EMPLOYMENT TRIBUNALS

Claimant: Mr R Gray

Respondent: HCRG Medical Services Limited

Heard at: Manchester Employment Tribunal (by CVP)

On: 4, 5, 6, 7, 8, 14 and 15 March 2024

Before: Employment Judge Dunlop
Mr T D Wilson
Ms A Berkely-Hill

Representation

Claimant: In person
Respondent: Mr D Bayne (Counsel)

JUDGMENT having been sent to the parties on 25 March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant, Mr Gray, is a paramedic who works for the East Anglian Ambulance Service ("EAAS"). Alongside that work, he also worked for this respondent, a company which provides health care professionals to work in police custody suites. He was dismissed from that role in November 2021 or January 2022 (the date is disputed) and that dismissal forms the subject matter of this case. The claims brought are for unfair dismissal, wrongful dismissal, various forms of disability discrimination and a complaint under the Part-Time Workers (Less Favourable Treatment) Regulations 2000.

The Hearing

2. The hearing was scheduled to last for seven days, being the week of 4-8 March 2024, Monday 11 March and Tuesday 12 March. The Judge became ill partway through the hearing, over the weekend of 9-10 March, and the hearing was unable to continue as listed. Happily, the Tribunal was able to

re-arrange the remaining days to take place on the Thursday and Friday of the second week, instead of the Monday and Tuesday. The Judge is grateful to the parties and to the non-legal members of the Tribunal panel, for accommodating this change of dates at short notice. That meant that the lengthy delay which can occur when a case is unable to be completed did not occur in this case.

3. The hearing took place fully by CVP and, save for some minor technical hitches from time to time, it proceeded smoothly. It is worth noting that the case was allocated to Manchester due to the respondent's head office address being given by Mr Gray in his ET1 form. Mr Gray himself, and at least some of his managers, were based in East Anglia, and that is where the events giving rise to this claim took place. The CVP hearing saved significant travel expense and inconvenience to everyone.

4. Mr Gray represented himself and attended alone. It is not unusual for people to be nervous of the Tribunal process and to struggle to understand every aspect of the Tribunal process and the legal tests which the Tribunal must apply. Mr Gray, however, presented as particularly nervous. His ability to understand and participate in the hearing appeared to fluctuate. At times, he was able to follow instructions from the Judge very well, to give clear answers under questioning and to ask clear questions of the respondent's witnesses. At other times, he struggled to recall and respond to instructions or questions, even when these were broken down and made as simple as possible. Similarly, there were times when he struggled to formulate questions of his own, and times when he seemed to 'zone out' and be unable to participate at all. We also noted that Mr Gray had great difficulty in dealing with any questions which required him to think about dates, or even the chronological order in which things had occurred. Luckily, most of the chronology of events in the case was evident from the documents and not seriously in dispute.

5. It appeared to the Tribunal (and there was no suggestion otherwise from Mr Bayne) that Mr Gray's difficulties were genuine, and that he was trying his best at all times to participate in the hearing and, when giving evidence, to give the best evidence he could. The medical records record that Mr Gray has a long-standing history of mental health problems. It seems this has mainly taken the form of depression, but also anxiety. As will be discussed below, Mr Gray suffered from long Covid which appears to have negatively impacted his mental health, and potentially left him with some symptoms of "brain fog". He has also been diagnosed with dyslexia in the past. He described very traumatic childhood events in his witness statement and also stated that he believes he has undiagnosed autism. Whilst the panel are not qualified to give a medical opinion on the exact cause of his difficulties during the hearing, it was evident to us that Mr Gray was experiencing marked difficulties with his cognitive functions during the hearing, when compared to our experience of other litigants with similar educational and professional backgrounds. Further, it was clear that there were points where he became overwhelmed, for whatever reason, and was unable to effectively continue.

6. Recognising Mr Gray's difficulties, the Tribunal made the following adjustments:

6.1 We took longer and more frequent breaks.

6.2 We adjourned the hearing day earlier than would otherwise have been the case, where it appeared that Mr Gray had exhausted his capacity to participate.

6.3 We allowed Mr Gray to introduce a witness statement that had been served late and to expand on the evidence given in his witness statement by giving more oral evidence before he was cross-examined. The Judge assisted him in this by asking open questions about areas not covered in his witness statement to prompt him. (This approach was agreed by Mr Bayne, who confirmed that he was able to adapt his cross-examination and that the respondent was not prejudiced by the new evidence.)

6.4 The panel asked more questions of the respondent witnesses than might otherwise have been the case.

6.5 We provided Mr Gray with an opportunity (although this was not ultimately taken up) to resume questioning of the respondent's final witness, after the panel had asked their questions.

6.6 We made arrangements for the parties to give their closing submissions primarily in writing, which was Mr Gray's preferred option.

6.7 The Judge gave simplified explanations of each stage of the process as we came to it, including repeating those explanations as necessary, and answering numerous questions from Mr Gray.

6.8 Finally, although the request for written reasons was made slightly outside the time limit set out in Rule 62(3) Employment Tribunal Rules of Procedure 2013, the Judge decided to extend that time limit and provide these written reasons anyway, in view of the difficulties which Mr Gray had had during the hearing.

7. In making the adjustments described above, we were grateful to Mr Bayne for his cooperation and assistance. We would also commend the way in which Mr Bayne carefully phrased his cross-examination questions to be as simple as possible. This enabled Mr Gray to give evidence to the best of his ability, and meant the case could the progress as efficiently as possible. At the end of the hearing, we paid tribute to both Mr Gray and Mr Bayne for the professional and courteous way they had each conducted themselves, without fail, for the entirety of this fairly lengthy hearing.

8. In considering the case we had regard to an agreed bundle of documents. There were some minor additions to the bundle during the course of the hearing and, by the end, it comprised some 1033 pages. There was also a supplemental bundle of 56 pages. We took time for reading at the start of the hearing when we read the witnesses statements, documents referenced in the statements and documents from My Bayne's suggested reading list. The parties were made aware that they must not assume we had read documents not specifically referred to.

9. We were grateful to the parties for preparing a Cast List and Chronology. The documents were mostly agreed, with any discrepancies clearly indicated, and were helpful to us.

10. We heard from the following witnesses:

10.1 Mr Gray giving evidence on his own behalf. Mr Gray also submitted a witness statement prepared by his mother, Mrs Gray, although she was not called as a witness. Mr Bayne did not object to us admitting the statement, subject to it being given limited weight in relation to any factual disputes.

10.2 On behalf of the respondent, Mrs Wendy Bartram, (Head of Clinical Operations), and Mr Andrew Downie (currently Head of National Operations, at the material time Head of Operations, East of England).

The Issues

11. We were assisted by an agreed List of Issues, which is annexed to this Judgment and which incorporated the various statutory tests to be applied. Broadly, and in less legal language, the key questions we had to ask were as follows:

Unfair dismissal claim

Did My Gray have a right to bring an unfair dismissal claim? Only employees can claim unfair dismissal. The respondent argued that, given the contractual arrangements in this case, Mr Gray was a "worker" but not an "employee".

If so, when did the dismissal take place, and was the claim presented in time? There was a dispute about the date of dismissal, explained below. If the dismissal took place on the earlier date (as argued for by the respondent) then the claim would be out of time, and we would have to consider whether to extend time.

If Mr Gray was an employee, and his claim of unfair dismissal could proceed, was the dismissal fair or unfair? (In the end, the respondent agreed that, if we got to this point, the dismissal was unfair)

If the dismissal was unfair, should compensation be reduced to reflect the fact that Mr Gray would (or might have been) dismissed fairly in any event? If so, by how much should it be reduced?

Wrongful dismissal claim

Was Mr Gray wrongfully dismissed? That means, was he dismissed without notice when he should have been given notice? If so, what, if anything, was he entitled to be paid during his notice period?

Disability discrimination claim

Was Mr Gray a disabled person within the meaning of s.6 Equality Act 2010 ("EqA")? Only people who meet the definition can succeed in a claim of disability discrimination.

By dismissing Mr Gray, did the respondent directly discriminate against him on the grounds of his disability?

By dismissing Mr Gray, did the respondent discriminate against him because of "something arising" from his disability? If so, was that justified?

By dismissing Mr Gray, did the respondent subject to harassment related to disability?

Part-time worker discrimination claim

By dismissing Mr Gray, did the respondent discriminate against him on the grounds of his status as a part-time worker?

Findings of Fact

Background and G4S

12. Mr Gray was drawn to the Ambulance Service through his own experiences of childhood trauma and depression. From starting as a cleaner in a hospital, he worked his way up to eventually becoming an Emergency Medical Technician. He then completed a foundation degree at Northampton University which enabled him to qualify as a paramedic in 2016. He began to work as a paramedic with the EAAS and worked "on the road" as part of an ambulance crew.

