the grounds of incapability on application of the Capability Process.

90. It was not in dispute that at the time of the dismissal the claimant was on the

redeployment register, that there was no suitable vacancy for him and that because of his lengthy absence the claimant would have required to undergo a full fitness test as part of the reintegration process. We accepted Area Commander Joe Mckay's position in evidence that given the position in the medical reports available to the respondent at the time of the claimant's dismissal, it is unlikely that the claimant would have passed that full fitness test, and that requiring the claimant to undergo that full fitness test may have caused the claimant injury. We did not however accept that at the time of the claimant's dismissal Area Commander Joe Mckay had either considered alternative employment for the claimant or considered whether the claimant should undergo the reintegration full fitness test, or the possible consequences of injury to the claimant had he been required to undergo that test.

91. Area Commander Joe Mckay's clear position in his examination in chief was that the claimant was dismissed because he had been '*deemed permanently unfit to carry out the role.*' As a matter of fact, the claimant qualified for IHR on that basis.

92. The nature of the respondent's service was a significant factor. The level of fitness required for a person in the role of Operational Firefighter is a higher level of fitness than may be required in a sedentary role. It was significant factor that the respondent has a duty of care to its employees and to the public.

93. The claimant did make some concessions. He conceded the nature of the respondent's service. He conceded that the respondent has a duty of care towards him and towards the public. He conceded that an Operational Firefighter's absence could have the effect that an appliance is '*off the run*' because the minimum crew level cannot be met. The claimant was however frequently unwilling to make concessions, even in respect of matters where there was no dispute, such as that he had not responded at the time to contradict the position that had been set out in a letter sent to him. It was significant that although the claimant conceded that what was set out in his '*discrimination schedule*' (JB235 - 238) was his account of the significant long

term effects of his conditions, he maintained his position that he was fit to return to his substantive role as a firefighter. The claimant did not concede or admit any inconsistency in those positions. We accepted the respondent's representative's submissions that the effects set out in that 'discrimination schedule' support the view of the Respondent that the claimant was not fit to be operational.

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94. A striking part of the claimant's evidence was his repeated position that the position in the report from his treating Consultant Neurosurgeon was that he was fit for work. That position is not reflected in the extract from the report which was before us, as included in the OH records at JB77. That sets out the position of the Neurosurgeon as confirming "*a diagnosis of cervical spondylosis with radiculopathy and neck pain*", and the Neurosurgeon offering the opinion around prognosis that "*It is very unlikely that Mr Granger will ever have complete relief from pain arising from the neck, degenerative changes are irreversible and possibly even progressive. Further surgery is unlikely to address this*". We accepted that it was reasonable, in the nature of the respondent's services and the claimant's role, for the respondent to accept OH's advice, on that basis, that the claimant was not fit to return to his substantive role. Similarly, the claimant did not accept that it was the position of Occupation Health that he was not fit for return to his duties. His position was '*Was that not a mistake of Occupational Health then?*'

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95. We accepted the respondent's representative's submissions in relation to the claimant's position in cross examination on the last two paragraphs at page 134 of the IQMP report. With reference to that part of the IQMP report, the claimant had accepted that in the years leading to February 2023 the main reason he had time off work was psychological. We also accepted the respondent's representative's submissions in relation to the claimant's position in cross examination on page 136 - 137 of the IQMP report. With reference to that part, the claimant was asked in cross examination, "*What is your view of the level of stress versus the physical symptoms preventing your return*", he replied "*stress levels*". We accepted the respondent's representative's submission that that was inconsistent with the claimant's

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position that he disagreed with the IQMP report where the opinion was that stress and psychological reasons prevented the claimant from being able to return to an operational role.

5 96. Although the claimant's position at this Hearing was that he did not agree with the conclusion in the IQMP report, there are similarities between the conclusions in that IQMP report and the claimant's position at section 11 of the Skills Profile he completed (JB112). The conclusion of the IQMP report was that the claimant was unfit for his role and qualified for ill health retirement at the higher tier because the claimant's mental health affected his physical health. The position in both the IQMP report and of the claimant in his completed Skills Profile is that he is affected by a combination of physical and mental health issues. That position is also consistent with the position in the Heales report that *"Given Mr Granger's complex musculoskeletal and associated mental health issues, I consider that he is unlikely to be able to provide reliable and consistent attendance as an active firefighter.* The significant difference is that in the IQMP report there is a suggestion that the claimant may have certain personality tendencies. The claimant did not agree with that suggestion, and was upset by it.

