Neutral Citation Number: [2025] EAT 90

Case No: EA-2024-SCO-000043-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street Edinburgh EH3 7HF

Date: 23 June 2025

Before :

THE HONOURABLE LADY HALDANE

- -

Between :

MR GAVIN GRANGER **Appellant**

- and –

SCOTTISH FIRE & RESCUE SERVICE **Respondent**

- -
- -

Mr James McHugh (instructed by DLG Legal Services)**,** for the **Appellant**
Ms Anna Beale KC (instructed by Miller Samuel Hill Brown LLP), for the **Respondent**

Hearing date: 10 June 2025

- -

JUDGMENT

SUMMARY

Disability Discrimination; Unfair Dismissal;

Dismissal on grounds of capability or some other substantial reason; whether an assessment that the claimant qualified for ill health retirement at the higher tier was in and of itself dismissal for some other substantial reason or an outcome of a capability process.

The claimant was employed as an operational firefighter. He suffered from musculoskeletal conditions and also suffered from stress. He had numerous absences from work. A capability process was commenced. During the course of that process the claimant was referred for assessment by an Independent Qualified Medical Practitioner ('IQMP'). The outcome of that assessment was that the claimant was deemed unfit for his role, or any other role with the respondent. He was assessed as qualifying for an Ill Health Pension at the Higher tier. The claimant did not wish ill health retirement but his employment was nevertheless terminated '*on grounds of capability due to ill health*.'

The ET concluded that the dismissal had been fair, and was for '*some other substantial reason*', specifically the assessment that the claimant qualified for ill health retirement at the Higher tier. The ET made a number of findings in relation to the process followed by the respondent that it concluded would have been unsatisfactory 'had this been a Capability Process' but were nevertheless not unfair on the basis that dismissal was 'for some other substantial reason.'

Held, upholding the appeal and remitting the matter back to the same ET to consider anew on the basis that:

(i) The respondent had stated in terms that it was dismissing the claimant on grounds of capability;

(ii) That the ET had fallen into error in conflating process (medical assessment within a Capability Process) with outcome (the claimant qualifying for ill health retirement at the higher tier);

(iii) That the matter required to be assessed from the proper start point; that is to say that the dismissal was on the grounds of capability; and therefore standing the ET's findings in relation to aspects of the process that it considered unsatisfactory or unreasonable within a capability process, whether in light of those unchallenged findings the dismissal, properly understood as being on the grounds of capability, was fair or unfair.

The Honourable Lady Haldane:

Introduction

1. The appellant in this matter is Mr Gavin Granger, and the respondent the Scottish Fire and Rescue Service. For ease, I shall refer to parties as the claimant and the respondent, as they were below.

2. The appellant brought claims for Unfair Dismissal and Discrimination on the grounds of disability contrary to § 15 of the **Equality Act 2010** ('**EqA**') arising from the decision of the respondent to dismiss the claimant on 23rd March 2023.

3. The ET heard evidence relating to these claims between 27th February and 1st March, and then 5th -7th March 2024. By its judgment, the ET dismissed both of the claims.

4. The claimant appealed that decision. His grounds of appeal are three in number, with an explicit acceptance that grounds 1 and 2 were linked. These are, (1) that in dismissing the claimant's claim for unfair dismissal the tribunal erred in law by finding the respondent had dismissed the claimant fairly, and (2) that the ET erred in law and/or came to a decision that was perverse by drawing an artificial distinction between the Ill Health Retirement Process and the Capability Process. The third ground was that the ET erred in finding that the dismissal of the claimant was justified for the purposes of § 15 **EqA**. Mr McHugh, who appeared for the claimant, accepted that so far as ground 3 was concerned, it would stand or fall depending on the view taken of the first two grounds. Ms Beale, for the respondent, contended that the reasoning supporting the section 15 claim could stand, even if the claimant were to succeed on the first two grounds of appeal.

Background

5. The facts found established by the ET were not challenged by either side, and so I draw on those findings in fact in providing a summary of the background to this matter, in order to provide context for the arguments advanced at appeal.

6. The claimant was employed as an Operational Firefighter. The role of Operational Firefighter requires a certain level of fitness, including cardiovascular fitness, agility, movement, and physical strength. Testing is carried out throughout an Operational Firefighter's employment, to ensure that they meet the fitness standard. The equipment used can be heavy, such as hydraulic cutting equipment used for road traffic accidents. Teamwork is required. There is equipment which needs 2-4 people to lift it. Some equipment requires to be worked with above shoulder height. Operational Firefighters are required to pitch ladders, which weigh 115kg and are carried by 4 people. The work of Operational Firefighters includes working in extremely hazardous work environments. If entering a burning building to save a life they do so in teams of 2. They may be required to rescue someone from a building by carrying that person on their back, e.g. from a third storey tenement building. It is imperative to be fit not just for the firefighter's own safety but for the safety of their crew and the public they are trying to save.