13. Within a short period of time, Mr Gray had reduced his working hours, taking a part time role with EAAS. He was aware of his vulnerability to mental "burn out" and did this, at least in part, to preserve his mental health. (As we have described above in relation to adjustments for the hearing, Mr Gray has a long history of various mental health difficulties. This was evidenced in copious medical records which formed part of the bundle.)

14. The change to part-time hours also gave him the flexibility to seek other roles to complement his work for EAAS. He gained experience working as an on-set medic at Elstree Television Studios, and also took on private events work from time to time.

15. In 2018, Mr Gray applied for a role as a custody medic with the well-known contracting group, G4S. He was successful in his application and entered into a written contract, expressed to be a contract of employment, with G4S Forensic Medical Services (UK) Ltd. The start date of this contract was 5 December 2018. There are various points to note about this contract:
    15.1 It is headed "Statement of Terms & Conditions of Employment" and, throughout, it uses expressions consistent with there being an employment relationship between Mr Gray and the company.
    15.2 It is a detailed and specific document, evidently drafted by lawyers or at least with detailed legal input. It covers matters such as health and safety obligations, a requirement to submit to searches, a requirement to obtain permission to undertake other employment, provisions as to intellectual property and restrictive covenants.
    15.3 The contract provides for a probationary period. Following the probationary period, it provides for a mutual notice period of one month to terminate the employment.

15.4 Under the heading "Commencement of Employment" it states "*Your date of commencement in the role is 5th December 2018, which is also you[r] continuous service date."*

15.5 Under the heading "Hours of Work" it states "*As this is a flexible hours' contract there is no set roster pattern assigned nor minimum hours of work per week. However, in order to provide continued competency within custodial settings a minimum of one shift per month is expected*."

16. The version of the G4S contract in the bundle is unsigned. However, it is agreed between the parties that Mr Gray was engaged by G4S on the basis of these terms and conditions.

17. At the time when Mr Gray joined G4S it was already known that the contract for providing health care professionals to custody suites was due to transfer to another provider, the present respondent. There is a letter dated 8 November 2018 in the bundle which was sent by G4S to its staff (and provided to Mr Gray at some point around the time he joined) which explained the view of G4S that this amounted to a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). The date when the respondent was to take over the contract was 1 April 2019. It appears that when this happened the respondent did not receive a copy of Mr Gray's contract from G4S as the outgoing contractor. We do not know whether they received contracts for other staff members, and, if so, whether they were in similar terms.

Working for the respondent

18. Mr Gray makes various complaints about the respondent as an 'employer' (we keep in mind at this point that employment status is disputed) following their takeover of the contract. Mr Gray pulled back from some of those complaints during evidence (for example one related to proposed memorials for colleagues who had died) when the respondents' witnesses were able to provide him with further information. In any event, we did not find it necessary to make specific findings about Mr Gray's complaints about the early part of his relationship with the respondent.

19. The respondent had produced a spreadsheet showing every shift which Mr Gray undertook following the transfer of the contract in April 2019. This was a very helpful document. It showed that Mr Gray worked consistently during the period between the respondent taking over the contract and the onset of the Covid-19 pandemic. In this period, he worked several shifts each month. The exact number varied between a low of seven shifts (December 2019) and a high of sixteen shifts (May 2019).

20. We understand that the respondent has some salaried staff who worked fixed numbers of shift. Mr Gray was a member of the 'bank' staff, used to provide a flexible resource to fulfill changing client demand. The respondent operated by notifying its bank staff of the shifts available and inviting them to book on. Where a shift was approaching and had not been filled, the respondent would increase the payment rate on offer. Mr Gray's habit was book onto shifts late, so that he almost always worked for a higher rate of pay than the minimum rate specific in his contract. In doing so, he ran the

risk that there would not be shifts available for the times he wanted to work, but in practice he was able to obtain plenty of shifts, as indicated by the figures above. Mr Gray mainly worked at Wymondham, but also took a small number of shifts at other police stations in Norfolk and Suffolk. The spreadsheet also showed that Mr Gray booked (as was paid for) a number of shifts as annual leave. We heard in evidence that some further shifts were accounted for by training courses which Mr Gray was paid to attend, although these are not separately identified in the document.

21. The respondent's contract with the police required it to provide qualified nurses and/or paramedics, registered with the NMC or HCPC respectively, to fulfil health care professional ("HCP") roles. The tender document we were shown gave other stipulations as to the length and nature of the experience it was necessary for them to have. This included a requirement that HCPs have skills including:
"Administering immediate life support and have completed an annual mandatory update skills training approved by the UK Resus Council or equivalent"
The tender document separately set out 28 skills which the contractor was required to train and assess its HCPs in respect of during induction and throughout the term of the contract. Of those skills "Administering Immediate Life Support (ILS)" was the first in the list.

22. We heard evidence from both sides about the custody suite environment. We also record that both non-legal members of the Tribunal panel have professional experience of working in custody suites themselves. We gave primacy to the evidence of the parties, as the witnesses were talking about the actual locations and time period during which the events of this claim took place. However, the experience of the non-legal members helped to contextualise the evidence given and played a part in determining which parts of the witnesses' accounts (which did differ) we found to be more credible. We made the following findings of fact about that environment:
    22.1 It would almost always be a busy environment with a number of people coming and going. Police officers present would have a lot to do. As Mrs Bartram put it, they would not be "sitting around twiddling their thumbs".
    22.2 Some detainees being brought into the suite would be suffering from the effects of intoxication and/or in acute mental health crisis and/or abusive or violent and/or in distress, or any combination of the above.
    22.3 Detainees who were in the cells and apparently 'settled' might require attention urgently and suddenly, whether due to their behaviour or their medical condition.
    22.4 The custody suites would each cover a large area, but it was also a contained area. The cells are small and close together. There were no stairs in any of the suites Mr Gray worked at, or was likely to work at. Mr Gray would typically be based in a medical office next to the custody sergeant's office and reception desk. There would be a secure door to pass through to gain access to the cells.
    22.5 The atmosphere and demands on staff in the custody suite could quickly escalate.
    22.6 Although Mr Gray would be the only HCP in attendance on his shifts, the custody suite would be staffed by a number of police officers who would all have training in basic life support. They would be

professionals, used to staying calm in emergency situations, prioritising what needed to be done, and following instructions.

22.7 The police, and the respondent, had to be prepared to respond to instances of cardiac arrest occurring in a custody suite. In reality, this was a very rare occurrence. Mr Gray, for example, never dealt with a cardiac arrest during any of his custody suite shifts. We find this was typical and that it contrasted to working as part of an ambulance crew, where crews would regularly be dealing with patients who had suffered cardiac arrests.

23. Mr Gray was successful in his work for the respondent. No concerns were raised about him, and he was commended for his work, particularly in respect of one difficult case where very positive feedback was received about his contribution.

First period of absence

24. In late March 2023 the government declared a national lockdown in response to rapidly escalating cases of Covid-19.

25. For obvious reasons, neither Mr Gray's role with EAAS, nor with the respondent, could be done from home, and it was essential that both roles continued to be performed during lockdown. However, Mr Gray caught covid at almost exactly the same time as the first national lockdown started. His last shift with the respondent prior to becoming ill took place on 21 March 2020.

26. Mr Gray subsequently developed symptoms of long covid, and remained off work from both of his jobs for several months. Medical reports from this time record that he was suffering from some residual long covid symptoms including breathlessness. In one report dating from 15 September 2020 it is recorded that "*He says currently struggle to do CPR secondary to breathlessness but he can manage to climb a flight of stairs in one go*". From this period onwards, there are frequent and consistent references to long covid-related breathlessness in numerous medical records and reports which appeared in the bundle.

27. Eventually, Mr Gray he recommenced working with EAAS, but he was put into a control room role. This meant that he was not required to carry out the physically strenuous work associated with being 'on the road' including carrying heavy equipment upstairs or long distances from the ambulance (for example if a casualty had collapsed on a beach or in inaccessible marshland) and evacuating a casualty back to the ambulance from those sorts of locations. Mr Gray explained (and we accept) that his work still involved patient contact in a virtual sense, as he undertook video calls to triage patients who had called to request assistance.

28. On 5 October 2020, Mr Gray undertook a 'shadow shift' with the respondent and, from there, he recommenced his duties from 10 October 2020. In the period October 2020 to March 2021 he undertook regular shifts each month, in much the same pattern as he had done previously. Mr Gray did not inform the respondent about his potential difficulty with conducting CPR, as recorded in the September report, which was produced for EAAS.

29. The bundle contains an appraisal document recording an appraisal meeting between Mr Gray and Shelley Watts, a senior HCP working for the respondent, dated 18 February 2021. In a section recording "obstacles encountered in the last year" it is noted that Mr Gray is "unable to practice as an operational paramedic for the time being". Neither Ms Watts, nor anyone else at the respondent, took any steps to explore the reasons why Mr Gray was unable to practice as an operational paramedic, nor whether this had any implications for his fitness or suitability to continue working for the respondent.