20 97. The claimant's evidence was that the decision to dismiss had had a very significant effect on his mental health. Although we accepted that the dismissal has had an effect on the claimant, we did not find the claimant to be reliable on the extent of that effect. In his evidence on the effect of the dismissal, the claimant did not recognise that the medical evidence showed that some of the effects he said in evidence were as a result of the respondent's treatment in dismissing him, had been affecting him prior to his dismissal.

30 98. Brian Pimley was straightforward in giving his evidence and was a credible and reliable witness. His evidence was not contested. However, he could only speak to his impression from attending the meeting with the claimant on 23 March 2023. His evidence was of limited value. He had had no involvement in any previous meetings between the claimant and the respondent. He could only speak to a limited part of the respondent's dealings

with claimant. His evidence on that meeting was in line with the contemporaneous record of the meeting.

Decision

Unfair dismissal

- 5 99. We accepted the respondent's representative's submissions that, following the EAT's decision in *DB Schenker Rail (UK) Ltd v Doolan EATS 0053/09*, although this is not a conduct dismissal, the sufficiency of the employer's belief in the grounds for dismissal is still governed by the approach in *British Home Stores Ltd v Burchell 1980 ICR 303, EAT.* We accepted that
- 10 following *DB Schenker Rail (UK) Ltd v Doolan*, while an employer requires to establish the 'true medical position' before deciding to dismiss, that should not be read as requiring a higher standard of enquiry than required for a misconduct dismissal. We accepted that the *Burchell* approach, requiring that a reasonable investigation into the matter be carried out, still applies.
- 15 100. We did not accept the claimant's representative position that there ought to have been further investigation by the respondent following their receipt of the IQMP Report. The circumstances of the present case are distinguished from those in *District Council v. Daubney [1977] ICR 566*, where the Industrial Tribunal had found that "*No medical evidence whatsoever was in the*
- 20 *possession of the local authority. They were merely content to accept the succinct wording of Dr < >'s letter and use it as a reason for immediate dismissal.*" (page 571 para A). This is not a case where the medical report relied on by the respondent '*merely stated that an employee was unfit to carry out his duties and should be retired on the ground of permanent ill health*'.
- 25 The respondent had a substantial volume of medical information on the claimant. The IQMP report included a comprehensive review of the claimant's medical history and allowed an informed decision to be made. The email from the Rachael Saunders to the claimant of 13 January 2023 (JB114) was significant. It was clear from this email that the decision on the claimant's
- 30 future employment with the respondent would be dependent on the outcome of the IQMP report. That email also made it clear to the claimant that the

respondent required to consider their duty of care towards him. The conclusions in the IQMP report were then that the claimant was not fit for any employment with the respondent and that he qualified for ill health retirement from the respondent, at the higher tier.

5 101. The reason for the claimant's dismissal was that he had been assessed by an IQMP as not fit for any employment with the respondent and as qualifying for ill health retirement from the respondent, at the higher tier. That was a substantial reason which justified the dismissal of an employee holding the position the claimant held (Operational Firefighter). The claimant's dismissal
10 was a fair dismissal under section 98(1)(b) ERA.

102. On application of Section 98(4) ERA, the circumstances include the nature of the respondent's service, the duties required in the claimant's substantive role of Operational Firefighter, the level of fitness required for that role and the lack of any suitable alternative roles for the claimant. In circumstances where the
15 claimant had been assessed by an IQMP as being unfit to continue in his substantive role and had been assessed as qualifying for IHR, at the higher tier, Area Commander Joe McKay acted reasonably in treating the medical position as set out in the IQMP report as a sufficient reason for concluding that the claimant was no longer fit to be employed by the respondent and
20 should be retired on ill health grounds.

