EMPLOYMENT TRIBUNALS

Claimant:	**Mr Paul Winfield**
Respondent:	**East Midlands Ambulance Service NHS Trust**
Heard at:	**Nottingham**
Heard on:	**3-11 June 2024**
Before:	**Employment Judge Victoria Butler**
Members:	**Ms J Hallam** **Mr C Goldson**
Appearances:	
Claimant:	**In person**
Respondent:	**Mr C Baran, Counsel**

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is:

1. The claim of whistleblowing detriment fails and is dismissed.
2. The claim of automatically unfair dismissal fails and is dismissed.
3. The claim of unfair dismissal fails and is dismissed.
4. The claim of failure to make reasonable adjustments fails and is dismissed.
5. The claim of unauthorised deductions from wages fails and is dismissed.

Background

1. The Claimant presented his claim to the Employment Tribunal on 22 September

2022 following a period of Early Conciliation between 1 August 2022 and 23 August 2022.

2. He was employed by the Respondent as a Paramedic until his dismissal by reason of capability with effect from 23 June 2022 and brings the following claims: unfair dismissal: whistleblowing detriments: automatically unfair dismissal: failure to make reasonable adjustments; and unauthorised deduction of wages.

The issues

3. The parties agreed the following issues for determination:

Disability

4. Does the Claimant's alleged autism qualify as a disability for the purposes of section 6 of the EqA 2010?

Protected Disclosures

5. The Claimant claims he made the following protected disclosures:

   5.1. **Protected Disclosure 1 –** The Claimant raised a formal grievance in writing on 18 January 2021 to the Respondent's Freedom to Speak up Guardian, Roger Watson.

   5.2. **Protected Disclosure 2** – The Claimant raised concerns with the Respondent's non-Executive Director, Vijay Sharma on 18 November 2020.

6. In respect of each alleged protected disclosure, did the events as described above occur?

7. If so, in respect of each alleged protected disclosure, was there a *"disclosure of information"* which conveyed facts? The Claimant asserts that these communications conveyed facts about the *"toxic behaviours including disability discrimination within the organisation"* and *"the Claimant's skill erosion and the Respondent's evading to have a return to work meeting with the Claimant in order to discuss, develop and agree his return to work".*

8. Did the Claimant believe that the information disclosed tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject?

9. Was that belief reasonably held?

10. Were the disclosures in the public interest? The Claimant says that they were in the public interest so that the Respondent as a public sector organisation could better identify and deal with wrongdoing.

11. Was it a qualifying disclosure?

Unfair Dismissal

12. What was the reason, or if more than one, the principal reason, for the Claimant's dismissal?

    12.1. Was it because he made one or both of the disclosures at para 5? If so, was the dismissal automatically unfair?

    12.2. Was it, as the Respondent says, for a potentially fair reason? The Respondent relies on the potentially fair reason of capability.

13. Was dismissal within the range of reasonable responses open to the Respondent?

14. Did the Respondent follow a fair procedure?

Whistleblowing detriments on the grounds that the Claimant has made a protected disclosure – Section 47B ERA.

15. The Claimant withdrew detriment two at the hearing.

16. The Claimant claims he was subjected to the following detriment: On 1 April 2021, the Claimant received an email from the Deputy Director of HR, Tina Richardson, notifying that his access to training was being put "on hold" due to him having raised a grievance about discrimination and harassment.

17. Did the above act occur?

18. If so, did it amount to a detriment?

19. If so, was it done on the ground that the Claimant made one of the alleged protected disclosures set out above?

Failure to make reasonable adjustments – Section 20/21 EqA 2010

20. Did the Respondent apply a provision, criterion or practice? The Claimant states this was as follows:

    20.1. Only allowing companions to be 18 years old and above:

    20.2. No provision of a confidential/private space (during the July 2022 appeal):

    20.3. Allowing the notetaker to be present at the appeal hearing via Zoom; and

    20.4. Members of staff who had previous involvement in a disciplinary or grievance process can be present in an appeal.

21. If so, did the PCP(s) put the Claimant at a substantial disadvantage in comparison

with persons who are not disabled contrary to section 20(3) EqA 2010? The Claimant states that the substantial disadvantage was:

21.1. Autism – feelings of overwhelm and inability to calm down not well managed; and

21.2. Anxiety and depression – feelings of paranoia and low mood.

21.3. The Claimant was unable to conduct nor represent himself appropriately, professionally and adequately during the July 2022 appeal.

22. Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at a disadvantage by the PCP?

23. Did the Respondent take such steps as reasonable to avoid any such disadvantage? The steps the Claimant alleges should have been taken are:

23.1. Permitting the Claimant's daughter to attend his appeal hearing as his emotional support:

23.2. Providing the Claimant with a breakout/comfort room during the appeal hearing:

23.3. Arranging for a notetaker to attend the appeal hearing in person:

23.4. Arranging for Christine Robinson to attend the appeal hearing in person; and

23.5. Excluding Gemma Wheldon from the Appeal Hearing panel.

24. If so, would it have been reasonable for the Respondent to have taken those steps at any relevant time?

25. The relevant time period is between 20 June 2022 and 7 July 2022.

26. Did the Respondent fail to take those reasonable steps at the relevant time?

Unlawful deductions of wages – section 13 ERA 1996

27. The Claimant alleges that he was owed full pay between the period May 2020 and 23 June 2022, however his pay was reduced to either nil or half pay due to being placed on sick leave. He alleges that this deduction totals £19,600.

28. Was the Claimant owed this money during the above time period? And if so, did the Respondent unlawfully deduct this money from the Claimant's wages as alleged?

Jurisdiction

29. Whether the complaint was presented to the Tribunal before the end of the period

of 3 months beginning when the acts complained of was done as required by section 123(1)(a) EqA 2010; and, if not,

30. Whether the Tribunal should consider the complaint on the ground that it is just and equitable in all the circumstances to do so pursuant to Section 123(1)(b) EqA 2010.

The hearing

31. The Claimant emailed the Tribunal on 29 May 2024 requesting adjustments as follows: clear explanations, concise and specific instructions, structure, feedback, avoiding sensory distractions and providing reassurance in stressful situations. These were all easily accommodated as necessary.

32. Prior to the hearing, the parties prepared various bundles of documents (including a disputed bundle), written witness statements and an agreed list of issues. During the hearing, we asked the Respondent to draft a chronology which was provided to us prior to our deliberations.

The evidence

33. We heard evidence from the Claimant and found it inconsistent at times and he refused to make concessions where appropriate. By way of example, he was adamant that he had never seen a return-to-work plan and could not return to work until one was put before him. However, a comprehensive plan is set out in a letter dated 20 October 2020 at page 815. Given his familiarity with the remainder of the documents, we did not find his evidence credible that he had not read it to date. Further plans are described in letters dated 2 March 2022 and 10 March 2022. Accordingly, where there was a conflict of evidence, we preferred that of the Respondent's witnesses.

34. For the Respondent we heard evidence from the following:

- Ms Annette McKenzie - Service Delivery Manager at the time
- Ben Holdaway – Director of Operations
- Roger Watson – Deputy Director of Quality Improvement and Patient Safety and a Freedom to Speak up Guardian.
- Mr Simon Tomlinson – Assistant Director of Operations
- Tina Richardson – Deputy Director of Human Resources and MD.

35. We found all the Respondent's witnesses to be entirely credible and their oral evidence was consistent with the contemporaneous documents where they existed.

The facts

36. We made our findings of facts based on the material and evidence before us. Where there was any conflict, we resolved it on the balance of probabilities.