Second period of absence

30. It appears that Mr Gray's work in the control room did not go smoothly due to interpersonal difficulties. In those circumstances, there were repeated references to occupational health ("OH") by EAAS.

31. Throughout this period, covid restrictions in both public life and, specifically within the NHS were changing regularly. From around March 2021 EAAS informed its staff that they were required to abstain from any external work, with the aim being to preserve the service as a "covid secure" workplace so far as possible. Mr Gray informed the respondent that he would be unable to undertake shifts for them for this reason.

32. Mr Gray received a response from Ms Watts including the statement: "*As for having time away from custody, CRG state that for bank workers the expectation is 2 shifts a month.*"

33. Despite that initial response, the respondent, in practice, accepted that the claimant was unable to book shifts, and we understand that that was the same for certain of his colleagues who also held substantive roles within the ambulance service. Effectively, his work with the respondent was put on hold.

ILS Course

34. In accordance with their contractual obligations to the police, the respondent arranged for each of their workers to undertake an Intermediate Life Support course on an annual basis. The respondent sent Mr Gray an undated letter in autumn 2021 informing him that he was booked onto an ILS course on 10 November 2021, and asking him to confirm his attendance. Mr Gray did not attend the course. He gave evidence, which we accept, that his managers had agreed that this could also be "put on hold" for a short period of time, due to the fact that he was not at work.

12 November email and termination

35. On 12 November 2021, Malgorzata Jonak, the respondent's clinical lead for Norfolk and Suffolk, sent a clinical supervision document to Mr Gray and three other recipients. This was a pro-forma document designed to record clinical supervision meetings, but had been completed without a meeting in circumstances where (it was said) these individuals had been out of contact with the respondent. The key requirement set out in both the pro-forma and

the email was that the recipients contact the respondent by the end of November to inform the respondent of their whereabouts and future plans regarding their engagement with the respondent. On the same day, Alison Driver, a Senior HCP, sent a short email to Mr Gray of similar effect.

36. Mr Gray replied to both Mrs Jonak and Ms Driver by email the same day. In many ways this email is the key document in this case, and we will set out the first part of the email in full (the underlining has been added for emphasis for the purposes of this Judgment):

"Firstly my apologies for the delay in getting back to you. I think you know I have some residual symptoms from Long-COVID and as such have seen the consultant in the Posy COVID clinic who is following me up.

Due to the sequelae I have, it has caused me to move away as an operational paramedic. Instead, I now work (contract expected shortly) triaging 999 calls in the control room. I must say I feel quite mentally exhausted from this role, even though I am part-time.

I really enjoy custody, but if I am honest, anxiety has stopped me from coming back sooner. I do want to come back though. I have some good colleagues in custody and wondered if it would be possible to maybe do 6 hours on either the last part of a day shift or the first part of a night shift? Paul Shuckford, Steve Wilson, or Annette at Great Yarmouth.

Due to my professional obligations, I thought I had better let you know what my Trust's occupational health department has said. I actually saw a nurse then a consultant, but this is mainly due to some workplace politics if I am honest. I have attached both reports, and also a follow-up email from my prospective new manager who is querying his findings.

My manager has no issues with custody work but the wording used is odd! Especially for a consultant i.e. he says I have worked in custody with no issues. Although not documented, we spoke and he saw no issues with custody, but clearly he isn't contracted to offer that advice.

Personally, I think he has over-generalised and not offered explanation, hence my manager emailing, to which, a vague reply is received.

The Long- COVID consultant expressed no issues and to be open and honest this report is attached. My CT head was clear and I am due to see the Physio in a few weeks. Driving is of no issue. There are just some residual symptoms they are working through.

Speaking personally again, I feel custody is not operation per se and in some ways mimics my triage role. I cannot see any issues with performing the role. The issues stopping me from going operational are mainly the breathlessness. For instance, I doubt I could carry chair, someone, down several flights of stairs now. I see no issues with CPR as I am not that breathless i.e. walking presents no issues just extreme exertion I guess. In the custody environment, I see no areas where this would cause issues. Moving a patient to the floor, supporting them etc I am able to do. With CPR I am able to perform this but prolonged CPR may cause issues i.e. 10 minutes.

I will expand on this! In case alarm bells ring! So, the recommendation is that CPR is done for 2 minutes then you swap over, this is a national recommendation as CPR becomes less effective. I can do CPR for 2 minutes. In custody, you have

many staff who are BLS trained. As the medic, you are the team leader and generally, you oversee the arrest and intervene when needed i.e airway, shocking etc. So, I see no problems here at all. It's just on the road! For instance, I could be single crewed due to sickness and attend an arrest. I will admit that I would become exhausted quicker than before and quicker than the average person, so it isn't clinically safe in this environment. But custody is different. I have no issues moving to the floor, it literally is the prolonged exertion.

I think the consultant was happy for me doing this (although he wasn't tasked with assessing this) and I think he has demonstrated this. The clarity email confuses things as I don't think, even as a consultant he is aware of the roles paramedics do! He could have expanded but hasn't. I don't think I can seek further clarity either.

I just wanted to protect my registration and your interests too as the statement 'he can't work as a paramedic' is odd. My manager felt this and needed clarity, to which, little is offered back. I personally am happy in custody, but I wanted to present you with the reports my Long-COVID report to make sure you are happy too.

The only thing I could suggest if you wanted clarity is an occupational health referral from CRG. Or, I could attend the ILS course first as this may offer reassurance I have performed CPR. Personally, I feel the occupational health consultant has just confused matters for my employers!

[End of email omitted]

37. As indicated in the text of his e-mail, Mr Gray enclosed certain medical reports. Most pertinently, a report from Dr J Halliday-Bell, a consultant occupational health physician, dated 15 October 2021 and prepared following a telephone assessment/consultation on 1 October 2021. (We record that Mr Gray made strong representations about Dr Halliday-Bell's lack of professionalism, including the fact that he had apparently conducted the assessment in a cursory fashion, whilst driving. We make no findings as to whether Mr Gray's assertions are accurate, as we do not need to so for the purposes of reaching our conclusions.)

38. Dr Halliday-Bell's report begins by setting out the history of Mr Gray's medical difficulties, with some reference to his employment. It then goes onto address some specific questions which had presumably been posed in the EAAS referral. In the response to the question "Is the employee fit to undertake their current role?, Dr Halliday-Bell responded:

Yes, he will soon be fit for his AWD role. He is not fit to work as a paramedic at present.

39. As Mr Gray alludes to in his email, his manager at EAAS, a Mr Sweeney, had asked for clarification of these comments. Mr Sweeney later copied and pasted a portion of his email, along with Dr Halliday-Bell's responses, to Mr Gray. This sets out Mr Sweeney's queries (non-bold) and the doctor's responses (bold), as follows:

…you have said that he is not fit to work as a paramedic – do you mean in a front line role. But he is able to work as a Paramedic in an ECAT role which is non patient facing, call centre based, but still Paramedic?

Yes, I meant not fit for front line work. He is fit for non-patient facing duties - I realise that he may still need to maintain his paramedic grade if he is permanently redeployed to ECAT.

However, in the second part of the query, you have said that he should be able to resume his substantial duties soon. Do you mean patient facing, front line work. Or do you mean his redeployed role in ECAT?

It would help him continue in employment if he can be permanently redeployed to a Paramedic role or another suitable role in ECAT - I appreciate that this is not currently substantive in his case. If there is no possibility of suitable permanent redeployment - his case should be re-referred to OH.

('ECAT', the parties confirmed, is a reference to the ambulance control room.)

40. It is apparent from this correspondence that the doctor was turning his mind (at least in a summary fashion) to the two roles which Mr Gray had performed at EAAS – a role crewing ambulances and a role in the control room. He did not turn his mind expressly to the entirely different set of requirements presented by a role as a custody suite HCP (and had no reason to do so).

41. Mr Gray's email envisaged that a meeting would be held to discuss steps to get him back into active service for the respondent. This would include, to his mind, addressing any concerns that may have arisen for the respondent in relation to the medical reports.

42. On 16 November 2021 Ms Jonak emailed Mr Gray to acknowledge his email. She said it had been passed to HR and management to review and that she would let him know the outcome.

43. The correspondence was indeed passed to management. It was discussed in a Zoom meeting between the senior leadership team comprising Alice Evans (HR), Seonaid McConnachie (Clinical Director), Gary Holland (Business Director) and Andrew Downie (Head of Operations). Mr Downie gave evidence to us. He also explained there was someone in the meeting with responsibility for clinical governance, but they had since left the organisation and he was unable to remember their name. The conclusion, arising out of this discussion, was that the respondent should end Mr Gray's engagement. Essentially, the reason for this was that the respondent's managers in the meeting considered it essential that the HCPs deployed in custody suites were able to carry out a patient-facing role and were capable carrying out CPR for extended periods on their own if needed. They considered that the medical evidence that Mr Gray was unfit for an operational paramedic role, combined with his own reference to potentially struggling to sustain CPR for a period of time, meant that to deploy him to a custody suite would be an unacceptable risk.