7. The claimant had a number of skills in his role as Operation Firefighter, including as a driver. Additionally, the claimant could drive specialist vehicles, such as height appliances. Driving fire appliances involves getting in and out of the vehicle. The steps to gain entry to the driver's cab in a fire appliance are around 3.5 feet off the ground, with handrails to assist stepping up.

8. In August 2021, the claimant was referred to the respondent's Occupational Health provider ('OH') due to his absence from work. He had, between the period January 2020 and March 2023, five periods of absence relating to stress, neck surgery, Covid 19 and musculoskeletal issues. There was a significant amount of input by that OH provider prior to the claimant's dismissal.

9. The position of the OH assessor, following their review of the claimant on 16 August 2021 was that the claimant was not fit for full duties but "*...would be fit for a spell on modified duties in order to allow further healing to take place, if these were available to him. In terms of restrictions, this would also need to be for short spells only, due to his neck issues. He would need to be able to get up and move around freely as required. He would be fit to undertake these if suitable meaningful work could be found for him. Unfortunately I am unable to state how long these would be required*

for at present."

10. The clamant was placed on alternative duties, primarily community safety duties, for a temporary period. He began those duties in October 2021. While carrying out these amended duties, the claimant continued to be absent from his substantive role as Operational Firefighter. His absence from that substantive role continued to be managed by the respondent. The claimant was invited to attend an Attendance Support Meeting ('ASM') on 26th January 2022. At that time the claimant had had 107 days of absence from his substantive role, in the previous 12 months. There was discussion on the absences and that the claimant had been carrying out alternative duties at Dumbarton Fire Station since 11th October 2021. Normally, within the respondent's service, alternative duties are for a temporary period of up to 12 weeks. The lockdown restrictions and backlog in home visits caused there to be alternative duties available for the claimant for a longer period.

11. A vacancy for a Community Firefighter ('CFF') role became available. At that time OH advice was that the claimant should not be declared by them as fit for operational duties (i.e. his substantive role as an Operational Firefighter) until a specialist report was obtained from the claimant's treating Neurologist. Thereafter both OH and the claimant took steps to obtain that specialist report. Further, the advice to the respondent from OH was that due to workplace stressors the claimant should not remain on Blue Watch at Dumbarton, and a change of work location was recommended. The claimant had been on amended duties since 11th October 2021 and in that role had been carrying out CFF work, to a good standard. Station Commander Chris Casey therefore considered that that vacant role would be a good fit for the claimant.

12. In March 2022 there was discussion on that CFF vacancy with the claimant. As alternatives to moving to this CFF post, other options were given to the claimant, to continue in his role as an Operational Firefighter. Those options were for the claimant to remain as an Operational Fire Fighter in Dumbarton, but to change Watch there, or to remain as an Operational Fire Fighter but to change base station to either Helensburgh, or Knightswood. The claimant knew that if he wanted to take up the option of the Community Firefighter role, he would have to make a transfer request. The claimant

decided that he did not want the Community Firefighter role because he wished to continue as an Operational Firefighter. The claimant's decision on the options available to him was that he wished to be transferred to Helensburgh as an Operational Firefighter. As the claimant continued to be assessed by OH as unfit for the role of Operational Firefighter, that transfer was actioned only to the extent that from March 2022 the claimant's substantive role was as an Operational Firefighter based at Helensburgh. The claimant did not carry out any duties in that transferred substantive role. That transfer to Helensburgh as an Operational Firefighter was then 'on paper' only.

13. As the claimant continued to be absent from his substantive role, he was invited to a meeting under Stage 1 of the Capability Process. He was given a target of returning to his substantive role within 3 months, that is to say by 22nd November 2022 failing which he would progress to stage 2 of the Capability Process. In August 2022 OH provided an update to the respondent following a review of the claimant and receipt of a report from the claimant's treating Neurosurgeon, who advised that it was unlikely that the claimant would ever have complete relief from pain arising in his neck and that surgery was unlikely to address this issue.

14. OH recommended a referral to health specialists Heales for an opinion on the question of future prognosis. The claimant's position that work stress and concentration issues now also stood in the way of a return as well as chronic pain was noted by Occupational Health.