37. We have confined our facts to those relevant to the issues we were required to determine.

The Respondent

38. The Respondent is an NHS Trust which provides emergency 999 care and telephone clinical assessment services across the East Midlands Area.

39. It has comprehensive policies and procedures including an Attendance and Well Being Policy and Procedure (pages 421 – 477). In respect of termination of employment, it provides:

> *"Termination of Employment*
>
> *If all the options within this policy have been considered, including sections 14 – 16, and the employee is considered permanently unfit or unable to carry out their substantive role for the foreseeable future, it may be necessary to end the contract of employment on the grounds of capability due to ill health. ……..."*

40. The policy also has provision for medical stand down which provides:

> "……*Medical Stand* down could be considered *as an authorised absence, on full pay, pending a referral to Occupational Health.*
>
> *Medical Stand down will only be necessary where the decision has been made to release an employee from the workplace on a temporary basis as opposed to them determining themselves that they are unfit for work. These cases are rare, and decisions to suspend will only be made where there is genuine concern for the well-being of staff and that by remaining at work their well-being could be aggravated by the working environment."*

The Claimant

41. The Claimant commenced employment on 29 April 2002. In 2008, he qualified and was registered as a Paramedic and held this role until his dismissal. He was initially based within the Derbyshire Division.

The disciplinary proceedings 2019

42. In or around February/March 2019, a colleague of the Claimant alleged that he had made offensive comments about her weight/size. On 28 March 2019, the Claimant was suspended on full pay pending an investigation. He was also referred to the Respondent's regulatory body, the Health and Care Professionals Counsel ("HCPC").

43. On 3 April 2019, the Claimant had a consultation with Psychological Services. The subsequent report confirmed that despite having symptoms of moderate to severe levels of anxiety and depression, he was fit for work (pages 734-735).

44. The Claimant attended an occupational health ("OH") appointment on 10 April 2019 at which the clinician confirmed that he was not fit for work. He was advised to self-refer to PAM Assist for counselling support and guidance (page 736).

45. The Claimant attended a disciplinary hearing on 26 June 2019 chaired by Paul Litherland, Ambulance Operations Manager. The allegation against the Claimant was: *"It is alleged that you acted in an inappropriate and unprofessional manner towards a colleague and demonstrated behaviours not in line with Trust Values".*

46. The outcome of the hearing was that the Claimant was summarily dismissed with effect from 3 July 2019 (page 1088).

47. On 20 July 2019, the Claimant appealed the decision (pages 1096 – 1097). An appeal hearing took place on 11 September 2019 chaired by Richard Lyne, General Manager for Leicestershire and Northamptonshire. The outcome of the appeal was that the allegations against the Claimant were upheld, however:

> *"The Appeal Panel whilst recognising the seriousness of the allegation and your actions have decided to revoke the original decision to terminate your contract of employment with effect from 3 July 2019. Instead, the Appeal Panel have decided to issue you with action short of dismissal, which will include the issuing of a Final Written Warning which will remain live for a period of 52 weeks from 3 July 2019 and held on you personnel file and a move from the Derbyshire Division to the Nottinghamshire Division, specifically to the "Amber" rota at Kingsmill Ambulance Station."* (pages 1120-1123).

48. As such, the Claimant was reinstated but was not permitted to return to Derbyshire.

49. On 31 October 2019, the Claimant was referred to Occupational Health the outcome of which was that he '*remains unsuitable for work at present and this is likely to remain pending suitable treatment ……"* (page 738). Given that the Claimant was unfit to work, he was advised to get a Med 3 to cover his absence so it was authorised and to ensure he would receive his entitlement to sick pay. He asked Ms Sally-Anne Else, Clinical Operations Manager and friend what he should ask the GP to cite on the Med 3 and she replied: *"Just get him to put work related anxiety as that is what occ health said*" (page 1444).

50. On 4 November 2019, the Claimant submitted a Med 3 citing work-related anxiety (page 13 bundle B) and commenced a period of sickness absence from which he never returned.

Events up to the Claimant's dismissal

The first welfare meeting

51. On 7 January 2020, the Claimant attended a welfare meeting chaired by Ms Annette McKenzie, Service Delivery Manager, to confirm the outcome of the appeal and how best to support him return to work. The Claimant was accompanied by Ms Ellse.

52. During the meeting the Claimant raised his concerns more generally about the disciplinary process and relocating to Nottinghamshire. At one point he said he did not think he would ever be able to return to work because he did not trust the Respondent. Ms McKenzie took the time to listen to the Claimant's concerns and confirmed that he would have a second welfare meeting on 20 January 2022 to discuss his unresolved questions from the appeal outcome letter. She followed the meeting with a comprehensive letter outlining their discussions (pages 770-773).

The second welfare meeting

53. The Claimant attended the second welfare meeting on 20 January 2020, chaired by Peter Ripley, Associate Director of Operations. Following the meeting, Mr Ripley sent a letter confirming their discussions. Within it, he recorded that the Claimant had explained that he was not well and did not think that Mr Ripley could assist him. Mr Ripley had asked the Claimant what he wanted from the Respondent to which he replied he: *"did not know, you did not trust EMAS and had lost your faith"* (pages 775-776).

The third welfare meeting

54. On 5 February 2020, the Claimant attended a third welfare meeting with Ms McKenzie to review his ongoing health situation and whether the Respondent could provide any additional support. During the meeting, the Claimant had said that he did not know if he could return to work as it was making him ill. He also said he did not know if he could be a Paramedic anymore and felt that the Respondent had '*wrecked*' his career, nor was he sure he would consider an alternative role. Again, Ms McKenzie followed the meeting with a comprehensive letter detailing their conversations (pages 777-780).

55. On 9 March 2020, the Claimant attended a further Occupational Health consultation. The clinician's opinion was that the Claimant was still suffering with *"severe anxiety and moderately severe depression…… In my opinion these work related management concerns are preventing Paul from returning to work therefore a timely resolution in this regard is advised".* (pages 741-742).

The fourth welfare meeting

56. On 18 March 2020, the Claimant attended a fourth welfare meeting chaired by Ms McKenzie. During the meeting, the Claimant confirmed that he would not return to the Nottinghamshire Division. Ms McKenzie recorded in her subsequent letter that:

"You then said you didn't want to go back to [Nottinghamshire], but you refused to be moved as part of a sanction and would only do it because it was your choice, although you did acknowledge it would be hard to see some people if you return to Derbyshire".

57. Ms McKenzie advised the Claimant that if he would not consider the options offered to assist his return to work in Nottinghamshire then she saw no other option than to arrange a Formal Case Review (page 782-787).

The fifth welfare meeting

58. On 29 April 2020, the Claimant attended a fifth welfare meeting with Ms McKenzie. Ms McKenzie confirmed that there was still an ongoing investigation by HCPC, and she reiterated the options she had given previously to support him return to work as follows:

- *Working with us to agree the supportive plan to phase you back into work with the long term aim of returning you to your operational role.*
- *Undertake any mandatory updates such as E-Learning modules and clinical updates at an appropriate and agreed time.*
- *Consider working in an alternative role outside of frontline operational work for an agreed period to support you back to work in some capacity initially. I am happy for you to put forward suggestions for areas you would like and be happy to work within for consideration by myself.*
- *An alternative area of operations that you would like to return to, excluding Derbyshire Division. This can be an area of your choice.*
- *As a supportive measure you could be added to the EMAS Redeployment Register for an agreed period. If you were to be placed on the Redeployment Register you would receive copies of all EMAS internal and external vacancies via email and receive a priority interview for any suitable vacancies that you apply for, where you have the relevant skills and experience to roles at Band 6. You may also be considered for Band 7 roles via the redeployment process, where you meet the required essential skills and criteria.*
- *Should you still feel that there are no options which would assist you back to work then I would ask if you have considered ill health retirement if you have more than 2 years pensionable service, we are happy to talk you through this process should you feel this is a possible option for consideration. (Pages 789-793).*

59. On 5 May 2020, the Claimant made an injury allowance application (Pages 750-754). His entitlement to sick pay was also reduced to half pay in accordance with the NHS sick pay terms.