44. Mr Downie agreed with this decision, although he described that he was not the driving force behind it. He was, however, the one tasked with writing to Mr Gray to communicate the decision.

45. We pause to record that, in reaching the decision to dismiss, the managers chose not to meet with Mr Gray and afford him the opportunity to put forward his point of view. The respondent had a contract with an occupational health provider itself (Medigold) but they chose not to refer Mr Gray for an assessment of his capability which was specific to the actual role he undertook for the respondent. They also chose not to get in touch with the providers of the ILS training and investigate whether there were any specific standards for delegates to meet in respect of their ability to sustain solo CPR (as opposed to demonstrating correct technique for a short period) and whether this would, or could, be assessed as part of the ILS course. (Mrs Bartram gave evidence that if the respondent had a particular concern about the ability of a person to perform CPR related to, for example, their ability to kneel down on the floor, they could request that the training provider specifically consider this as part of the annual certification course.)

46. Mr Downie drafted a letter which was circulated to various managers. Other than some minor points in relation to the wording, the text was agreed. Mr Downie duly sent an email to Mr Gray at his CRG email address, attaching the termination letter. Mr Gray contends that he did not receive the email. As this is a key point of dispute between the parties, we set out our conclusions in a later part of this Judgment.

47. At a later date, we understand sometime in January 2022, Mr Gray sent a message to a Whatsapp group which was used by the respondent to notify staff of available shifts. Mr Gray's message stated he was "*not sure if im still on the books*" and explained that he had been ill with long covid. A supervisor/manager replied asking if he was interested in picking up work again. Mr Gray responded to explain that he was very anxious, but he would like to battle the anxiety as he had loved the job. He noted that he had "heard nothing" since providing his last occupational health report from EAAS and said "…*if they'd rather not have me. can [they] just let me know, so I can draw a line under it*…"

48. This generated some email correspondence between the respondent's managers, and subsequently, on 13 January 2022, the termination letter was re-sent to Mr Gray by Ms Jonak. This time it was emailed to his personal address and Mr Gray acknowledges that he received it.

Events after termination

49. There followed more messages, particularly from Ms Jonak, who appeared genuinely keen to try to get Mr Gray back to work. She proposed that if he could provide "*an independent doctor/GP report*" stating that he was fit to work in a patient-facing capacity, she could then get him booked onto ILS training and, provided he passed that, he could then be booked for shift.

50. These messages also demonstrate that Mr Gray had investigated the electronic 'properties' of the termination letter and concluded that it had been written in January, and not in November as the respondent had stated. This contributed to deep feelings of suspicion and resentment on the part of Mr Gray towards the respondent, which are apparent from the messages.

51. On 15 February 2022 Mr Gray sent the respondent a formal "Letter Before Action" by email which outlined the way in which he felt he had been subjected to unlawful treatment by the respondent. On 21 February 2022, in response, Alice Evans sent him a letter offering to book him onto an ILS course, on the basis that he was now informing the company he was "fully recovered". The letter does not state whether there would be any other condition attached to Mr Gray resuming shifts, assuming he was successful in passing the course. It gave details of the two next available courses, acknowledging that these were not nearby (in Lincolnshire and Powys respectively). It was noted that there were likely to be courses becoming available in closer locations, but this might not be before the training provider's year end, in July 2022. Mr Gray did not take up either of the courses.

52. It is fair to say that from this point Mr Gray's focus was on pursuing his claims. He made a data subject access request on 9 February 2022 and he commenced early conciliation with ACAS on 24 February 2022. The early conciliation period ended on 1 April 2022 and Mr Gray presented his claim on 7 April 2022.

Comparator

53. Mr Gray relies on a colleague, Ms Jill Murrell, as a comparator for both his disability discrimination claim and his part-time working discrimination claim.

54. Ms Murrell did not give evidence. We make the following findings of fact based on the documentary evidence and the evidence of the witnesses.

55. Ms Murrell was also an HCP engaged to attend custody suites. She was initially employed on a full-time, permanent contract, but the respondent provided evidence that she had switched to a zero-hours 'bank' contract from the end of May 2021. She was not on exactly the same terms and conditions as Mr Gray, as this was not a G4S contract, but we accept that she would be offered shifts on exactly the same basis as Mr Gray. She was no longer a full-time worker from that point.

56. Ms Murrell was sadly involved in a car accident in September 2019, following which she had an initial period of 14 days sickness absence, and several subsequent short absences. It appears from the documentation that Ms Murrell was placed on a waiting list for neck surgery. There was medical advice that Ms Murrell limit the amount of driving she did, and certain adjustments were agreed by the respondent in order to achieve that.

57. Mr Gray contended that Ms Murrell's neck was fractured and that she would have been unable to safely perform CPR at all whilst waiting for her surgery, but the respondent continued to let her work. We accept Mrs Bertram's evidence that the respondent had not been told, and had no reason to conclude, that Ms Murrell was unable to perform any aspect of her role, including CPR (subject to the requirement to limit her driving). The respondent also provided evidence that Ms Murrell had passed an ILS course.

Discussion and conclusions

58. Within this section we will deal with each part of the claim in turn, summarising the submissions made by the parties, as well as the relevant legal principles (where necessary) in respect of that part of the claim.

Employment status

59. Only "employees" have the right to claim of unfair dismissal. For the purposes of the Employment Rights Act 1996 ("ERA") an "employee" is "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment"* and a "contract of employment" is defined as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."*

60. A lot of case law has build up around what exactly amounts to a "contract of service" and what working arrangements will give rise to one. There is no rule that 'bank' workers will necessarily be employees or, conversely, that they will not employees. The Tribunal must look at the individual contract and the working arrangements that were in place.

61. Mr Bayne set out the relevant legal principles in some detail in his skeleton argument and we agree with his summary. For bank workers and those in similar arrangements to the one in this case, it will often be the case that the ingredients of an employment relationship are present during the actual shifts worked, but may not be present during the breaks between those shifts. Unless the claimant can point to an "umbrella contract", which spans the gaps between the shifts, they are likely to be a worker, but not an employee.

62. We find that the contract between Mr Gray and G4S was an "umbrella contract" and that it gave rise to a mutuality of obligation which subsisted between the parties, even during periods where no work was being carried out. They key factors which lead us to this conclusion are as follows:
    62.1 The contract is expressed to be a contract of employment. We accept this is not conclusive, but consider that it carries weight. From the way in which the contract is drafted and from taking judicial notice of the scale of G4S as a group of companies and its wide experience with contracting, we conclude that this description was not inadvertent. G4S had a choice as to the status it wished to accord HCPs working in custody suites and it chose employment status. As well as affording extended rights to the people doing the job, this reflected the level of contractual obligations G4S wished to impose on them.
    62.2 In line with the above comments, it is particularly relevant that the contract gave a start date for continuous employment. That directly conflicts with the respondent's position that Mr Gray could only be an employee in relation to the particular shifts he had accepted.
    62.3 We find that the contract contains a requirement that staff members undertake at least one shift per month, and that the company will offer sufficient work to ensure that this happens. Mr Bayne characterises this as an 'expectation' and submits that neither party could argue the other was in breach of contract if they did not offer/accept the work. We disagree. When the relevant clause is read in full there is a distinction drawn between the week-to-week position, where there are no minimum

hours, and the monthly position, where there is a minimum of one shift. Although describing it as an 'expectation', G4S have chosen to include it in the contract. If it was not intended to be contractually enforceable, we consider they would not have done so.

62.4 Mr Bayne cites the Supreme Court decision in **Autoclenz v Belcher [2011] ICR 1157** as authority for the proposition that "*the tribunal is entitled to disregard the terms of any written contract created by the employer if it seeks to characterise the relationship between the parties in an artificial way; and to ask 'what was the true agreement between the parties'.*" Of course, the context of that case is an employer attempting to use contractual drafting to preclude a finding of employment status, whereas Mr Bayne is asking us to find that there was no employment relationship despite the clear wording of the contract. In any event, however, we find that the requirement that bank workers would complete a minimum number of shifts *did* reflect the reality of the agreement, and practice, between both G4S and its staff, and, post-transfer the present respondent and its staff. This is reflected in the email from Shelley Watts, a supervisor, recorded at paragraph 32 above, where she noted that CRG's expectation was for staff to complete a minimum of *two* shifts per month.

62.5 Taking all of the above into account, we find that the one shift per month minimum requirement is sufficient to give rise to a mutuality of obligation, as required in accordance with **Carmichael v National Power Ltd [1999] ICR 1226**. It is right to note that this minimum requirement was not always met by Mr Gray during the course of his employment. It was met, however, during the periods when he was actively working; there were no isolated or casual instances of non-compliance.