103. In those circumstances, the respondent carried out a reasonable investigation and followed a fair process. Where the respondent was in receipt of substantial medical reports on the claimant, including the IQMP report, it was reasonable for the decision to dismiss to be made without a further medical
25 report. Given the content of the medical information available to the respondent at the time of the claimant's dismissal, and the nature of the claimant's role as Operational Firefighter, the respondent could not reasonably be expected to wait longer before dismissing the claimant.

104. It was the claimant's position before the Tribunal that he felt there were a number of inaccuracies contained within the report of Dr Williams and that Dr
30 Williams' position in that report on the claimant having certain tendencies was

inconsistent with his medical history and contrary to the conclusions reached when he had been assessed by a Clinical Psychologist (JB277). The claimant had sight of the reports prior to the meeting with Area Commander Joe McKay. Although at his meeting with Area Commander Joe McKay, the claimant's position was that there were inconsistencies in the reports, he did not specifically point to the Clinical Psychologist's report. In any event, the circumstances were that the medical report on which Area Commander Joe McKay made his decision was that of an IQMP, appointed to assess the claimant's eligibility for ill health retirement under the relevant pension scheme. There was a separate process under which the medical position in that IQMP's report could be appealed. The decision that the claimant qualified for IHR, and any appeal of position in the IQMP report which was the basis of that position, was a process separate to the respondent's dismissal process. If the claimant disagreed with the medical position in the IQMP report, the process was for an appeal to be made under that separate process. The claimant had the opportunity to appeal, and did so, appealing both the decision to dismiss and, separately, the decision in respect of the medical position in the IQMP report. The grounds of the claimant's appeal do not reflect a position that he considered there to be inaccuracies between the IQMP report and the Clinical Psychologist's report. Both appeals were later withdrawn by the claimant. We accept that following Chrystie, an employee cannot consent to being unfairly dismissed by virtue of not pursuing an appeal. The claimant's dismissal was not an unfair dismissal.

105. The IQMP report is comprehensive. We did not accept the claimant's representative's submission that that report likely falls within the category of report described by Edwards as one that an employer could have disregarded. Although the IQMP did not physically examine the claimant, the IQMP is suitably qualified and he carried out a comprehensive review of the claimant's medical records, including the claimant's GP records, in so far as the claimant allowed. It would not have been reasonable for any employer to have disregarded the content of that report. In the circumstances of the nature of the claimant's role, and the fitness requirements for that role, medical evidence is particularly significant.

106. It was the claimant's representative's submission that, broadly speaking, the conclusions reached in the IQMP report are opposite to those reached by those in the Heales report (JB75 – 77). We did not accept that submission. Both the Heales report and the IQMP report (JB75 – 77) concluded that the claimant is unfit for work as an Operational Firefighter. We did not accept that no employer acting reasonably would have taken the decision to dismiss at that time and on the basis that an IQMP had assessed the claimant as qualifying for ill health retirement at the higher tier. Given the conclusions in the IQMP report that the claimant was unfit for any employment and given that the claimant was on the redeployment register and no suitable vacancies were available for him, it was reasonable for Area Commander Joe McKay not to discuss alternative posts with the claimant at the meeting on 23/3/23, and instead to proceed to terminate the claimant's employment on his qualification for ill health retirement.
107. We accepted Area Commander Joe McKay's evidence that on the basis of the medical information set out in the Heales Report and the IQMP report, it was unlikely that the claimant would pass the full fitness test required for his reintegration to the service after absence of more than six months. We took into account the claimant's evidence that he had never failed a fitness test. We took into account that the full fitness required on reintegration after lengthy absence is more rigorous than the fitness test regularly carried out on working Operational Firefighters throughout their career.
108. It was not contested that the claimant would have required to pass the full fitness test before returning to work as an Operational Firefighter. The respondent has a duty of care towards its employees. We accepted that on the basis of the medical information available to the respondent from Occupational Health and the IQMP, requiring the claimant to undergo a reintegration fitness test may have caused injury on exacerbation of the claimant's musculoskeletal conditions.
109. We did not however accept that prior to his decision to dismiss the claimant, Area Commander Joe McKay had considered whether the claimant would have passed the reintegration fitness test, or the risk of injury to the claimant

had he been required to undergo that fitness test. Neither the minutes of his meeting with the claimant nor the correspondence to the claimant after that meeting reflect that that consideration took place at that time.