60. On 6 May 2020, the Claimant was discharged from the Respondent's Psychological Services albeit considered still psychologically unfit for duties *"due to the ongoing work related issues"* (pages 743-746).

The sixth welfare meeting

61. On 14 May 2020, the Claimant attended a sixth welfare meeting chaired by Ms McKenzie. During the meeting, the Claimant confirmed he wished to discuss an exit from the Respondent. Ms McKenzie confirmed within her subsequent letter:

> *"I reassured you that we had a genuine wish to support you back to work, whether that is an operational or alternative role, however you reiterated your wish to discuss an exit from EMAS as you felt this was currently the best option for you, taking into account your current situation and also your health. You advised us that this suggestion was also supported by David Edwards, PAM Assist Counsellor whom you have been attending sessions with over the last few months. Prior to the closure of the meeting I asked you to think about the way forward and Sally also agreed to have further discussions with you around this suggestion as we all agree that this was something that required thought from your perspective and must not be a decision taken in haste. I must again reiterate that there are other options we are willing to consider, however, I appreciate that you feel there is no longer any trust between yourself and EMAS despite my best efforts to support you back to work with a new start in Nottinghamshire Division"* (pages 794-797).

62. On 31 May 2020, the Claimant's application for injury allowance was rejected because it is not payable if sickness absence is a result of disputes relating to employment matters (pages 755-756).

The seventh welfare meeting

63. On 19 August 2020, the Claimant attended a seventh welfare meeting chaired by Ms McKenzie. Again, the Claimant confirmed that he could not consider returning to the Nottinghamshire Division.

64. During the meeting, the Claimant enquired about a return to work in non-frontline duties, and Ms McKenzie confirmed that she would submit an Occupational Health referral, identify potential alternative roles if a return to work in some capacity was possible and would add him to the Redeployment Register. She also confirmed that if there was no likelihood of him returning to his contractual role within the foreseeable future, the Respondent would formerly put him on the permanent Redeployment Register. If he did not want to accept alternative duties, then he would progress to a formal case review and one possible outcome could be the termination of his employment. In her subsequent letter, Ms McKenzie outlined the following:

> *"I discussed that over several months we have offered you several options*

other than frontline, to support you back to work including, alternative duties, catch up days, e-learning etc. You said that you found it difficult to accept the sanction and therefore can't consider alternative duties in Nottinghamshire division as you felt that would be accepting the sanction and you did not accept this……..." (pages 803-808).

65. On 17 September 2020, the Claimant attended a further OH consultation. The reviewing clinician confirmed that *"Paul is fit to return to alternative duties to enable him to get back into the work environment given that he has been off work for such a long time. A return to work is likely at the end of this current sick note…"* (pages 745-746).

The eighth welfare meeting

66. On 28 October 2020, the Claimant attended an eighth welfare meeting chaired by Ms McKenzie. Within the meeting, Ms McKenzie reviewed the Claimant's most recent OH report confirming that he was fit to begin alternative duties for a period prior to a phased return. He responded: *"If that's what it says"*. The Claimant also said he felt that placing him on the Redeployment Register was just a way to get rid of him hence he emailed her asking to be taken off it. He remained adamant that he would not return to work at Nottinghamshire because he could not accept it as a sanction. Ms McKenzie confirmed that if he was not going to return to Nottinghamshire, the Respondent could not support him.

67. In her subsequent letter, Ms McKenzie also set out a very comprehensive return-to-work plan over a period of three weeks for the Claimant to consider. The plan predominantly allowed time for him to set up his IT equipment and update his training rather than return to duties (pages 810-816).

68. Thereafter, the Claimant confirmed that he did not want to attend any more welfare meetings.

69. Given that the Claimant's entitlement to sick pay was due to expire, Ms Tina Richardson, Deputy Director of Human Resources and OD felt it was appropriate to exercise the discretion allowed by the Standard NHS Terms and Conditions of Service Handbook to extend the Claimant's sick pay to receive full pay with effect from 4 November 2020 (page 866).

70. On 18 November 2020, Ms McKenzie contacted Ms Richardson to request more CBT sessions for the Claimant. She was happy to authorise a further six sessions despite the Respondent's funding usually being limited to four – six. Ultimately, the Respondent funded at least fifteen sessions for him (para 13 Ms Richardson's statement).

The Claimant's e-mails to Mr Watson

71. In November 2020, the Claimant had raised several concerns via his Freedom to

Speak up Guardian, Roger Watson.

72. On 18 January 2021, the Claimant e-mailed Roger Watson raising a grievance as follows (pages 91 – 93):

> *"I am really disappointed that Danielle chose not to call me on Friday. She could have called to explain things herself instead of passing it on to Sal. Some of the main points. This list is not* ***TO BE SEEN AS EXHAUSTIVE****. Everything can and will be evidenced. I feel this is a good place to start.*
>
> - *Deliberate indifference by clear breaches of EMAS Policy and Procedures when acting as Commissioning Officer and allowing a flawed investigation process for my disciplinary.*
> - *Acting with malevolence in ignoring the potential impact his actions would have on my family unit which was already under huge amounts of stress.*
> - *Wilful negligence in regard to my known/recorded/pre-existing mental health problems including the fact that two of my family members have committed suicide.*
> - *Wilful negligence in regard to my partners mental health – he was made aware by Adrian Brown at a Welfare Meeting in December 18 that she was having suicidal ideations and expressed a wish to kill herself to her GP.*
> - *Blatant victimisation based on clear bias the fact that I had walked out of a "return to work" meeting on 4 October 2018 in disgust following my assault. Meeting attended by Brady Price as Ian Cross's support. This is less than 6 months prior to my suspension on 28 March 2019.*
> - *Blatant disregard for the content of statements when deciding if my case should/should not go to panel*
> - *Failing to protect me from victimisation – Stephen McQuirk aka Space McQuirk states he was aware of my disability however continued with unwelcoming threatening/provocation on 21 March – bulk – abusive Social Media posts (reported to management but post continued) – nonfactual, inaccurate Statement – Drug use (self-confessed).*
> - *Blatant disregard for HCPC standards.*
>
> *Roger you understand I am having a tough time at present".*

73. The Claimant sent a further email at 12.11pm as follows:

> *"These may become sporadic as things come to my mind, sorry*
>
> - *Failure to enter into mediation without just cause.*

- *Refer to EMAS Training 2017 re importance of mediation, EMAS dignity and respect DR policy, HCPC and ACAS recommend mediation as a form of "alternative dispute resolution".*

- *Continual, massive impact on my mental wellbeing requiring ongoing pharmacological and therapeutic treatments. I have input from GP, Occupational Health, PAM Assist, Able Futures, a support manager etc.*

- *Catastrophic collapse of my family unit, heavily influenced by Ian Cross's decisions.*

- *Continual impact on my 16 year old daughter who begins her counselling today. Counselling to help her understand why her mother left us.*

You know others are to follow.

Chris Klus – blatant discrimination (criminal offence).