62.6 Mr Gray's non-compliance during periods of absence can be explained firstly by sickness absence. The fact that an employee may be unable to attend work due to sickness does not undermine the wage-work bargain in any other sort of case. Mr Bayne suggests that it does in this case as Mr Gray was not submitting Med3 sickness certificates. However, we find that is explained by the fact that Mr Gray was submitting certificates to his primary employer (and receiving sick pay via them) and would not therefore be entitled to sick pay from the respondent.

62.7 In the later period of absence, as we have explained, the obligation was put in abeyance due to covid. It is always open to parties to suspend contractual requirements by mutual agreement, and the unprecedented circumstances of the pandemic gave rise to many examples of this happening. It is relevant that the respondent did not leave this requirement in abeyance indefinitely, but took proactive steps to contact those who were not actively booking work, and to seek to formalise their position, either as leavers, or to return them to shifts within a few months. None of this undermines the reality, as we find it to be, that there was a contractual requirement to work a minimum number of shifts per month.

62.8 We also considered that the level of control that the respondent had over Mr Gray was a relevant factor pointing towards an employment relationship. This did not simply involve control during the shifts themselves, but also requirements for clinical supervision and appraisals. This factor (although less important than the one shift per

month requirement) further supports our conclusion that there were subsisting obligations between the parties in the periods outside the actual working shifts.

63. In view of the findings above, we conclude that the contract with G4S was a contract of service, and Mr Gray was an employee within the meaning of s.230(1) ERA. As an employee of G4S, his contract of employment transferred to the respondent when they took over the contract to provide HPCs to custody suites. That is the effect of the TUPE Regulations, and it was not disupted by Mr Bayne. That means that throughout the time Mr Gray was working for the respondent he was an employee.

64. Finally, we pause to note here that there is a broader definition of "employee" within the Equality Act 2010. The respondent has always accepted that Mr Gray meets that broader definition and is entitled to pursue his discrimination claims under that Act. There was therefore no need for us to make a decision about status for the purpose of those claims.

Date of Termination

65. It is well-established that written notice of termination of employment will generally only take effect when the employee receives and reads it (**Brown v Southall and Knight 1980 ICR 617, EAT**).

66. Although Mr Gray initially suggested that Mr Downie had not, in fact, emailed the dismissal letter on 24 November and that the documents which recorded that had been tampered with in some way, he did not maintain that position (or, at least, not with any force). We have no hesitation in finding that Mr Downie did send the email, with the attachment, on 24 November as he purported to do.

67. We then have to decide whether it was received. We accept, from the respondent's perspective, that there is weight in the fact that emails will normally be reliably delivered and there was nothing (e.g. a 'bounce back') to indicate to Mr Downie that this was not the case here. We find, however, that Mr Gray's actions in messaging the Whatsapp group in January (where he queried whether he was still 'on the books'), and his response when he received the re-sent termination letter, were entirely consistent with his evidence that he had not received the letter in the first place. Mr Gray is not, in our judgment, someone who would act in a disingenuous way by feigning not have received this email if he had, in fact, received it. What is more, in our view he would have been temperamentally incapable of 'sitting on' the letter. Had it been received, it would inevitably have provoked a swift response. For all these reasons we find that the first attempt to send the letter of dismissal failed because Mr Gray never received the email.

68. There were some suggestions in evidence for why this might have happened, including the fact that (according to Mr Gray) the respondent changed all its email addresses around this time reflecting a change in company name following a management buy-out. There is, however, no need for us to make findings about why the email wasn't received, the key point is simply that it wasn't.

69. It follows that the effective date of termination was 13 January 2022, when Ms Jonak re-sent the letter, and when Mr Gray acknowledges he opened and read the attachment.

70. Our finding that the effective date of termination was 13 January 2022 means that all the claims brought by Mr Gray were presented in time, and the time limit points set out in the List of Issues fall away.

Unfair dismissal claim

71. Section 98 ERA provides (so far as is material) as follows:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal; and**
>
> **(b) that it is either a reason falling within sub-section (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 sub-section if it-**
>
> **(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)-**
>
> **(a) "capability" in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality…**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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 reasonable 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**

Reason for dismissal

72. The effect of s.98 is that it is for the respondent to establish that the reason for dismissal is a potentially fair one. The reason for dismissal is not simply the statutory label applied (e.g. "capability") but is the set of beliefs held by the employer which caused it to dismiss the employee (see **Abernethy v Mott Hay and Anderson [1974] ICR 323**).

73. We accept, as a finding of fact, the summary of the reason for dismissal given in Mr Bayne's skeleton argument, namely the existence of an occupational health report stating that Mr Gray was not fit for a patient-

facing role, and his own comments that he would (or may) not be able to sustain solo administration of CPR for an extended period. We are satisfied that these reasons are both reasons relating to "capability" within the meaning of s.98, and are therefore potentially fair. We did not need to consider the respondent's alternative position, that this was "some other substantial reason" justifying dismissal in the circumstances.

Fairness of dismissal

74. Mr Bayne acknowledged in his closing submissions that (subject to the jurisdictional points determined above) the respondent's dismissal of Mr Gray was "procedurally unfair". This was a pragmatic concession, given the complete absence of any dismissal process. The panel considered that it was important, nevertheless, to reach specific findings about exactly *why* the dismissal was unfair, as those findings would inform the Tribunal's subsequent consideration of remedy issues and, particularly, the application of the ***Polkey*** principle (see below).

75. We therefore proceeded to consider the usual questions asked by a Tribunal in capability dismissal cases, as set out in the List of Issues.

76. In doing so, we kept in mind the key principle that it is not the Tribunal's role to substitute its own view for the view of the respondent. In a capability context, that principle is encapsulated well in the following comments from Lord Denning MR's judgment in **Taylor v Alidair Ltd [1978] ICR 445**, which were cited by Mr Bayne in his skeleton argument:

> *"Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent."*

Did the respondent genuinely believe C was no longer capable of performing the role?

77. In short, "yes". There has been no hint of any alternative explanation for the dismissal. The genuineness of the respondent's belief that Mr Gray was unable to do the role in the light of what had been disclosed is evident from internal emails, as well as from the explanation given to Mr Gray. Both Mrs Bartram and Mr Downie gave clear evidence about this, and we accept their evidence.

Did the respondent adequately consult the claimant?

78. The answer to this question is a resounding "no".

79. By "consultation" we mean, primarily, the employer informing the employee that dismissal is being considered and then holding one or more meetings in which the employee can argue, if they wish, why they should not be dismissed and what other steps should be taken. Consultation in the context of a potential capability dismissal has more than one purpose. Partly, it is to allow the employee to challenge the employer's belief that he lacks capability. That challenge may or may not result in the employer changing

its mind, which is something we shall return to. However, consultation is also valuable for other reasons which are completely separate to any potential impact on the final decision. Consultation allows an employee to ask questions and to better understand the decision being taken; it puts a face to decision-maker; it shows respect and consideration for the employee and it gives the employee some time in which to accustom himself to the possibility of dismissal, rather than receiving the news out of the blue. (It also assists in avoiding the sort of damaging mix-up which occurred here with the receipt of the termination letter).

80. We accept, factually, that Mr Downie did not meet with Mr Gray because he (presumably on advice from the respondent's HR and/or legal team) did not consider Mr Gray was an employee, and therefore believed that there was no legal obligation to do meet with him. We have found that conclusion to be wrong. Even acknowledging the respondent's assumption, however, there are plenty of employers of casual workers or agency staff who would at least have gone as far as holding a meeting in this situation, even if they weren't strictly obliged to do so. The circumstances of this case were that Mr Gray had had almost three years of service, there were no concerns about his conduct or performance on the job, and he had expressed that felt able to carry on with the role and wanted to return to work. In those circumstances, the view of this Tribunal is that it would have been common courtesy to hold a meeting, and that terminating the engagement by email was slapdash and even callous. This is particularly the case given that the respondent did not even check that the email had been received, and did not ensure that Mr Gray was removed from the other communication channels.

Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position?

71. Again, our answer to this is 'no'.

72. We keep in mind that, in holding the respondent to the standards of a reasonable employer, we must apply the range of reasonable responses test, and not substitute our own view.

73. Notwithstanding that, we find that it was not reasonable for the respondent to place any firm reliance on the occupational health reports produced for EEAS. The roles of an on-the-road paramedic, a paramedic working in an ambulance control centre, and a paramedic working in a custody suite are three very different roles with different requirements and demands. Any report about the fitness of a worker to do another job must be treated with caution. It is possible that in some cases there might be specific findings which could legitimately be 'read across' to another role, but only if they are very clear. Mr Gray's medical conditions were complex and interrelated, and the report of Dr Halliday-Bell is not specific or clear about exactly what operational, or patient-facing, duties Mr Gray cannot do, nor why. Mr Gray's NHS manager, Mr Sweeney, was able to obtain only a little further clarity by asking following up questions.

74. It will be recalled that the report, read with the clarification, opined that Mr Gray was not fit "*to work as a paramedic*" in "*front line work*" but that he was

fit for "*non-patient facing duties*" and may need to maintain his paramedic grade.