15. The claimant was assessed by Heales. They concluded that the claimant was not likely to be fit to undertake reliable active or desk duties full time due to pain and mobility issues. It was considered unlikely he could provide reliable and consistent attendance as a firefighter. Redeployment could be considered if a suitable role were available, but ill health retirement was also put forward as an option, dependent upon obtaining medical reports for that assessment.

16. A Capability stage 1 meeting took place on 22nd October 2022. The Heales report was discussed. The Station Commander with whom the claimant met (Jim Logan) also discussed ill health retirement and at that stage the claimant indicated he wished to pursue that option. Commander Logan was of the view that there were no meaningful duties available at the time which would not

have a negative effect on the claimant's musculoskeletal condition. The claimant was placed on paid leave pending the outcome of the ill health retirement process.

17. The ill health retirement process required input from an Independent Qualified Medial Practitioner ('IQMP'). The outcome of the IQMP process may be that the employee in question does not qualify for ill health retirement or that the employee qualifies at either the 'lower tier' or the 'higher tier', which grading is relevant in terms of the pension scheme applicable to the claimant. The claimant was invited to attend a stage 2 Capability meeting on 5th January 2023, but on 4th January the claimant advised Commander Jim Logan that he no longer wanted to pursue ill health retirement. After taking advice, Jim Logan advised the claimant that the IQMP process could not be stopped once it was underway.

18. The stage 2 meeting took place. The claimant advised that he felt his symptoms had improved. A letter sent after that meeting confirmed that stage 2 of the Capability Process would continue until either a decision from the IQMP was received granting ill health retirement or he was able to return to his operational role full time. The claimant was also placed on the redeployment register. He confirmed in writing his desire to return to an operational role, if he were able to pass the fitness test, and also reiterated his wish to stop the IQMP/ill health retirement process, as he did not wish to proceed down that path. He was certified by his GP as unfit for work from 12th January 2023.

19. The claimant was advised in writing that the ill-health retirement process could not be stopped once started and that it was a medical decision on the question of his level of fitness and ability to carry out any form of work. The IQMP report, dated 10th February 2023 was received by the respondent. Its conclusions, in short, were that the claimant was suffering from stress related to personality traits and chronic pain; that he was disabled from engaging in firefighting; that he was disabled from performing the duties of a regular firefighter additional to firefighting; that this had not been brought about by the claimant's own 'default' and that he was not capable of undertaking any regular employment (meaning employment of 30 hours a week on average, over a 12 month period). On the basis of the report, the claimant qualified for ill health retirement under the applicable pension

scheme, at the higher tier rate.

20. The claimant was sent the report on 9th March 2023 and invited to a meeting with Area Commander Joe Mackay on 23rd March 2023. That letter informed the claimant, amongst other things, that the IQMP report "…*provides the opinion that you are permanently unfit to carry out your role as a as firefighter. This opinion is binding on all parties*.". It went on to state: "*The purpose of this meeting will be to discuss the medical report and to allow full discussions on the next steps. Please, however, note that, taking into account the IQMP report, this meeting may result in terminating your contract of employment on the grounds of capability due to ill health*."

21. At that meeting, Area Commander Joe McKay informed the claimant that he accepted the decision in the IQMP report and '…*had also considered the possibility of medical redeployment however, this is not a viable option as has been deemed permanently unfit for any role within the SFRS*.". The claimant said he was '*...unclear on a number of findings in the IQMP report*." The claimant was advised to seek professional medical advice. The claimant stated that he "*...found the report insulting...*" he referred to the IQMP not having met him face to face and that he "*...found his report to have lots of inaccuracies*.". The claimant was advised to "*... take this up with a medical practitioner*." There followed discussion on the payments due to the claimant on the termination of his employment. The claimant was given information on the appeal process both in relation to the decision to dismiss, and separately, in relation to the decision of the IQMP. The claimant stated that he "*...feels disappointed in the position he finds himself in*."

22. Commander Mackay took the decision to terminate the claimant's employment at that meeting. He took into account the IQMP report and considered it to be significant that the claimant had been assessed as qualifying for ill health retirement at the higher tier, not something he had seen before. He wrote to the claimant on 24th March 2023, advising that in light of the IQMP report, the claimant was permanently unfit to carry out his role. He wrote further '*In view of our discussions, the medical advice received and no suitable alternative roles available, it is with regret that my decision is that your contract of employment with the Scottish Fire and Rescue Service should be*

terminated on the grounds of incapability due to ill health."