Tim Slater – blatant bias and breach of policy and procedures.

Richard Henderson – withholding pay (criminal offence) and liable (he has his name above the door).

Stephen McQuirk – blatant discrimination, slander, abuse, threats and approaching my daughter for information.

Natalie Morton – malicious allegations.

***This needs to stop. Everyone is trying to hide from this. Burying hands in sand will not fix this!**"*.

74. The Claimant's concerns were sent to Ms Richardson the same day who acknowledged that he wanted his concerns treating as a grievance (page 1200). Given the nature of the Claimant's concerns, Ms Richardson considered it would be appropriate to appoint an independent investigator to review them and determine those which had already been addressed via internal procedures (e.g., the disciplinary process) and then make recommendations about how the Respondent could resolve the remainder. Ms Richardson set out her proposal in detail, including each and every concern raised by the Claimant, in an e-mail dated 28 January 20221 (pages 1232 – 1235).

75. On 26 February 2021, the Claimant attended a further OH review at which the reviewing physician confirmed that the Claimant was suitable for alternative duties, albeit would require skills updates, and he would like to remain in Derbyshire (Pages 747-749).

76. On 1 March 2021 the Claimant emailed the Respondent's Training Department about receiving refresher training (pages 1269-1275).

77. On 4 March 2021, Ms Richardson emailed the Claimant confirming that she would arrange a meeting with the independent investigator and, once that had happened, she would make more detailed arrangements in relation to training, a return to work and associated time scales (page 1278).

78. Ultimately, the Claimant declined to engage with the investigation process despite it being a means to have his complaints/grievances reviewed independently and impartially.

79. On 5 May 2021, the Claimant messaged Ms Ellse with a screenshot about autism with the comment *"Looks familiar!"* but made no reference to himself personally. Indeed, at no point did the Claimant did the Claimant disclose to the Respondent that he was autistic because he did not know himself.

80. In June 2021, the Claimant's sick pay reduced to half pay.

81. The Claimant's HCPT final hearing took place over 21-29 June 2021. The outcome was that the Claimant's conduct had amounted to a serious departure from the standards of conduct properly expected of a Paramedic and he was subject to a 12-month Order with conditions, one of which being that he could not work with or be based at the same station as five colleagues based in Derbyshire (pages 832-865).

82. On 8 October 2021, the Claimant had attended a further OH consultation by telephone. The report confirmed the following:

> *"……From a medical point of view, based on my assessment today, Mr Winfield is fit and well. He is on medication, but he does not suffer from symptoms which would prevent a return to work. ……..Although there is some level of uncertainty regarding possible stress-related symptoms, if he returns to work, based on my assessment today, I see no medical reason, why he should not be able to attempt to return to work with the appropriate support……."* (page 44 bundle B)

83. However, the Claimant refused consent for the report to be released to the Respondent.

84. On 21 September 2021, the Claimant e-mailed Ms Else as follows:

> *"As I have not heard from EMAS re a Return to Work plan, I will consider that one has not been arranged.*
>
> *I had a recent telephone conversation with ACAS who confirmed that, after a period of long term sickness, it would not be unreasonable to expect that a return to work plan be agreed prior to returning. In fact it was explained to me that without a plan it would simply be 'unsafe' to return. My GP has been stating "not fit for duty" as the other four options would need to be considered as part of my return to work plan. Therefore I have no choice but to submit a*

further Med 3 and will be forced to continue this process until a return to work plan is agreed.

My Med 3 does not prevent me from returning to work before the end of the stated period.

……..

My continued absence is not due to ill health, rather a failure of EMAS to provide a route back into the workplace" (pages 1297 – 1398).

The Claimant's dismissal

85. On 14 October 2021, the Claimant attended a Formal Case Review chaired by Simon Tomlinson, Director of Operations. The Claimant was accompanied by Ms Ellse.

86. At the meeting, the Claimant confirmed that: he had not given consent for the most recent OH report to be released to the Respondent: he had been fit to return to work for some time and could return once a return plan was put before him and agreed: he would not agree a return-to-work plan if it was to Nottinghamshire; and, he denied seeing the return to work plan in Ms McKenzie's letter dated 28 October 2021. The Claimant then received a message on his phone and left the meeting leaving his epaulettes on the table (pages 905-911).

87. On 9 February 2022, Ms Ricardson confirmed to the Claimant in writing that his entitlement to sick pay would cease with effect from 28 February 2022:

"……. You have been absent from work since 5 November 2019 and your entitlement to full pay ceased on 5 May 2020. You received half pay from 6 May 2020 and this should have reduced to nil pay on 4 November 2020. However, with a view to supporting you and facilitating a return to work, I exercised discretion in accordance with s14 of the Agenda for Change terms and conditions and reinstated your full pay with effect from 4 November 2020. This continued until 26 June 2021, when your pay reduced to half pay. While you have not been contractually entitled to any pay since November 2020, the Trust has continued to pay you full or half pay. While the intention was to continue half pay until the Final Case Review meeting, which took place on 14 October 2021, half pay has continued beyond that while an alternative solution was continued considered and to support you following your recent bereavement.

However, the Trust must exercise its discretion in a fair and equitable way and it is not appropriate to continue paying you significantly beyond your contractual entitlements, when there appears to be no prospect of a return to work and no other grounds to extend pay. Therefore, your period pay will cease with effect from 28 February 2022.

> *I am aware that a final case review meeting is due to take place on 23 February 2022. The panel will make decisions about all matters relating to your employment at that meeting"* (pages 866 – 867).

88. The Formal Case Review was reconvened on 23 February 2022 at the Belfry Hotel which was a neutral location at the Claimant's request. In any event, it had become common practice at the time to use the hotel for meetings because the Respondent's HQ had been reconfigured to allow for social distancing and, as a result, meeting rooms were no longer available.

89. During the meeting, the Claimant allowed the panel to read the OH report dated 8 October 2021 and maintained that he had not received the return-to-work plan. The sticking point to his return was that it would have to be to Nottinghamshire. The Claimant's position was, and remains, that if he agreed a return to work to Nottinghamshire, he would be accepting what he considered to be a flawed disciplinary process. As such, under no circumstances would he return to Nottinghamshire.

90. Mr Tomlinson explained that a full package of support would be available to him if he returned and that he could be placed on the transfer register once the appeal sanctions had expired. He also explained that if the Claimant spoke to his GP and they agreed he could return, he would be placed on full pay and would meet with his new manager thereafter.

91. The meeting was closed with Mr Tomlinson allowing the Claimant seven days to speak to his GP and sign fit to work if the GP agreed. He confirmed the following:

> *"That would be a full package of support including a route to raise concerns (possibly externally), the option to apply to go on to the transfer register, to utilise your annual leave to enable a transition period and remain on full pay, a tailored and gradual phased return along with the package of remedial training to address any skill fade. If that didn't work out then we would deal with that if and when it comes to it. The position we are in today is that we need to have a decision around whether you are willing and able to return to work, I expect you will need to have a conversation with your GP and you will need time to do that"*. (pages 913-932).