75. Mrs Bertram recognised in her oral evidence that the fact that someone was unfit for a role as an on-the-road paramedic did not mean that they would be unfit for a role in custody. Plainly, she acknowledged, it would depend what it was about the on-the-road role that the individual could not do. Dr Halliday-Bell's report makes reference to Mr Gray's long-covid symptoms and the fact that these are aggravated by strenuous activity. It can reasonably be inferred that it is the strenuous nature of the on-the-road job which is unsuitable. The focus of the report, however, is on interpersonal concerns which have developed in the control room, something which was not a concern in the custody role.

76. We accept that the custody role was less strenuous than the on-the-road role. Although Mr Gray might have to rush through the custody suite to reach a casualty, the custody suite is one contained space. It is not the equivalent to having to run up flights of stairs, or across marshland, or onto a beach, nor make the return journey with a casualty. At most, the occupational health report and other records supplied should have raised a question mark with the respondent that this was something to be investigated. In the context of the custody role, they did not provide any answers.

77. The much stronger point, from the respondent's perspective, is that it didn't need to investigate further because of the comments Mr Gray himself had made in his email about the possible limitations on his ability to do CPR. Whilst we find that the respondent was right to be concerned about those, we still consider that further investigation would have been possible, and reasonable. In particular, the respondent could have explored with both its own occupational health provider and the ILS team whether it was realistically possible to test stamina in performing CPR and discussed further with Mr Gray the minimum required levels and reason for this, and whether he was prepared to undergo such an assessment. Combined with the lack of consultation, we find that the respondent's actions in relation to investigation were outside the band of reasonable responses.

Whether the respondent could reasonably be expected to wait any longer to dismiss?

78. It flows from what we have said about that a fair dismissal process would have taken some weeks, following from Mr Gray's email of 12 November, during which an investigation/consultation process could have been completed. It would have been reasonable for the respondent to wait those few additional weeks, particularly where there was no real cost to maintaining Mr Gray's on-going employment.

79. Beyond that, however, it is fair to say that this was a situation that had been going on for some months and it was appropriate, from the perspective of both parties, for it to be brought to an end. This is not a case where the claimant was awaiting surgery or some other medical intervention, nor where there was a suggestion that his medical position was likely to change in the short-to-medium-term.

Unfair dismissal - conclusion

80. For those reasons, Mr Gray is entitled to a finding that his dismissal was unfair.

Could Mr Gray have been fairly dismissed in any event?

81. Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344** the Tribunal may reduce the amount of compensation payable to the claimant if it is established that a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis.

82. We agreed with the parties at the start of the hearing that we would hear evidence, and submissions, on the issue of any **Polkey** reduction as part of the liability portion of the hearing. This is the usual way in which the Tribunal addresses this question, as the findings arise out of the same evidence as our liability findings.

83. Important guidance on approaching the question of an appropriate reduction (and compensation more generally) is found in **Software 2000 Ltd v Andrews [2007] ICR 825**. (We record that the **Andrews** decision reflects the short-lived statutory disciplinary and grievance procedures then in force, and those references must be set aside by Tribunals using the case to guide their decisions today). We considered that case as a whole, and in particular the guidance summarised at paragraph 54, which is not set out here in the interests of brevity.

84. We also bear in mind that in making an assessment, we must consider what *this* employer would have done (absent the unfairness we have found) and not what a hypothetical fair employer might have done (see **Hill v Governing Body of Great Tey Primary School [2013] ICR 691, EAT**).

85. For the reasons we have discussed, we find that the respondent could not have fairly dismissed Mr Gray on 24 November 2021 (nor in January 2022) without taking further steps in relation to his employment. Acting properly, there would have been meetings with Mr Gray, a referral to occupational health and, most likely, a request to attend another ILS course. We consider Mr Gray would have cooperated with those requests as he wanted to maintain this role and the evidence showed that he cooperated with similar processes at the Trust. Indeed, these are the sort of steps that Mr Gray was inviting the respondent to take in his own 12 November email. Mr Gray would have been entitled to be paid for the training. He may have been entitled to be paid for the other meetings. (We made no findings about that as we did not hear evidence and submissions on the point -see further below).

86. If the respondent had engaged properly with Mr Gray from the end of November, when Mr Downie attempted to send the termination email, the process may have taken until the end of January 2022. We find that the respondent would not have been obliged to offer, nor pay for, one shift per month in this period in circumstances where we have found that contractual requirement was in abeyance, by mutual consent.

87. We next had to consider the likelihood that Mr Gray would actually have made a substantive return to work at the end of that process. If he would not have done so, or if there is a material chance that he would not have done so, then the financial loss that he has suffered is limited, and his compensation must be limited accordingly.

88. Because the respondent has not done the investigation and consultation that it should have done, it was very hard for us to reach a decision on this point.

89. Before discussing the matters we took into account, it is important to note here one thing we have *not* taken account of. It was evident during the hearing that Mr Gray has experienced real cognitive difficulty in taking part in these proceedings. Mr Bayne suggests, in short, that we can read from that Mr Gray would also be unable to perform the custody role in any event. We decline to do so. The Tribunal process is very stressful, in a different way to the custody role. It is not unusual for people to struggle with it. There were no concerns raised about Mr Gray's performance whilst he was actually working in the custody role, although we accept that he had been absent for several months. There may or may not have been cognitive impairments which would have affected his performance had he returned after November 2021. Indeed, had the respondent commissioned an occupational health report it *may* have revealed other matters for concern, including cognitive impairment. But we simply do not have any evidence on which we can properly make findings that there would have been any difficulty with Mr Gray continuing in employment, other than those identified by the respondent at the time of termination.

90. The panel had considerable sympathy for Mr Gray's view that he could perform this role, notwithstanding his physical limitations. As we have said above, a cardiac event in a custody unit would be a rarity. It would be an 'all hands on deck' event. Not only would Mr Gray be able to share the physical CPR responsibility with other staff, and assume more of a leadership position, we accept would be best-practice for him to do so in line with Resuscitation Council guidance on rotating individuals in and out of performing CPR compressions to maintain effectiveness and avoid fatigue. In making those findings we are not suggesting (as Mrs Bartram seemed to think Mr Gray was suggesting) that officers and other staff in custody suites are sitting idle waiting to be called upon; far from it, we recognise they would be very busy with lots of competing demands on their time. But they would also, given the nature of their roles and training, be very willing and able to prioritise dealing with an emergency situation over other the demands on their time.

91. Set against that, we acknowledge that the respondent was entitled to be risk-adverse, and that it would be wrong for us to trespass on their genuine assessment of the risk they were prepared to take. Ultimately, given the critical nature of the role and the fact that an HPC such as Mr Gray would often be the only representative of the respondent onsite in the custody suite, we accept that the respondent was entitled to take the view that an employee had to be fit enough to perform CPR without assistance for an extended period of time. The importance of the capability to perform life

support, even if it is very rarely called upon, is evidence from the tender documents which we have referred to above. It is also, to some extent, a matter of common sense. Unfortunately for Mr Gray, we consider it extremely improbable that either an occupational health practitioner, or a ILS training provider, would ultimately have been prepared to certify his fitness to perform CPR for an extended period in the face of the extensive medical records of breathlessness and physical impairment arising from long covid, and given his own comments in the 12 November email. If the respondent has carried out the process which it ought to have done Mr Gray may well have felt considerably less aggrieved, but the ultimate outcome, in our conclusion, would almost certainly have been the same.

92. In those circumstances we considered making a high percentage reduction, to reflect a very low possibility that a proper investigation would have resulted in Mr Gray's return to work. We eventually concluded, however, that the possibility of the respondent reaching a different conclusion in the circumstances of this specific case was simply not realistic. Whilst we cannot say with absolute certainly that there was no chance whatsoever, any chance there was, was, in our judgement, theoretical only. For that reason, it is appropriate to make a 100% reduction in respect of any losses sustained after the initial period of investigation/consultation.

93. The discussion above sets out the primary rationale for our conclusion that a 100% reduction was appropriate. We also found that following matters further supported that conclusion:
    93.1 The fact that Mr Gray had been off work for a number of months prior to the termination email;
    93.2 The fact that Mr Gray never approached his GP to explore the possibility of the GP certifying him as fit to work, although this had been suggested to him by Mrs Jonak (albeit after termination); and
    93.3 The fact that Mr Gray did not take up the respondent's later offers to attend an ILS course (again, we acknowledge this was after termination).

94. We reached this conclusion without regard to the respondent's alternative argument that Mr Gray could have been fairly dismissed for gross misconduct on the basis that he did not disclose his 'unfitness' for work at an earlier date. We found this to be a somewhat circular argument as Mr Gray, of course, did not accept that he was unfit to work. Further, he had disclosed that he was unable to work as an operational paramedic in his February 2021 appraisal and the respondent had taken no action. In our view, Mr Gray was extremely frank in his email of 12 November (perhaps against his own better interests) and it was that frankness which prompted the respondent to act. In all those circumstances we feel it sits ill in the mouth of the respondent to now suggest that Mr Gray was guilty of gross misconduct.