Key findings of the ET

23. Against that background, the ET made the following key findings: -

In paragraph 61, following on from the findings relating to the letter sent by Commander Mackay after the dismissal meeting, the ET stated: -

> '61. The claimant was not dismissed for incapability under the respondent's Capability Process. He was dismissed because he had been assessed as qualifying for ill health retirement. He was medically retired on that basis. The position in both the Heales Report and the IQMP report is that the claimant was unfit for work as an Operational Firefighter. The claimant was on the respondents' redeployment list. No suitable vacancies had arisen for the claimant. Had the claimant not been medically retired on his qualification for ill health retirement, the claimant would have continued to have been absent from his substantive role as Operational Firefighter and would have continued to be managed under the respondent's Capability Process. A Stage 3 Capability Hearing would have been arranged. On the basis of the substantial medical evidence available to the respondent as at the time of the claimant's dismissal, it was likely that the claimant would have been dismissed at that Stage 3 Capability Hearing.'

At paragraph 87, the ET found, in relation to the evidence of Commander Mackay, that: -

> 'His evidence in examination in chief that he was the decision maker and had to "*review all the evidence*' was undermined by his position in cross examination that he had not had sight of the OH reports when making his decision. Had the dismissal been a dismissal under the Capability Process, that failure would have been significant. The claimant's dismissal was however because he had been assessed as qualifying for ill health retirement. In fact, the claimant was medically retired on that basis.'

24. The tribunal also found at paragraph 89 that: -

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

25. Ultimately, in relation to the reasons for dismissal, in addition to those set out at paragraph

61, the ET came to the following conclusion: -

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

26. So far as the question of the claim under § 15 **EqA** was concerned, the ET concluded that, having regard to factors such as the claimant being placed on the redeployment list up to the time of termination of his employment and no suitable vacancies having been identified, it could not be said that the respondent had acted unreasonably or failed to consider alternatives. It accepted that ill-health retirement was, in all the circumstances, a proportionate means of achieving a legitimate aim and concluded at paragraph 121 that: -

> 'We did not accept her (the claimant's representative) position that the claimant had therefore established a prima facie case of disability discrimination and the Respondent has not met the burden of proving that it did not treat the Claimant unfavourably nor that their actions were a proportionate means of achieving a legitimate aim.'

The relevant legislation

27. The law relating to Unfair Dismissal is set out at § 98 of the **Employment Rights Act 1996** ('**ERA**') 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 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, …

(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."

28. In relation to Disability Discrimination, reliance was placed on section 15 of the EqA which provides: -

'(1) A person (A) discriminates against another (B) if –

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

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

29. As to the role of the EAT in appeals such as the present one, under section 21 of the **Employment Tribunals Act 1996** an appeal to the Employment Appeal Tribunal lies only on a question of law. Useful guidance as to the proper approach is found in the judgment of the Court of Appeal in **R (Iran) v SSHD** [2005] EWCA Civ 982 at [9], where examples of errors of law are given

and include: i) making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters"); ii) failing to give reasons or any adequate reasons for findings on material matters; iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters; iv) giving weight to immaterial matters; and, v) making a material misdirection of law on any material matter.

30. Also, as the Court of Appeal has emphasised, decisions under appeal must be read fairly, and not hypercritically (**DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 at paragraph 57). I have approached matters with that guidance in mind.

Submissions for the claimant

31. For the claimant, Mr McHugh addressed grounds 1 and 2 together. He summarised his position as being that ET erred in finding that the reason for dismissal was 'some other substantial reason' in terms of § 98(1)(b), whereas, having regard to the findings made by the ET the appropriate finding would have been that the clamant was dismissed by reason of capability.

32. In support of that overarching submission, Mr McHugh placed reliance on the guidance set out in, firstly, In **Spencer v. Paragon Wallpapers Ltd** [1977] ICR 301 where the EAT held at p 305-6 that:

> "…an employee ought not to be dismissed on the ground of absence due to ill-health without some communication being established between the employer and the employee before he is dismissed…What is required will vary very much indeed according to the circumstances of the case. Usually what is needed is a discussion of the position between the employer and the employee. Obviously, what must be avoided is dismissal out of hand. There should be a discussion so that the situation can be weighed up, bearing in mind the employers' need for the work to be done and the employee's need for time in which to recover his health."

33. Mr McHugh turned, secondly, to **East Lindsey District Council v Daubney** [1977 ICR 566, where, referring back to **Spencer**, the EAT held, at p. 571 – 2:

> "Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health, it is necessary that he should be consulted and the matter discussed with him and that in one way or another steps be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles

> to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves of the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultations will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done."