92. Mr Tomlinson provided an interim letter following the meeting as follows:

> *"Please note that this letter is not intended to be the full outcome letter from the meeting - it is an interim letter to outline the details of the supportive measures we discussed within the meeting which will be applicable should you sign fit prior to the given date of 4 March. During the course of the meeting we discussed the following:*
>
> - *That you can sign fit straight away if you are well enough to do so, and - subject to your GP being in agreement that you are well*

enough to return to work

- *Once you sign fit, you do not have to immediately return to a place of work, you will be placed on authorised absence until your manager contacts you to arrange to meet with you to discuss a return*
- *A manager will discuss with you a Welcome Back meeting in order to agree a phased return to work plan with you; this meeting can take place away from the station if you wish, and Sally-Anne Ellse may accompany you as your colleague representative at the meeting. A phased return to work may include reduced hours/shifts initially, gradually increasing over an agreed period of time*
- *Your phased return to work will include a robust and comprehensive re-skilling programme to include education, and statutory and mandatory training, which will take place over an agreed period of time.*
- *Prior to return to your substantive role, you will be able to attend observer shifts as a third person to assist you to gain confidence; you will also be able to discuss the provision of a mentor with your manager*
- *Your manager will also outline how the requirements of the HCPC recommendations will be met……* (pages 889 – 890).

93. On 4 March 2022, the Claimant e-mailed Mr Tomlinson as follows:

> *"Unfortunately I am unable to provide you with a decision at this time and I do recognise that today, Friday 4th March, was given to me as a deadline. I simply do not have sufficient information on which I am expected to make an informed decision which may have significant implications with regard to my career with EMAS. In my honest opinion and being mindful of my disability due to anxiety, there are far too many unknowns for me to take a 'leap of faith' as was suggested at the final case review. I am also aware and understand that decisions have consequences.*
>
> *There are multiple ongoing unresolved matters between EMAS and I which are complex and far reaching therefore may have significant, actual and potential future health ramifications. These contributing factors cannot now simply be ignored. I strongly believe that if we are to progress correctly we must attempt to address and resolve these matters to avoid any unnecessary and continued risks which may negatively impact my psychological health and well-being. I would feel understandably aggrieved if any of my considerable efforts were to be derailed as a result……...*

> *It was established, acknowledged and accepted at the beginning of the final case review on the 23rd February, that my current sickness absence is, in fact, a result of an instruction from EMAS Senior HR Gemma Weldon, that I be placed on sick leave and required to obtain a Med 3 from my GP to reflect work related anxiety...*
>
> *Notwithstanding the above, I must also state, again, that I am not unwilling to undergo any and all retraining which must be required before I am able to return to my substantial position as paramedic. It would therefore be dishonest of me to declare myself fit as per your request in your interim letter...*
>
> *I would also offer that your request for changes to my current Med 3, as was suggested in Christine's e-mail dated Friday 25th February, be made directly to my GP at this time ….....”* (page 881)

94. On 8 March 2022, the Claimant obtained a further Med 3 confirming he was not fit for work for the period 8 March 2022 – 7 June 2022 (page 25 bundle B).

95. In the absence of the Claimant signing fit, Mr Tomlinson wrote to the Claimant comprehensively in a letter dated 10 March 2022 setting out the discussions at the Formal Case Review and subsequent events. For further clarity, Mr Tomlinson explained the process that would happen next namely, if the Claimant was fit to return to Nottingham, then his return would commence with a period of training and reskilling, the full plan being worked out in consultation with him. He would be referred to Occupational Health after which a return-to-work plan would be developed.

96. Mr Tomlinson confirmed:

> *“The outcome of the Formal Case Review therefore is that I will provide you with a further 7 days in which to confirm that you are willing and able to return to work as a Paramedic in the Trust’s Nottingham Division, subject to an agreed period of training and phasing in as described above…”.*

97. Mr Tomlinson also re-offered the appointment of an independent investigator to discuss the Claimant’s concerns (excluding issues such as the disciplinary outcome). He confirmed that if the Claimant did not sign fit within the additional seven days permitted, he would be dismissed (pages 292-900).

98. On 15 March 2022, the Claimant submitted the Med 3 dated 8 March 2022. Accordingly, Mr Tomlinson confirmed by way of letter dated 30 March 2022 that his employment was terminated with twelve weeks’ notice because of capability due to ill health and *“no indication that you will be able to return to work in any capacity within the foreseeable future”.*

99. The Claimant’s last day of employment was 23 June 2022 (pages 902-903).

100. At the point of dismissal, the Claimant had been absent from 4 November 2019

totalling nine hundred and forty-seven days, had received funding for fifteen sessions of CBT Therapy, had ten Occupational Health referrals and attended eight welfare meetings.

The appeal

101. On 12 April 2022, the Claimant appealed his dismissal (pages 883,886-888). An appeal hearing was scheduled to take place at the Belfry on 20 June 2022 chaired by Mr Ben Holdaway, Director of Operations. The Claimant was advised of his right to be accompanied by a trade union official or colleague. Ms Robinson, HR Business Partner was in attendance to support Mr Tomlinson and Ms Morris, Assistant HR Advisor, attended to take notes.

102. The Respondent booked two rooms at the Belfry hotel, one room for the hearing and the other for the Claimant to use separately as a breakout room.

103. Prior to the hearing, the Claimant received an appeal pack. On the day, the Claimant attended with his 17-year-old daughter to support him despite having Ms Ellse there too. Mr Holdaway was concerned because the Claimant's daughter was in her school uniform and her persona and body language suggested she was scared and uncomfortable. The panel did not feel it was right that a minor should be accompanying the Claimant and felt that there were potential safeguarding issues arising from it. However, the Claimant was advised that he could confer with his daughter during adjournments, but he refused to accept this as an option.

104. Accordingly, Mr Holdaway adjourned the meeting and invited the Claimant to attend a rescheduled meeting (page 975). Mr Holdaway followed the adjourned meeting with a letter addressing the Claimant's request for his daughter to attend again. He said:

> *"I have fully considered your request and unfortunately have to reiterate that it is our view that it is not appropriate for someone under 18 to be present in the Appeal Hearing, as your support person. I would set out again, that we are happy for Jo to be present, in another room, and for you to take your adjournments as you feel necessary to speak with her, for support. You may also be accompanied in the Appeal Hearing by Sally-Anne or another work colleague or an accredited trade union representative.*
>
> *Taking into account your request to be accompanied by someone who can support your mental well-being during the appeal hearing, in addition to Sally Anne we would be comfortable for you to bring an accredited mental health practitioner, or an adult relative with you…..*
>
> *… . Alternatively, there is also an option for you to submit a written statement for the panel to consider, along with any questions that you would like us to ask the original panel. We can then hear the appeal in your absence, limiting any additional pressure on you to attend"* (pages 976-978).

105. The rearranged appeal was scheduled for 7 July 2023. Ms Sharon Simpkin, the HR representative appointed to advise Mr Holdaway contracted covid and was no longer able to attend. Mr Holdaway was advised of this on 6 July 2022 and Gemma Wheldon was the only member of HR who could take her place at such short notice. Ms Wheldon was the HR adviser at the original disciplinary hearing in 2019.

106. Given that the appeal was not related to the original disciplinary hearing, and Ms Wheldon was simply advising on policy and process, Mr Holdaway considered it was appropriate for her to be on the panel, more so given the passage of time and his view that the appeal ought to be resolved for the Claimant's benefit. The Claimant was notified of the change in an e-mail on 6 July 2022 (page 984) to which he did not initially raise any objection.

107. On the day of the hearing, Ms Robinson and Ms Morris attended via Teams which had become common practice during the covid pandemic. However, the Claimant raised concerns about others listening in. Mr Holdaway took the view that the notetaker was not involved in the hearing and Ms Robinson was simply attending in a supporting capacity therefore in his view, their attendance virtually did not put the Claimant at a disadvantage. However, to reassure the Claimant he confirmed that they were both alone, would wear headsets and remain on camera.