95. The appropriate remedy for unfair dismissal, in view of the findings we have made, is discussed further below.

Wrongful dismissal claim

96. Mr Gray's contract was terminated with immediate effect. It follows on from the conclusions we have reached that he was wrongfully dismissed. He was entitled to one month's notice under the G4S contract. The compensation payable in respect of wrongful dismissal is discussed further below.

Disability discrimination claim

Disability status issue

97. The respondent accepts that Mr Gray was disabled at all relevant times by reason of a mental impairment (depression and anxiety), but not by reason of a physical impairment (long covid symptoms, in particular, breathlessness).

98. This is relevant because we have found that the dismissal was primarily connected to the physical impairment, rather than the mental one. There is a potential difficulty for Mr Gray in that, on the one hand, in order to amount to a disability his breathlessness has to be severe enough to have an impact (which is more than 'minor' or 'trivial') on his ability to carry out day-to-day activities. Rather than arguing that that is the case, however, most of Mr Gray's own evidence has been that the effects of his breathlessness are minimal, and that it is something which arises only when he is exerting himself (as it does for everyone to a greater or lesser degree, depending on our physical fitness). This evidence appears to the panel to be in conflict with the contemporaneous medical evidence, which is more suggestive of unusual breathlessness, of a level which might well amount to a disability.

99. In the end, we found it easier to determine the discrimination claims on the substantive merits of the claim, rather than on the question of disability status. For the reasons elaborated below, we are satisfied that even if Mr Gray was disabled by reason of a physical impairment at the material time, the respondent did not subject him to unlawful discrimination. In those circumstances, we found it unnecessary to make a final determination on the question of disability status.

Direct discrimination on grounds of disability

100. Section 13 EqA provides as follows:

> **A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

101. In determining whether a claimant has been treated "less favourably" the Tribunal must have regard to how an actual comparator was treated, or as to how a hypothetical comparator would have been treated. Under s.23(1) EqA the claimant can only rely upon comparators where there is '*no material difference between the circumstances relating to each case*'.

102. The House of Lords decision in **London Borough of Lewisham v Malcolm [2008] IRLR 700** established that, in a disability case, the material circumstances of the comparator must be the same as those of the claimant *including* those circumstances which arise as a result of the disability, or are otherwise connected to it.

103. Mr Gray's primary case has always been that he was discriminated against compared to the treatment received by Jill Murrell, who was not dismissed when she was unable to perform CPR.

104. We accept the submission of the respondent that Jill Murrell's circumstances were not materially the same. If there was any difficulty with her ability to perform CPR, this was not something the respondent was aware of.

105. It is not clear from the List of Issues whether Mr Gray was also taken to be relying on a hypothetical comparator, as an alternative to Ms Murrell. (Mr Gray was not able to grasp the point when the Judge attempted to discuss it with him.) Although the point is not addressed in Mr Bayne's submissions, we are satisfied that a hypothetical comparator, properly drawn, would be someone whom the respondent believed not to have employment status and whom the respondent believed was unfit to act an operational paramedic, and unfit to carry out CPR over a sustained period (for non-disability reasons). We are satisfied that such a comparator would have been treated in the same way as Mr Gray. For those reasons, the direct discrimination claim must fail.

Section 15 EqA claim – discrimination arising from disability

106. Section 15 EqA provides as follows:

> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

107. This test requires the following questions to be asked (See **Pnaiser v NHS England [2016] IRLR 170**):

107.1 Was there 'unfavourable treatment'?

107.2 What was the cause of, or reason for, the impugned treatment, in the mind of the alleged discriminator (what was 'the something', in the language of the Act)?

107.3 Objectively speaking, did that 'something' arise in consequence of the employee's disability?

108. The **Pnaiser** questions can be easily addressed in this case. It is not in dispute that the respondent dismissed Mr Gray and that that amounts to unfavourable treatment. The respondent accepted that the reason for the dismissal was its belief that Mr Gray would not safely be able to perform his role, and that that belief arose as a consequence of Mr Gray's physical and/or mental impairments.

109. The respondent also accepted that it knew of those impairments and, therefore, if the impairments amounted to a disability, then it had knowledge of that disability at all material times.

110. Putting aside the disability status point, the respondent therefore relies solely on the defence of justification. It is asserted, in terms of the statutory wording, that the dismissal was a proportionate means of achieving a legitimate aim.

111. The Tribunal must first identify whether the respondent was acting in pursuit of a legitimate aim. The aim relied on by the respondent is expressed as follows:
"ensuring that its bank staff engaged to work in custody suites were able to perform all clinical aspects of the role, thereby not endangering the health, safety and wellbeing of those in the care of its bank staff."

112. We have no hesitation in accepting that that is a legitimate aim.

113. Was dismissing Mr Gray a proportionate means of achieving that aim? Answering that question requires the Tribunal to engage in a balancing exercise – the discriminatory effect of the treatment on the employee must be weighed against the reasonable needs of the employer. The treatment must be both appropriate and conservative, in the sense that treatment will not be justified if a less discriminatory action could have achieved materially the same result.

114. There are a number of authorities relating to the interaction between the 'reasonableness' test for unfair dismissal and the 'proportionality' test for s.15 claims. Although the Court of Appeal in **O'Brien v Bolton St Catherine's Academy [2017] ICR 737** expressed doubts that "the two tests should lead to different results," this observation was made specifically in the context of dismissal for ill health absence. Although Mr Gray had been absent for a significant period by the time of his dismissal, we recognise that there is a distinction in that the justification for the dismissal was the respondent's concern that it was unable to safely permit him to perform his substantive role, rather than the absence itself.

115. We accept Mr Bayne's submissions that in considering the question of justification we must direct our attention to the outcome of the decision-making process (in this case, the decision to dismiss). An analysis of the process followed to reach the decision may play a part in that, but it is important not to lose sight of the fact that it is the decision itself which must be justified. (See **Department of Work and Pensions v Boyers 2002 EAT 76**, particularly paragraph 40, citing **Chief Constable of West Midlands v Harrod [2015] ICR 1311**.)

116. To the extent that the respondent relies on Mr Gray's mental impairment, and the conclusion expressed by Dr Halliday-Bell that he was unfit for a "patient-facing" role, the Tribunal does not accept that the respondent has established that dismissal was proportionate. The respondent had failed to establish exactly what it was about the requirements of a "patient-facing" role that Mr Gray was unfit for. Nor has it

established how his mental impairment presented any concern in relation to the health and safety of the people in his care. Both of those matters may have been established if the respondent had taken its own occupational health advice, specific to the custody suite role, but it did not. There is therefore simply no evidence to say that Mr Gray's dismissal contributed anything towards the legitimate aim so far as it was based on mental impairment and/or his supposed unfitness for patient-facing duties.

117. The issue around fitness to undertake CPR over a sustained period is different. Above, we have explained at length our conclusion that Mr Gray's dismissal was a virtual certainty had a fair process been undertaken, notwithstanding the serious criticisms we have made of the process actually undertaken by the respondent. Key to that conclusion is our view that it would be wrong for us, on the particular facts of this case, to attempt to usurp the view taken by the respondent's management team, and particularly its clinical leads, that the information Mr Gray had himself communicated about the limitations he might face in conducting CPR meant that his continued service was incompatible with the respondent's contractual obligations under the tender document, and its broader commitment to the people in its care, as expressed in the aim set out above.

118. We accept that the dismissal was a weighty matter for Mr Gray. Although this was a casual role, and although he had not actively worked for some months, Mr Gray did enjoy this role and found great value in it. At the time of the dismissal, he was experiencing problems with his mental health, and with his other employer, EAAS. In that context, the sudden dismissal from this role was a real blow.

119. Notwithstanding those findings, we accept that dismissing Mr Gray was the only way the respondent could achieve its legitimate aim. It was simply not possible for it to ignore the risk that Mr Gray's physical impairment presented. The likelihood that Mr Gray would be in a situation where he had to administer CPR for an extended period of time, and where there would be nobody available who could properly be asked to relieve him was very, very small. But the consequences for the respondent if that risk did materialise were potentially catastrophic, particularly where they had been "put on notice" that Mr Gray's long covid-related breathlessness could limit his ability to carry out CPR. It was the respondent's decision as to what level of risk was acceptable or unacceptable to them, and we cannot say that their response was disproportionate in the circumstances.

120. Mr Gray mentioned at certain points that if a proper process had been carried out then 'adjustments could have been considered'. If there were reasonable adjustments (within the meaning of s.20 and 21 EqA) which could have enabled Mr Gray to perform in the role, then that would be something we must take into account in conducting this balancing exercise. Mr Gray, however, was never able to suggest an adjustment which could address the respondent's legitimate concerns about CPR and nor can we think of anything which would have done so.