34. The claimant's position was that the ET failed properly to take into account and apply the guidance in **Spencer** and **Daubney**. In both of those cases there had been significant emphasis on the requirement to consult with employee prior to dismissal. In the present case, and unusually, the ET made a number of findings saying, in effect, that had the dismissal been on the grounds of capability the dismissal would have been unfair, but since the dismissal was for some other substantial reason, it is not. In so doing, the ET had fallen into error.

35. Mr McHugh then turned to analyse in more detail the findings of the ET and its conclusions that the dismissal in this case was not a capability dismissal but one for some other substantial reason. The core reasoning could be found at paragraph 101 (set out at paragraph 25 above) which was then followed, at paragraph 102 by the conclusion that:

> 'In circumstances where the claimant had been assessed by an IQMP as being unfit to continue in his substantive role and had been assessed as qualifying for IHR, at the higher tier, Area Commander Joe McKay acted reasonably in treating the medical position as set out in the IQMP report as a sufficient reason for concluding that the claimant was no longer fit to be employed by the respondent and should be retired on ill health grounds.'

36. Taking those two paragraphs together, and having regard to the wording of § 98(3)(a), Mr McHugh submitted that it was difficult to see how this dismissal could not be viewed as a dismissal related to the claimant's capability assessed by reference to his skill aptitude, health or any other physical or mental quality. He further submitted that in light of those factual findings the decision of the ET proceeded artificially to draw a distinction between the respondent's Capability Process and the Ill Health Retirement Process in circumstances where the claimant had made it clear he did not

wish to be considered for ill health retirement.

37. Mr McHugh conceded that it was not necessarily an error of law in every case for a tribunal to categorise what might be capability dismissal, as a dismissal for some other substantial reason but he contended that the cases relied upon by the respondent to support their argument in that respect (**Wilson v Post Office** [2000] IRLR 834; **Ridge v HM Land Registry** UKEAT/0485/12, 19 June 2004; **Kelly v Royal Mail Group Ltd** UKEAT/0262/18/RN, 14 February 2019) involved dismissal on very different factual bases from the present case and ought therefore to be distinguished. In the present case, given the clear findings by the ET that the claimant was dismissed because he was unfit to carry out his duties, that was the essence of a capability dismissal and it was hard to see how it could fall under any other categorisation.

38. Mr McHugh then moved on to identify findings in fact made by the ET supporting the conclusion that there had been a failure to follow the guidelines in **Spencer** and **Daubney** and that there had been overall, a failure to follow fair procedure including, fundamentally, a failure to consult with the claimant before dismissing him. Mr McHugh pointed to a finding in paragraph 111 to that effect, followed by the observation on the part of the ET that, had the dismissal been on the grounds of capability 'that failing would have been significant.' Further, the ET found as a matter of fact at paragraph 87 that Commander Mackay had failed to consider the relevant Occupational Health Records at the time of the dismissal, and that he had made up his mind to dismiss the claimant prior to the final meeting on 23rd March 2023. These were all findings that the ET concluded would not be reasonable in the context of a capability dismissal. In essence, Mr McHugh contended, the ET had conflated process with outcome, specifically that it had considered that because the claimant received ill health retirement at the higher rate, and therefore a full pension because of that outcome, it had dismissed fatal procedural flaws leading up to the decision to dismiss. It was however difficult to reconcile the fundamental procedural fallings with the decision that the dismissal was fair. The claimant was having his employment terminated when he did not want that to happen, and even if the claimant's primary submission that the ET had erred in concluding that this was a fair dismissal for

some other substantial reason did not find favour, there was no reason why the same basic procedural safeguards surrounding dismissal should not apply.

39. Mr McHugh recognised that the respondent placed reliance upon the case of **Leonard v Fergus and Hayes Civil Engineering Ltd** [1979] IRLR 235 in support of the proposition that it could be reasonable in certain circumstances to dismiss an employee without consultation, but he submitted that **Leonard** was distinguishable on its facts, since the circumstances of **Leonard** involved an unusual contractual provision in the claimant's contract of employment as a North Sea oil rig worker entitling the employer to dismiss on the basis of frequent absence. This was described by the Court of Session as a relationship between the parties that was of an 'exceptional and special nature' and did not overrule the general principles in **Spencer** and **Daubney**.

40. Touching lightly on his third ground of appeal, Mr McHugh reiterated that this was to a great extent parasitical upon grounds 1 and 2. The key findings could be found at paragraphs 115 to 124 and Mr McHugh accepted that reasoning in support of the conclusions on this aspect of the claim could be found. However Mr McHugh allied himself with the conclusion in paragraph 115 that:

> 'We accepted that although following Grosset justification under section 15 EqA and substantive fairness for the purposes of s.98(4) ERA 1996 are 15 distinct tests, as per O'Brien this is a case where the two matters are inextricably linked. We accepted that the procedure prior to the dismissal is a relevant consideration.'