108. The Respondent had only been able to secure one room at the Belfry but the panel offered to vacate the room so the Claimant could use it as a private space during adjournments. The Claimant was not content with that arrangement and left the hearing. Accordingly, the panel proceeded in his absence (pages 992-996).

109. On 9 July 2022, the Claimant emailed Mr Holdaway to express his disappointment about the arrangements for the appeal hearing namely his concern that there was no breakout room available for him, he felt it was unfair that Ms Wheldon was on the panel and his concern about Ms Robinson and Ms Morris attending remotely (pages 1000 -1002).

110. On 18 July 2022, Mr Holdaway confirmed the outcome of the appeal hearing namely that the decision to dismiss was upheld. Within the letter, he explained that the Claimant had been absent for a period of nine hundred and sixty-three-days days, reasonable support measures had been put in place including an extension of sick pay, extensive welfare support, regular OH appointments and welfare meetings. He considered that the supportive return to work plan set out in the Respondent's letters dated 2 and 10 March 2022 were reasonable and, at the point of dismissal, the Claimant had submitted another Med 3 stating that he was unfit to work in any capacity for a further three months. He said that the Respondent had shown willingness to explore any outstanding concerns and barriers preventing the Claimant from returning to work and, there had been no evidence available to suggest that there had been any material change in the Claimant's health status and likelihood of a return to work after his dismissal.

111. Mr Holdaway addressed the Claimant's specific grounds of appeal as follows:

- *"Getting a medical report from their GP with the employees permission - they have the right to see the report before you do*

  The dismissing panel was entitled to rely on the Med 3 certificate which recorded that you were unfit for work in any capacity for at least 3 months. You have not suggested that your GP's opinion has changed or that a medical report requested by the dismissing panel would have given any additional information which was not already known to the panel.

  As such, the appeal finds that the dismissing panel was reasonably entitled to make the decision to terminate your employment without requesting a medical report from your GP.

- *Arranging an occupational health assessment*

  The latest Occupational Health report available to the dismissing panel was dated 8 October 2021. This reported that you were fit to return to work and formed the basis of the return to work package that was proposed after the hearing. However, conflicting information was received from your GP in the form of a Med 3 certificate which confirmed that you would be unfit for work in any capacity for at least 3 months.

  The dismissing panel was entitled to rely on the most up to date medical information from your GP, the person who has managed your care most closely and therefore knows you better than the OH practitioner. The dismissing panel was reasonable to make its decision without a further referral to Occupational Health

- *Work out whether or not they are disabled and make any reasonable adjustments to help them do their job*

  It is not disputed that you live with a long-term impairment which could amount to a disability. Simon Tomlinson advised the appeal panel that the panel had treated your long-term mental health condition as a disability which had caused it to propose the adjustments set out in the letters dated 2 and 10 March 2022. This included not reaching a decision quickly and allowing a period of authorised leave to afford you the time and flexibility to consider the proposals put to you.

  Simon Tomlinson explained that the dismissing panel considered it had made reasonable adjustments (and other reasonable adjustments have been made by the Trust prior to the panel hearing) but that it was not reasonable to continue employment after receiving no indication that you would consider the support measures and receiving confirmation that you would not be fit to work in any capacity for at least

2 months" (pages 1003-1008).

112. On 4 April 2024, the Claimant was diagnosed with autism spectrum disorder (pages 1427 – 1429)

The law

Whistleblowing

113. Section 43B Employment Rights Act 1996 provides:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

…….

114. Section 47B Employment Rights Act 1996 provides:

> *(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*
>
> *(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—*
>
> *(a) by another worker of W's employer in the course of that other worker's employment, or*
>
> *(b) by an agent of W's employer with the employer's authority,*
>
> *on the ground that W has made a protected disclosure.*

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

. . . ……..

115. Section 98 Employment Rights Act 1996:

(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 subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

(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,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

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

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

116. Section 103A Employment Rights Act 1996 provides:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

117. Section 13 Employment Rights Act 1996 provides:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of

the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

……

118. Section 20 Equality Act 2010 provides:

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

(2) The duty comprises the following three requirements.

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

……..

119. Section 21 Equality Act 2010 provides:

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

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

……..

120. We were referred and had regard to the following cases: **Kilraine v Wansdworth London Borough Council [2018] ICR 1850, CA: Chesterton Global Limited v Nurmohamed [2018] ICR 731, CA: Fecitt v NHS Manchester (Public Concern at Work Intervening) [2012] ICR 372, CA: Malik v Cenkos Securities Plc UKEAT/0100/17/RN (2018): Kuzel v Roche Products Limited [2008] EWCA Civ 380 CA: Alidair Limited v Taylor [1978] ICR 445, CA: Spencer v Paragon Wallpapers [1977] ICR 301: East Lindsey DC v Daubney [1977] ICR 566: HSBC Bank v Madden [2000] ICR 1283, CA: Pinnington v Swansea City Council**

[2004] 5WLUK 737, EAT: S v Dundee City Council [2014] IRLR 131: Polkey v A E Dayton Services Limited [1987] IRLR 50, HL: Environment Agency v Rowan [2008] ICR 218 EAT: Ishola v Transport for London [2020] ICR 1204, CA; and Miss C Robinson v Mind Monmouthshire ET/1600412/2018.

Submissions

121. The Respondent provided a skeleton argument/position statement and made further oral closing submissions. The Claimant provided written closing submissions for us to consider. We do not set out the parties' submissions in full but refer to them as appropriate below.

Conclusions

Whistleblowing

122. The protected disclosures relied on are by the Claimant are 1.) his raising concerns with the Respondent's non-Executive Director Vijay Sharma on 18 November 2020 and ii.) his grievance dated 18 January 2021 to Roger Watson, Speak Up Guardian.

123. We record at this point that the Claimant seemed somewhat confused about the whistleblowing element of his claim more generally and suggested it was simply something that his solicitor had included. Indeed, he withdrew detriment two in cross examination because he did not understand why it was an issue in the case.

The verbal disclosure to Mr Sharma

124. The Claimant has not provided any detail about the substance of the concerns raised, what he said and why it amounted to a protected disclosure. In cross examination, when it was put to him that he raised matters to Mr Sharma, he replied: *"if that's what it says*" and failed to expand further. Absent any information we cannot find that he made a protected disclosure to Mr Sharma.

The e-mails to Mr Watson

125. We are satisfied that the emails dated 18 January 2021 do not amount to qualifying disclosures. They do not have sufficient factual content capable of tending to show one of the proscribed matters in section 43B(1). The Claimant conceded in cross examination that the e-mails were vague and lacking detail.

126. Furthermore, even if there was sufficient specificity, the matters raised relate to the Claimant's personal circumstances and cannot be said to be in the public interest.

127. Given that we are satisfied the Claimant did not make protected disclosures, his claims of whistleblowing detriment and automatically unfair dismissal must fail and are dismissed.

Unfair dismissal

128. The Respondent submits that the Claimant was fairly dismissed by reason of capability due to ill health and such dismissal was fair in all the circumstances.

129. The Claimant argues that the Respondent dismissed him because of his refusal to return to Nottinghamshire, not for ill health capability. However, we reject that argument. The Claimant was certified as medically unfit for work by his GP from 4 November 2019 until March 2022. He was given two opportunities to sign fit before he was dismissed yet submitted a further Med 3. At no point in the process did the Respondent suggest that he was being dismissed because of his refusal to return to Nottinghamshire. Whilst this may have been a barrier to the Claimant's return, the Claimant's GP continued to certify him as medically unfit for work, and it was reasonable for the Respondent to take that certification at face value. A such, we are satisfied that he was dismissed for the potentially fair reason of capability by reason of ill health.