5 110. In considering the reasonableness of the decision to dismiss we took into account Area Commander Joe McKay's position that if the claimant had not been dismissed on the basis of ill health retirement, the capability process would have continued and it would have been likely, given the medical position, that the claimant be dismissed on incapacity grounds. The claimant would then have been in a worse financial position than being retired on ill health grounds, with entitlement to ill health retirement pension at the higher rate. We accepted that Area Commander Joe McKay had taken that into account and that it was reasonable for Area Commander Joe McKay to have taken that into account when dismissing the claimant. The letter to the claimant confirming his dismissal confirms that at the time the claimant was 10 on the redeployment register and there were no suitable vacancies for him. 15

20 111. In all these circumstances, we did not accept that the failure to substantively discuss the contents of the IQMP report with the claimant on 23/3/23 was a clear breach of the guidance given in Spencer & Daubney and represents a fatal flaw in the procedure adopted by the respondent when dismissing the claimant. It is significant that this meeting was not a Stage 3 Capability meeting. Had it been so, that failure would have been significant. We accepted the respondent's representative's position that given the medical information on the claimant available to the respondent at that time, and the lack of any suitable vacancies for the claimant, there were no real alternative 25 outcomes to the claimant's dismissal and dismissal on the basis of ill health retirement was reasonably considered to be the best option for the claimant.

30 112. In all the circumstances there was no significant defect affecting the overall fairness of the dismissal. The claimant's dismissal was a fair dismissal in terms of section 98(4) ERA, with regard to the decision to dismiss and the procedure followed prior to that dismissal.

113. We accepted the claimant's representative's submissions that following Williams the bar for unfavourable treatment is a low one, particularly when taking into account the EHRC Code of Practice. On that basis, we accepted that the following was unfavourable treatment of the claimant by the respondent because of something arising in consequence of the claimant's disability:
- Preventing the claimant from returning to his substantive role due to his conditions (June 2022 to 23 March 2023)
 - Failing to consider alternative roles (March 2023)
 - Terminating the claimant's employment on 23 March 2023
114. We then considered whether the respondent had shown that the treatment was a proportionate means of achieving their legitimate aim.
115. We accepted that although following Grosset justification under section 15 EqA and substantive fairness for the purposes of s.98(4) ERA 1996 are distinct tests, as per O'Brien this is a case where the two matters are inextricably linked. We accepted that the procedure prior to the dismissal is a relevant consideration.
116. The claimant's position was that his absence from work was extended by the respondent. His position was that he ought to have been allowed to return to work and that the respondent acted unreasonably in accepting their Occupational Health provider's advice that the claimant should not return to work until a report had been received from his treating Neurosurgeon. That was the basis for the position that the respondent had prevented the claimant from returning to his substantive role due to his conditions (June 2022 to 23 March 2023)
117. In circumstances where the duties involved in the claimant's role may have exacerbated his musculoskeletal conditions, it was reasonable for the respondent to accept their Occupational Health provider's advice to await the Neurosurgeon's report before allowing the claimant to return to work. The respondent had a duty of care towards the claimant and may have been liable

for his injury had it been exacerbated by his duties.

118. It was the position of the respondent's OH advisors that the claimant could not be assessed by them as fit to return to work until they had sight of the specialist report from the claimant's treating Neurosurgeon. Given the nature of the respondent's services, the claimant's role, and the medical information available to them, the respondent acted reasonably by following that advice from OH, so preventing the claimant from returning to his substantive role due to his conditions (from June 2022 to 23 March 2023). In the circumstances, the respondent showed that their treatment of the claimant in preventing him from returning to his substantive role due to his conditions in that period, although unfavourable treatment which arose in consequence of the claimant's disability, was a proportionate means of achieving their legitimate aim relied upon, including ensuring that firefighters are fit to undertake their roles.