121. For those reasons, we find the s.15 claim must fail.

Harassment

122. Section 26 of the Equality Act 2010 provides (as relevant) as follows:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

123. We accept that in dismissing Mr Gray the respondent subjected him to unwanted conduct, and that that conduct was related to his disability.

124. We therefore must consider whether the test in s.26(1)(b) EqA, as set out above, is met.

125. In determining whether conduct has the effect of violating B's dignity or creating the relevant environment for the purposes of EqA 2010, s 26(1)(b) the Tribunal must take into account: B's perception; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect (EqA 2010, s 26(4)).

126. In the case of **Land Registry v Grant [2011] EWCA Civ** Elias LJ commented in relation to the words "intimidating, hostile, degrading, humiliating or offensive" that:

> ***"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."***

A similar point was made in paragraph 22 of the Judgment in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**.

127. This is not a case of a minor slight, name-calling or 'banter'. As we have said, the dismissal was a serious matter which caused great upset to Mr Gray.

128. In our view, however, there is a qualitative distinction between an action which will cause upset because of its substance and conduct with the purpose or effect proscribed by this section. We are satisfied that the respondent's purpose was purely to effect the dismissal, which it considered necessary in view of all the matters set out above. Mr Gray was entitled to disagree with that decision, and to be upset by it. In our judgment he was not entitled to see it (if indeed he did) as being a decision which either violated his dignity or created the sort of environment described. Whilst the process was poor, the letter terminating his employment was professional and courteous, as were all his engagement with the respondent's staff. (Mrs Jonak, in particular, appears to have taken trouble to try to support him.) There is nothing here that can properly attract the label of 'harassment'.

129. For those reasons the harassment claim fails.

Part-time worker discrimination claim

130. Regulation 5 Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 contains the following provisions:

> **5.**
>
> **1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—**
>
> **(a) as regards the terms of his contract; or**
> **(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.**
>
> **2) The right conferred by paragraph (1) applies only if—**
>
> **(a) the treatment is on the ground that the worker is a part-time worker, and**
> **(b) the treatment is not justified on objective grounds.**
> **…**

131. A 'comparable full-time worker' is defined at regulation 2, and must meet a number of criteria. In particular:

131.1 They must be 'identifiable as a full-time worker' 'having regard to the custom and practice of the employer' (regulation 2(1)); and

131.2 'at the time when the treatment alleged to be less favourable takes place', they must be 'employed by the worker's employer under the same type of contract' (regulation 2(4)); where 'employees' and 'workers' are employed under different types of contact (regulation 2(3)).

132. Mr Gray again relies on Ms Murrell as his comparator. The way in which the Regulations are drafted make it clear that we must look at the contractual status of Ms Murrell and Mr Gray at the time of the less favourable treatment of Mr Gray – in this case his dismissal. It does not permit a comparison between the way Ms Murrell was treated at the time of her accident in 2019 and the way Mr Gray was treated in late 2021/early 2022.

133. At the time of Mr Gray's dismissal (and for the period between his email of 12 November and the dismissal) Ms Murrell was also on a flexible bank worker contract. In those circumstances, we accept the respondent's submission that she was not a full-time worker.

134. In any event, we also accept the respondent's submission that the reason for the difference in treatment was that the respondent did not believe Mr Gray could perform his role with adjustments, and did believe that Ms Murrell could perform her role with adjustments.

135. We have sympathy with Mr Gray in bringing this claim as we agree with him that if he had a been a salaried member of staff, with fixed contracted hours, rather than a member of bank staff, it is very likely that the respondent would have followed a process in relation to his dismissal, including obtaining its own occupational health reports. Although that is a

difference in treatment arising out of contractual status, it is not one which fits within the technical constraints of the Part-Time Worker Regulations.

Remedy

136. At the conclusion of the hearing we were able to announce our decisions in respect of the above matters to the parties, and provide verbal reasons for those decisions. We invited Mr Bayne and Mr Gray to reach agreement as to the compensation which would properly be due in light of those findings, failing which we would hear further evidence and submissions about that. Mr Bayne and Mr Gray were able to reach agreement on the appropriate figures, which we then incorporated into the short Judgment which was sent to the parties on 25 March 2024.

Employment Judge Dunlop
Date: 8 May 2024

WRITTEN REASONS SENT TO THE PARTIES ON

14 May 2024

FOR EMPLOYMENT TRIBUNALS

Mr R Gray v HCRG Medical Services Ltd
List of issues

1. Employment status

1.1 Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

It is accepted that the claimant an employee of the respondent within the meaning of section 83 of the Equality Act 2010 and a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996.

2. Time limits

2.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 25 November 2021 may not have been brought in time.

2.2 Were the discrimination complaints made within the time limits in section 123 of the Equality Act 2010 and Regulation 8 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000? The Tribunal will decide:

- 2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
- 2.2.2 If not, was there conduct extending over a period?
- 2.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- 2.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
- 2.2.5 Why were the complaints not made to the Tribunal in time?
- 2.2.6 In any event, is it just and equitable in all the circumstances to extend time?

2.3 Were the unfair dismissal / wrongful dismissal complaints made within the time limits in section 111 of the Employment Rights Act 1996 / Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994? The Tribunal will decide:

- 2.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?
- 2.3.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
- 2.3.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

3. Unfair dismissal

3.1 If the claimant was an employee within the meaning of section 230 of the Employment Rights Act 1996, what was the effective date of termination?

3.2 What was the reason or principal reason for dismissal? Was it a potentially fair reason? The respondent says the reason was capability (absence) or some other substantial reason.

3.3 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

- 3.3.1 The respondent genuinely believed the claimant was no longer capable of performing his duties;
- 3.3.2 The respondent adequately consulted the claimant;
- 3.3.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
- 3.3.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
- 3.3.5 Dismissal was within the range of reasonable responses.

3.4 In the alternative, the respondent says the reason was some other substantial reason capable of justifying dismissal, namely the claimant was unable to perform all clinical aspects of the role, as a result, continuing to employ the claimant would pose an unacceptable risk to life and limb of people within his care.

3.5 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

4. **Remedy for unfair dismissal**

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

- 4.1.1 What financial losses has the dismissal caused the claimant?
- 4.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 4.1.3 If not, for what period of loss should the claimant be compensated?
- 4.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 4.1.5 If so, should the claimant's compensation be reduced? By how much?
- 4.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 4.1.7 Did the respondent or the claimant unreasonably fail to comply with it?
- 4.1.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 4.1.9 Does the statutory cap apply?

4.2 What basic award is payable to the claimant, if any?

5. **Wrongful dismissal / Notice pay**

5.1 Did the claimant's terms and conditions with G4S transfer to the respondent under a transfer of undertakings?

5.2 What was the claimant's notice period under his contract with the respondent?

5.3 Was the claimant paid for that notice period?

6. **Disability**

6.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

6.1.1 Did he have a physical or mental impairment: (The impairments relied on are Long Covid, depression and anxiety?)

6.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

6.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

6.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

6.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
Did they last at least 12 months, or were they likely to last at least 12 months?
If not, were they likely to recur?

7. **Direct disability discrimination (Equality Act 2010 section 13)**

7.1 Did the respondent do the following things:

7.1.1 Dismissed the claimant

7.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says he was treated worse than Jill Murrell.

7.3 If so, was it because of disability?

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

8.1 Did the respondent treat the claimant unfavourably by:

8.1.1 Dismissing the claimant.

8.2 Did [the dismissal] arise in consequence of the claimant's disability?

8.3 Was the unfavourable treatment because of that?

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

8.4.1 ensuring that its bank staff engaged to work in custody suites were able to perform all clinical aspects of the role, thereby not endangering the health, safety and wellbeing of those in the care of its bank staff.

8.5 The Tribunal will decide in particular:

8.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

8.5.2 could something less discriminatory have been done instead; the claimant says had they undertaken a risk assessment or occupational health review they would have known he could have performed his role with adjustments.

8.5.3 how should the needs of the claimant and the respondent be balanced?

8.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

9. Harassment related to disability (Equality Act 2010 section 26)

9.1 Did the respondent do the following things:

9.1.1 Dismissed the claimant

9.2 If so, was that unwanted conduct?

9.3 Did it relate to disability?

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

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

10. Remedy for discrimination

10.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

10.2 What financial losses has the discrimination caused the claimant?

10.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

10.4 If not, for what period of loss should the claimant be compensated?

10.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

10.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

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

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

10.9 Did the respondent or the claimant unreasonably fail to comply with it?

10.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

10.11 By what proportion, up to 25%?

10.12 Should interest be awarded? How much?

11. Part-time worker discrimination

11.1 Did the respondent do the following things:
11.1.1 Dismissed the claimant

11.2 Was that less favourable treatment than a comparable full-time worker?
The claimant says he was treated worse than Jill Murrell.

11.3 If so, was it because the claimant was a part-time worker?

11.4 If so, was the treatment justified on objective grounds?

11.5 If so, how much should the claimant be awarded?