It was for that reason that Mr McHugh reaffirmed his initial submission that ground 3 would stand or fall depending on the outcome of the appeal on the first two grounds.

Submissions for the respondent

41. For the respondent, Ms Beale divided her submissions into three chapters; first that the ET was entitled to find that the dismissal was for some other substantial reason and this did not amount to an error of law; second that even if she were wrong about that and that the reason for dismissal should have been capability, the ET's findings on fairness were nevertheless still applicable and valid regardless of whether the reason was properly viewed as some other substantial reason or capability

and that therefore if there had been an error in the reasoning that had made no difference to the outcome; and third and in any event that there was and is a difference between the test for a finding under § 15 **EqA** and the test for unfair dismissal which remained important on the facts and thus the reasoning on the question of § 15 could stand whatever the view taken of the other grounds of appeal.

42. Ms Beale revisited the passages in **Spencer** and **Daubney** that had been relied upon by Mr McHugh and drew the further proposition that these cases made clear that there were no detailed principles to be laid down and that what might be appropriate in terms of consultation and procedure in one case might not be in another. Therefore these cases could do no more than set out broad general principles which might be applicable depending on the circumstances. She conceded that the factual circumstances in **Leonard** were different to the present case but nevertheless submitted that it was demonstrative of the proposition that a dismissal could occur without consultation and still be held to be fair.

43. Ms Beale acknowledged that the factual circumstances in the cases of **Wilson**, **Ridge** and **Kelly** relied upon in her skeleton argument were not on all fours with the present case, however what she sought to draw from each of those authorities was that even with a background of ill health there could be circumstances where it was reasonable and appropriate to categorise a dismissal as being for some other substantial reason, particularly where the focus was on the failure to comply with a particular policy or procedure of the employer and secondly that there is no hard and fast distinction to the effect that all ill health must be categorised as capability. The central question was always 'Could the employer be expected to wait any longer?'

44. In the present case the ET had set out its findings at paragraph 101. The respondent was clear that the IQMP report was binding in matters of a medical nature, and thus binding in terms of the relevant pension scheme. The ET's findings in relation to dismissal were more complex that just a conclusion that because the ultimate outcome was favourable to the claimant, the dismissal must be fair. Its decision encompassed the following findings and conclusions:

(a) The Heales Report had concluded that, given the claimant's complex musculoskeletal

and associated mental health issues, he was unlikely to be able to provide reliable and consistent attendance as an active firefighter, and suggested he be referred for consideration of ill health retirement (at paragraphs 33, 34 and 59), in which the claimant initially acquiesced [paragraph 86].

(b) The IQMP had determined (unusually) that the claimant qualified for ill health retirement at the upper tier, on the basis of "stress related to personality traits and chronic pain", which meant he was unfit to undertake not only firefighting, but any regular employment of 30 hours per week on average over a 12 month period and thus any role within the respondent (Paragraphs 53 – 55; 58 59).

(c) The duties required of an Operational Firefighter, which was the claimant's substantive role, were physically arduous and the respondent had a duty of care to both its employees and to the public to ensure all Operational Firefighters were suitably fit to undertake those duties (paragraphs 59; 88; 92).

(d) It was the IQMP's view that the claimant could not operate safely and effectively as a firefighter (paragraph 60) and indeed was unfit for any employment with the respondent (paragraph 106). (e) The decision-maker considered the IQMP's report to be binding on him, in that he could not overturn the medical opinion (paragraph 59).

(f) The process by which the claimant could challenge the IQMP's report was by way of an appeal against that report, separate from the dismissal/capability process (89; 104).

(g) Had the claimant not been medically retired, the capability process would have continued to stage 3, dismissal following which would have left him in a worse financial position than he was when medically retired on the higher tier (110).

45. The central point, submitted Ms Beale, was that the claimant had not been doing his

substantive role since October 2021; that he had been off sick for parts of that period and had been offered a role as a Community Firefighter that he had decided not to take up. This begged the key question; how much longer could the employer be expected to wait? That remained the pertinent question whether the dismissal was categorised as capability or some other substantial reason. In any event, the ET had not drawn a bright line between capability in terms of § 98(2)(b) and some other substantial reason under § 98(1), but rather had focussed on the capability process. The references to capability were to be understood as references to a process that was not being applied in the present case. Therefore whether the dismissal was classified as for some other substantial reason or on the basis of capability, the ultimate conclusion of the ET that the dismissal was fair was a sound one.