130. In a long-term capability dismissal, it is incumbent on the Respondent to ascertain the up-to-date medical position, consult with the employee and consider the availability of alternative employment before moving to dismissal. We must also consider whether the Respondent could reasonably have waited any longer before dismissing the Claimant.

131. At the time of the reconvened Formal Case Review on 23 February 2022, the Claimant had been absent for circa two-and-a-half years. Throughout that period, he had submitted Med 3s confirming that he was unfit for any work because of work related anxiety.

132. Despite the Claimant's submissions to the contrary, the Respondent placed return-to work-plans before him for consideration. On 28 October 2020, Ms McKenzie set out a comprehensive return-to-work plan setting out a phased return to cover his re-integration into the workplace and time to get up to speed with his training, rather than an immediate return to duties. We do not accept the Claimant's evidence that he did not read it. Further plans were set out in the letters dated 2 and 10 March 2022 and the Claimant was assured throughout his absence that he would have support plans in place to ease his transition back to work.

133. We are satisfied that the Respondent was appraised of the most up-to-date medical position. The Claimant agreed the release of the 8 October 2021 OH report at the Formal Case Review which confirmed that he was fit to return to work, and the Claimant himself confirmed he was fit to return. He complains in these proceedings that the Respondent failed to obtain a further OH report or write to his GP, but we are satisfied that this was not necessary, nor would it have made any difference given the Claimant's position being that he was fit to return to Derbyshire but was not fit to return to Nottinghamshire. We consider that the Respondent acted reasonably in concluding that the final Med 3 reflected the most up-to-date medical position in light of the Claimant's stance.

134. We are satisfied that the Respondent fully consulted with the Claimant before taking the decision to dismiss him. Prior to the reconvened Formal Case Review, the Claimant attended eight welfare meetings, had ten OH referrals, benefitted from CBT funding by the Respondent and was offered the opportunity to have his outstanding complaints/grievances reviewed by an independent investigator, an offer rejected by the Claimant. The Formal Case review itself was lengthy, and the Claimant was given the opportunity to have his say in full. Mr Tomlinson did not make his decision on the day, rather allowed the Claimant further periods in which to confirm that he was fit to return, at which point the Respondent would explore a full return-to-work plan with appropriate training. The Claimant was not required to return to duties, just confirm that he was fit to, but was certified as unfit to work for a further three months.

135. We are satisfied that the Respondent extensively explored opportunities for redeployment with the Claimant. He was placed on the redeployment register from which he subsequently asked to be removed. Options to return to non-frontline duties and alternative locations had been discussed and, at the Formal Case Review, he was advised that he not required to return to any substantive duties, simply sign fit so he could undertake his learning.

136. Despite the Claimant's declarations that he was fit at the Formal Case Review, he submitted a further Med 3 and Mr Tomlinson took the decision to dismiss him because there was no foreseeable return. We are satisfied that Mr Tomlinson's decision was reasonable given i) the length of the Claimant's absence to date ii) the submission of a further Med 3 certifying him as unfit to work for a further three months, and iii) the reason for his absence remained unchanged. The Claimant had been given two opportunities to sign fit with warnings that he would be dismissed if he did not. Ultimately, his position was that he would not sign fit to return to work at Nottinghamshire under any circumstances because doing so would mean that he would accept the sanction imposed on him by the Respondent following the 2019 disciplinary process, and the HCPC findings. He emphasised the same position repeatedly throughout this hearing. In the circumstances, we are satisfied that the Respondent acted reasonably in not waiting any longer before taking the decision to dismiss.

137. In terms of the procedure followed more generally, we are satisfied that the Respondent acted reasonably. The original Formal Case Review on 14 October 2021 was postponed when the Claimant walked out without explanation and reconvened on 23 February 2022. The Claimant was accompanied by Ms Ellse, and the meeting was lengthy. All support measures to assist the Claimant to return were discussed.

138. The Claimant appealed the decision, and a hearing was scheduled. Again, the Claimant was given the right to be accompanied by a trade union official or a colleague, yet he attended with his 17-year-old daughter to support him in addition to Ms Ellse. We are satisfied that the Respondent acted reasonably in adjourning the hearing at this point given the demeanour of the Claimant's daughter, her status

as a minor and the Claimant's refusal to proceed without her.

139. We do not consider that the Respondent's decision to disallow the Claimant's daughter as a support person at the reconvened appeal undermined the fairness of the procedure, more so because he still had Ms Ellse present to accompany him, who had accompanied him at meetings prior. Furthermore, the Respondent confirmed that he could confer with his daughter during adjournments, so she was not excluded entirely. The Respondent also acted reasonably in permitting the Claimant to bring an accredited mental health practitioner or adult relative to the reconvened hearing in addition to Ms Ellse if he so chose.

140. At the reconvened appeal hearing, the appointed HR representative contracted covid the day prior and Ms Wheldon was identified as a replacement at short notice. Whilst we appreciate the Claimant's concerns that Ms Wheldon was on the disciplinary panel, we are satisfied that the Respondent acted reasonably in proceeding given she was in attendance in the capacity of advising on policy and procedure only and was not a decision maker.

141. Furthermore, we are satisfied that the Respondent's decision to proceed with one meeting room at the Belfry Hotel was reasonable. The Respondent attempted to alleviate the Claimant's concerns by confirming that he could have sole use of the room during adjournments, but the Claimant was unwilling to accept this and left the hearing.

142. We are also satisfied that the attendance of Ms Robinson and Ms Morris remotely was reasonable. The hearing took place when many social distancing provisions were still in practice and they were not the decision makers, who were present in person. Mr Holdaway attempted to ease the Claimant's concerns about confidentiality by assuring him that they were alone, would wear headsets and would remain on camera.

143. The Claimant refused to participate in the hearing, and we are satisfied that it was reasonable for the Respondent to proceed in his absence given it was already a reconvened hearing and three months had passed since his initial appeal. The panel undertook a thorough consideration of the Claimant's grounds of appeal and confirmed its rational for upholding the decision to dismiss in a comprehensive letter. As such, we are satisfied that the procedure followed by the Respondent was reasonable in all the circumstances.

144. To conclude, we are wholly satisfied that the decision to dismiss the Claimant fell within the range of reasonable response of a reasonable employer and his claim of unfair dismissal fails and is dismissed.

Disability Discrimination

Disability and knowledge of disability

145. The Respondent conceded at the outset of the claim that the Claimant was a disabled person at the material time by reason of anxiety and depression. Disability by reason of autism or autistic spectrum disorder was not admitted.

146. The Respondent says that even if the Claimant was disabled at the material time by reason of autism, it could not have been known to the Respondent.

147. The Claimant accepted in cross examination that he did not raise autism with the Respondent because he was not aware himself that he had the impairment. As such, we are satisfied that the Respondent could not have had knowledge at the material time.

148. We have considered the Claimant's message to Ms Ellse with a list of symptoms on 5 May 2021, but there was no indication within the message that he was referring to his own circumstances as such, we are satisfied that the Respondent did not have constructive knowledge of autism either.

149. The Claimant provided an impact statement for these proceedings on 16 February 2023 before his diagnosis. He describes how autism substantially adversely effects his normal day to day activities yet does not refer to those effects at the material time. Furthermore, the examples given are very generic. By way of example, he cites fixation and reliance on routines and becoming anxious and upset if his routines are interrupted or changed. He also cites: *"Almost photographic memory. Examples during paramedic training"* yet fails to provide supporting examples.