119. In his submissions, Mr McHugh relied on there having been no mention throughout the capability process of the consideration of reasonable adjustments, beyond placing the claimant on amended duties.

120. In respect of the application of *Rentokil* to the present case, we noted that here there is no claim brought under s.21 EqA for failure to comply with a duty to make reasonable adjustments, as was the case in *Rentokil*. We noted that reasonable adjustments can be a relevant factor to consider in terms of the s.15 EqA claim. We accepted Ms Macdonald's submission that this case can be distinguished from the circumstances in *Rentokil*. We accepted her reliance on the respondent having identified to the claimant that there was the potential for a role as a Community Firefighter which the respondent felt was suited to the claimant and was essentially what he had been doing in the exercise of his modified or alternative duties. We took into account that the respondent placed the claimant on their redeployment list, the claimant continued to be on that redeployment list up to the termination of his employment, and no suitable vacancies arose for the claimant. We accepted her reliance on the fact that the claimant was medically retired and that ill health retirement is itself considered an alternative to dismissal. We accepted

her submission that on this basis, it cannot reasonably be said that Respondent failed to consider alternatives.

121. We did not accept Ms Likulunga's position that considering alternative roles even on a trial basis would have removed the risk of dismissal and/or had sufficient prospects of averting dismissal. The claimant was on the redeployment list and no suitable vacancies had arisen for him. We did not accept her position that the claimant had therefore established a prima facie case of disability discrimination and the Respondent has not met the burden of proving that it did not treat the Claimant unfavourably nor that their actions were a proportionate means of achieving a legitimate aim.
122. We accepted that at the time of the dismissal, Area Commander Joe McKay failed to consider alternative roles for the claimant, as an alternative to ill health retirement. There was however ongoing consideration of alternative roles by the respondent up to the termination of the claimant's employment, as the claimant was on the redeployment list, managed by HR. We accepted Ms Macdonald's reliance on the position in Merseyside and North Wales Electricity Board v Taylor 1975 ICR 185, QBD that '*an employer should consider whether there is any suitable alternative employment before taking the decision to dismiss, but it is not under a duty to go to unreasonable lengths to accommodate an employee or create a job where none exists*'. No suitable vacancies arose while the claimant was on the redeployment list.
123. Although in the circumstances, where the claimant wished to continue to be employed by the respondent, we accepted that it was unfavourable treatment to the claimant for Area Commander Joe McKay to fail to consider alternative roles (March 2023) and to terminate the claimant's employment on 23 March 2023, we accepted Ms Macdonald's submissions that that treatment was not unlawful in terms of section 15 EqA. We accepted that the respondent acted in furtherance of their legitimate aim of managing staff levels to ensure service delivery, which includes those in safety critical roles (such as operational firefighters) and ensuring they are fit to undertake those roles. In furtherance of that legitimate aim, given the medical evidence, the respondent required to make a decision on the claimant's employment, as well as how to support the

claimant. In the particular circumstances of this case, Area Commander Joe McKay's failure to consider alternative employment for the claimant at the time of dismissal was not unlawful under section 15 EqA. We accepted that the respondent acted reasonably and proportionately in placing the claimant on amended duties for an extended period, providing support mechanisms, offering and considering alternative options, carrying out a skills profile exercise, placing the claimant on their redeployment list, considering ill health retirement as an option and, following being notified by an IQMP that the claimant qualified for ill health retirement at the higher rate, terminating the claimant's employment on that basis.

124. Ms Likulunga invited us to consider whether the respondent's consideration of alternative roles for the claimant had a real prospect of mitigating dismissal. Although we found that Area Commander Joe McKay had failed to consider alternative roles, the respondent had made that consideration, by carrying out the skills profile exercise and placing the claimant on their redeployment list. In all the circumstances, we found that further consideration of alternative roles did not have a real prospect of mitigating the claimant's dismissal.

125. For these reasons the claims of unfair dismissal under s98 ERA and unlawful discrimination under section 15 of the EqA are dismissed.

C McManus

Employment Judge

17 April 2024

Date of Judgment

Date sent to parties

19 April 2024