46. Dealing with the criticism that Commander Mackay had failed to review the OH records, that was a reasonable conclusion in a situation where the claimant did not raise any other medical evidence contradicting the IQMP report. The important conclusion in that report was that the claimant had been assessed to be unfit to undertake any regular employment with the respondent. On that basis looking for alternative employment within the service was otiose, but in any event the claimant had been placed on the redeployment register. The claimant had had an opportunity to offer his views on the IQMP report, which he had done, but he had not pointed to any other medical evidence that might contradict that binding conclusion.

47. Turning finally to the third ground of appeal, Ms Beale submitted that it was correct to say that if the first two grounds of appeal failed, then this ground must fail also. However she did not agree that the converse was also true. She invited the conclusion that even if the claimant were to succeed on the other grounds of appeal the reasoning in relation to the claim under § 15 **EqA** was sound and could survive even if the other conclusions did not. The decision was an objective one for the ET to take. the ET gave full separate consideration to the question of justification under §15 **EqA**. It set out 15 separate reasons for concluding that the dismissal was a proportionate means of achieving a legitimate aim, including detailed consideration of a distinct authority on the issue of alternative employment (**Rentokil Initial UK Ltd v Miller** [2024] UKEAT 37; see paragraphs 116 – 124). The

claimant had made no substantive challenge to the findings and reasoning therein. Thus even if grounds 1 and 2 succeed, ground 3 identifies no error of law in the reasons relating to the §15 claim, and must fail.

Reply for the claimant

48. In a succinct reply, Mr McHugh focussed on the contention that the claimant had failed to raise any medical objections to the IQMP report during the dismissal meeting in March 2023. Mr McHugh submitted that that argument simply served to underline how significant the lack of consultation was, as well as the fact that by that stage the decision, as was accepted by the ET, had been pre-determined. Discussion around the IQMP report had been limited, although the claimant had complained about a number of the findings. This exposed the contradiction in the respondent's position: it could not benefit on the one hand from the claimant not raising any medical evidence and on the other the ET finding that there had been no discussion of the report and that Commander Mackay had made up his mind prior to the meeting. If anything, reliance on what occurred at the meeting made it clear that if the claimant had gone back with new evidence then what ought to have happened is that the respondent should have taken that to the IQMP. That process was not possible because there was no substantive discussion about the report and the decision to dismiss had been taken prior to the meeting.

Analysis and decision

49. The central question for determination in this case has two aspects to it – was the categorisation of the reason for dismissal in this case wrong, and if so, does that affect the ultimate conclusion that the dismissal of the claimant was fair? I propose to follow the structure adopted by the parties and address grounds 1 and 2 of the appeal together.

50. On the broad question of categorisation of the reasons for a dismissal, parties were essentially agreed, and I concur, that the dividing line between dismissal for some other substantial reason and

dismissal on grounds of capability is not a bright one, and that the question of categorisation is highly fact specific. However, it is undisputed that there can be found in the Judgment of the ET a number of conclusions in relation to the events leading up to the dismissal of the claimant in March 2023 which it considers would have been, for example, 'significant' (paragraph 87) or 'not reasonable' (paragraph 89) in a capability process, but which it held to be fair because the claimant was being dismissed for 'some other substantial reason', namely ill health retirement. This is so notwithstanding the terms of the dismissal letter sent to the claimant, the key parts of which are recorded at paragraph 60 and which conclude:

> "In view of our discussions, the medical advice received and no suitable alternative roles available, it is with regret that my decision is that your contract of employment with the Scottish Fire and Rescue Service should be terminated **on the grounds of incapability due to ill health**." (emphasis added)

51. Thus despite the explicit terms of that letter, that the claimant is being dismissed on capability grounds, the ET have concluded, in effect, that the respondent was wrong to say so - see the sentence immediately following the quote above in paragraph 61, for example, and the finding at paragraph 87 line 30, that Commander Mackay '*did not appear to appreciate that distinction*' (referring to a distinction between capability and ill health retirement). It can of course sometimes be the case that despite what a litigant might think the position is, upon careful scrutiny by a court or tribunal the true legal position is in fact determined to be otherwise. I recognise also that the respondent's position in relation to the repeated reference to findings that would be significant in a capability process, but not in fact in this case, is that this should be understood to be a specific reference to process, rather than overall categorisation.