150. The Claimant did not receive a formal diagnosis of Autism Autistic Spectrum Disorder until April 2024, some two years after the material time. Indeed, the Claimant did not seek a referral from his GP until after his dismissal. The psychiatrist's report does not deal with his symptoms whilst employed by the Respondent, just those currently.

151. Given the lack of necessary detail, we are satisfied that he has not proven that he was a disabled person at the material time. However, this finding is somewhat academic given i.) the Claimant's admission that he did not raise it with the Respondent and therefore it did not have the requisite knowledge; and ii) in his closing submissions he only refers to substantial disadvantage in relation to anxiety and depression (which is appreciable given he was not aware of his autism at the material time).

Failure to make reasonable adjustments

152. We were referred to Ishola v Transport for London in which Simler LJ stated:

> *"The concept of PCP does not apply to every act of unfair treatment of a particular employee. It connotes a state of affairs, or continuum in the sense that it is the way in which things generally are or will be done. In a case of a one-off decision in an individual case where there is nothing to indicate that*

the decision would apply in future, this may not amount to a PCP".

153. The Claimant relies on the following PCP's:

153.1. Only allowing companions who were 18 years old and above:

153.2. No provision of a confidential/private space (during the July 2022 Appeal):

153.3. Allowing the notetaker to be present at the Appeal Hearing via Zoom:

153.4. Members of staff who had previous involvement in a disciplinary or grievance process can be present in an appeal.

Only allowing companions who were 18 years old and above

154. The Respondent submits that the decision to disallow the Claimant's daughter to accompany him was a one-off decision in the circumstances. In arriving at our conclusion we have had regard to the invite to the reconvened appeal hearing which states: *"I have fully considered your request and unfortunately have to reiterate that it is our view that it is not appropriate for someone under 18 to be present in the hearing, as your support person….."*

155. This indicates a policy more generally of not allowing companions under the age of 18 which would likely apply in the future, rather than it being restricted solely to the Claimant's daughter. As such, we are satisfied that the Respondent had a PCP of only allowing companions who are 18 years old or above.

156. In considering whether this put the Claimant at a substantial disadvantage compared to persons who are not disabled we reminded ourselves that the threshold is low. The Claimant states in the list of issues that he suffers with feelings of paranoia and low mood and was unable to represent himself appropriately and adequately. However, he was able to represent himself in all previous meetings and still had the support of Ms Ellse who had accompanied him at such meetings, including the Formal Case Review. As such, we are not satisfied that the Claimant was put to a substantial disadvantage by reason of not having his daughter accompany him.

157. Furthermore, he not addressed why not allowing a companion under the age of 18 put him at a substantial disadvantage compared to persons who are not disabled or why persons without a disability would also not be disadvantaged.

158. Regardless, even if the duty to make a reasonable adjustment arose, we are satisfied that it was not reasonable to allow the Claimant's daughter to accompany him. We accept Mr Holdaway's evidence that she appeared uncomfortable and scared thereby potentially amounting to a safeguarding issue.

159. Moreover, Ms Ellse was still present to attend with him and Mr Holdaway offered the facility to confer with his daughter during adjournments. The Respondent also

offered to relax the statutory right to be accompanied by allowing an accredited mental health practitioner or an adult relative to be present at the reconvened hearing.

160. For the reasons above, this element of the reasonable adjustments claim fails and is dismissed.

No provision of a confidential/private space (during the July 2022 Appeal)

161. We agree with the Respondent that this does not amount to a PCP but was a one-off situation because of the prevailing circumstances at the time, namely that the hotel only had one room available on the day. The Respondent had previously provided the facility of a separate room for the Claimant and there is no evidence that the provision of a second room would be denied in the future.

162. Furthermore, the Respondent took steps to give the Claimant a private space in its offer to vacate the room during adjournments, an offer rejected by the Claimant.

163. Given we are satisfied that the Respondent did not have a PCP of not providing a confidential/private space, this element of the reasonable adjustments claim fails and is dismissed.

Allowing the notetaker to be present at the Appeal Hearing via Zoom

164. We are satisfied that the Respondent had a PCP of allowing the notetaker to attend hearings by Zoom. Mr Holdaway gave evidence that this had become practice consequent of the pandemic.

165. However, we are not satisfied that the PCP put the Claimant at a substantial disadvantage compared to persons who are not disabled. We conclude this for the following reasons: i.) the Claimant has not explained what the substantial disadvantage was in this context: ii) we agree with the Respondent's submission that arguably it might be seen as an advantage for some disabled persons; and, most importantly iii.) the Claimant was only concerned about confidentiality and not the effect of the PCP on him. As such, the Claimant has not established that he was put to a substantial disadvantage and this element of the reasonable adjustments claim fails and is dismissed.

Members of staff who had previous involvement in a disciplinary or grievance process can be present in an appeal.

166. We are satisfied that the decision to allow Ms Wheldon to attend the reconvened appeal hearing was a one-off decision because of the prevailing circumstances at the time, namely that Ms Simpkin had contracted covid the day before. Ms Simpkin was not involved with the 2019 disciplinary process and, had she not become ill, would have been present. Furthermore, any suggestion of bias or perceived bias would have applied equally to persons who were not disabled.

167. As such, this element of the claim of failure to make reasonable adjustments fails and is dismissed.

Unauthorised deductions from wages

168. The Claimant claims that he should have received full pay between the period May 2020 and 23 June 2022.

169. In accordance with the NHS standard terms and conditions, he was in receipt of full pay for his first six month's absence and half pay until 4 November 2020. When he was due to receive nil sick pay the Respondent exercised its decision to pay him full pay until June 2021 and he remained on half pay thereafter until 28 February 2022, after his Formal Case Review.

170. The Claimant argues that it was not his decision to go onto sick leave and he should have been in receipt of full pay for the duration of his absence. We are not persuaded by this argument. He attended an OH appointment on 31 October 2019 at which he was diagnosed as being unfit for work. In consequence and on advice from HR, he attended his GP to obtain a Med 3. In the absence of a Med 3, his absence would have been unauthorised, and he would not have qualified for sick pay. As such, he was not instructed to stay at home, simply advised to get a Med 3 for these reasons.

171. If the Claimant was fit to attend, his GP would not have certified him as unfit or, alternatively, completed a Med 3 confirming he was fit to attend with adjustments. There was nothing preventing the Claimant from signing fit if he indeed was. As it was, the Claimant submitted his Med 3s without change until his dismissal.

172. Throughout the hearing, the Claimant maintained that the Med 3s meant that he could return to work with the Respondent's agreement, and it was the Respondent who was preventing his return by not proffering that agreement. He places reliance on the explanatory note which says:

> *"You are not fit for work": Your health condition means that you may not be able to work for the period shown. You can go back to work as soon as you feel able to and, with your employer's agreement, this may be before your fit note runs out."*

173. This argument holds no weight. As no point did the Claimant say or certify that he was fit to return to Nottinghamshire despite the Respondent's efforts to support him do so. As such, we are satisfied that the Respondent was not preventing his return.

174. The Claimant suggests in his closing submissions that he should have been placed on medical stand down on full pay. However, medical stand down only applies where there has been a decision by the Respondent to release an employee from duties or where OH recommends the same. Neither of these circumstances arose in this case.

175. We are satisfied that the Claimant received in excess of his contractual entitlement to sick pay after the Respondent exercised its discretion to extend its payment for additional periods on both full and half pay during his absence. As such, we are satisfied that there was no unauthorised deduction from his wages and his claim fails and is dismissed.

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Employment Judge Victoria Butler

Date: 6 September 2024

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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