52. However, whilst intending no disrespect to the elegance of the submission made, I cannot conclude that that distinction is a valid one, when the Judgment is looked at as a whole. It is clear that throughout the Judgment, the ET is seeking to make a distinction between dismissal on the grounds of capability, and dismissal on the basis of some other substantial reason, in this case ill health retirement. Indeed it is not entirely clear why the ET thought it necessary to depart at all in

the present case from the respondent's own categorisation of this dismissal as being on the grounds of capability, given the ample evidence that the claimant's ill health, both physical and in terms of the stress from which he suffered, was preventing him from carrying out his operational role. Inferentially, it may be that the outcome of the IQMP assessment, that the claimant should benefit from ill health retirement on the higher tier, has caused the ET to be deflected from the respondent's own conclusion that the claimant was dismissed on grounds of capability, with the benefit if an ill health pension as by then was his entitlement following the IQMP assessment. Thus contrary to the submission on behalf of the respondent, looked at objectively, the ET has sought to draw a clear distinction between dismissal on the grounds of capability, and ill health retirement, as being a dismissal for some other substantial reason.

53. However, properly understood, ill health retirement is but one possible outcome of a Capability Process, rather than being a reason in and of itself. The cases of **Wilson**, **Ridge**, and **Kelly** are distinguishable, relating as they do to the question of categorisation of dismissal where issues of policy or procedure were at the forefront against a background of ill health or absence in each case. So far as **Leonard** is concerned, the Court itself recognised that the circumstances in that case were 'exceptional and special' and they are in any event distinguishable from the factual matrix in the present case. It follows that in describing the fact of the claimant being medically assessed as being entitled to retire on ill health grounds with an enhanced pension as the substantial 'reason' for his dismissal, the ET has fallen into error. That medical assessment took place in the context of a Capability Process which ultimately resulted in the claimant's employment being terminated on grounds of capability. The grounds of appeal suggest that the in its conclusion the ET 'erred in law and/or came to a decision that was perverse.' The threshold for perversity is a high one but I am satisfied that the error identified, whilst an error in law for all of the foregoing reasons, does not require to be labelled as perverse for this ground of appeal to succeed.

54. Of course the mis-labelling of a reason for dismissal does not inevitably mean that the overall conclusion that the dismissal was fair is untenable. Equally, errors of law of which it can be said

that they would have made no difference to the outcome do not matter (**R(Iran),** above)However in the present case there are numerous examples (referred to above) of the ET stating in terms that whilst certain actions or failures would have been significant, or unreasonable, in a Capability Process, that conclusion did not arise in the context of an ill health dismissal. Standing the conclusion in relation to the categorisation of the reason for dismissal, it follows that the ET has equally fallen into error in its approach to the question of the fairness or otherwise of the dismissal, since it has embarked upon that exercise from the wrong start point. What cannot be said with the requisite degree of confidence to permit this Tribunal to substitute its own finding at this stage however, is that it would inevitably follow that there could only be one possible outcome, that is to say that the decision to dismiss on grounds of capability was inevitably unfair. In that respect I agree with Ms Beale and concur that the matter will have to be assessed by the ET of new, relying on the same findings in fact (none of which were challenged) but from the start point that the basis upon which the claimant was dismissed was on grounds of capability. In so saying I recognise that the claimant seeks a basic award of compensation only and therefore no additional or new matters require to be considered by the ET.

55. So far as the third ground of appeal is concerned, there was much force in the submissions made by Ms Beale, and indeed Mr McHugh did not seek seriously to suggest that there was a lack of reasoning on the part of the ET on this question. However, looking at matters in the round, I consider that it is appropriate to defer to the conclusion of the ET, having had the benefit of hearing all of the evidence, that the question of unfair dismissal and any breach of § 15 **EqA** are inextricably linked, and that for that reason the appropriate course to take is to remit that question too back to the ET to consider in light of their conclusions on the question of unfair dismissal, looked at from the appropriate start point.

Conclusion and disposal

56. For all of the foregoing reasons, the appeal succeeds on the first and second grounds of appeal. There was no suggestion that any remit back to the ET required to be to a differently constituted

Tribunal (See **Sinclair Roche and Temperley v Heard** UKEAT/0738/03/MH). Standing the lack of challenge to any of the findings in fact, I see no reason not to remit back to the same Tribunal, to consider whether, on the basis that the dismissal of the claimant on 23rd March 2023 ought properly to be understood as a dismissal on the basis of capability, its findings in relation to what was and was not done during the process of dismissal was justified in terms of § 98 **ERA** and therefore whether the dismissal was, in the result, fair or unfair. Depending on its conclusions on that matter, the question of the claim under the **EqA** may require to be revisited also, standing the conclusion that these two matters are interlinked.