Case Number: 2501242/2024

EMPLOYMENT TRIBUNALS

Claimant:	**Ms J Wilkinson**
Respondent:	**Cleveland Fire Authority**
Heard at:	**Middlesbrough Employment Tribunal**
On:	**9 - 12 June 2025, 13 June 2025 (deliberations), 24 July 2025**
Before:	**Employment Judge L Robertson** **Ms E Wiles** **Mrs C Hunter**
Representation	
Claimant:	**Mr D Cahill (lay representative). Claimant also in attendance.**
Respondent:	**Miss B Clayton, counsel. Mr P Devlin, solicitor, also in attendance.**

JUDGMENT having been sent to the parties on 25 September 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Introduction

1. This claim is the claimant's fourth claim against the respondent. As such, we may make reference to it as Claim Four. Confusingly, in the particulars of claim it is referred to as 'Claim Two'. ACAS early conciliation began and ended on the same day: 31 May 2024. The claim was presented on 31 May 2024.

2. Claim One (2500877/2022): was heard at a final hearing on 12 and 13 January 2023. By a reserved judgment dated 25 January 2023, the Tribunal upheld the claimant's claim of sexual harassment relating to incidents on 22 December 2021 and 31 January 2022. The detail is set out in the previous judgment and is not repeated here except to the extent that it is directly relevant to the issues in this case. Facts which had already been determined in Claim One were not in dispute.

3. Claim Two (2502417/2022): went to a final hearing on 3 and 4 June 2024. The claims were struck out and dismissed as they fell foul of the 'res judicata' and

so-called '*Henderson v Henderson*' principle.

4. Claim Three (2501606/2023): was made the subject of a deposit order and subsequently dismissed on withdrawal on 4 December 2023.

Claims and Issues

5. In this case, the claimant is bringing the following complaints:

   5.1. 'Ordinary' unfair dismissal pursuant to section 98 Employment Rights Act 1996 ("ERA");

   5.2. Discrimination arising from disability pursuant to Section 15 Equality Act 2010 ("EqA"), about the following:

      5.2.1. The respondent subjecting the claimant to a capability procedure, in that the respondent commenced stage 3 of the formal capability procedure in or around September 2023; and

      5.2.2. Dismissing the claimant; and

   5.3. Victimisation pursuant to section 27 EqA – relating to her dismissal.

6. The claimant's complaints that the respondent failed to make reasonable adjustments had been dismissed on withdrawal prior to the start of the final hearing.

7. A list of issues had been agreed between the parties. Some clarification was agreed with the parties at the start of the hearing. The list of issues for the Tribunal to determine at this liability hearing was as follows:

   7.1. Unfair dismissal (pursuant to section 98 ERA)

      7.1.1. Was the claimant dismissed? The respondent accepted that it dismissed the claimant.

      7.1.2. What was the reason or principal reason for dismissal? The respondent relies upon capability as being the reason.

      7.1.3. Was that reason a potentially fair reason within the meaning of section 98 ERA?

      7.1.4. If the reason was capability, did the respondent act reasonably in treating this as a reason for dismissal in all the circumstances? Specifically:

         7.1.4.1. Did the respondent genuinely believe the claimant was no longer capable of performing their duties?

         7.1.4.2. Did the respondent adequately consult the claimant?

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

7.1.4.4. Could the respondent reasonably have been expected to wait longer before dismissing the claimant?

7.1.4.5. Did the decision to dismiss fall within the range of reasonable responses that was open to the respondent in all the circumstances?

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

7.2.1. The respondent had conceded that the claimant had a disability at the material time and that it knew of the claimant's disability at the material time.

7.2.2. Did the respondent do the following things:

7.2.2.1. Subject the claimant to a capability procedure in that the respondent commenced stage 3 of the formal capability procedure in or around September 2023?

7.2.2.2. Dismiss the claimant? The respondent accepted that the claimant was dismissed.

7.2.3. If so, was this unfavourable treatment?

7.2.4. Was this unfavourable treatment because of something arising in consequence of the claimant's disability? The claimant says the "something arising" was the claimant's inability to perform her firefighter role which arose in consequence of her disabilities.

7.2.5. Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent says that the legitimate aim was ensuring an efficient workforce.

7.2.6. Was the treatment an appropriate and reasonably necessary way to achieve those aims?

7.2.7. Could something less discriminatory have been done instead?

7.2.8. How should the needs of the claimant and the respondent be balanced?

7.3. Victimisation (Equality Act 2010 section 27)

7.3.1. Did the claimant do a protected act within the meaning of section 27(2) EqA: Specifically:

7.3.1.1. presenting Claim One;

7.3.1.2. presenting Claim Two; and

7.3.1.3. giving evidence in Claim One.

7.3.2. The respondent accepted that the claimant's presentation of Claim One and Claim Two and giving evidence in Claim One were protected acts.

7.3.3. Did the respondent at the relevant time believe that the claimant had done, or may do, a protected act?

7.3.4. Did the respondent do the following things:

7.3.4.1. Dismiss the claimant? The respondent accepts that it dismissed the claimant.

7.3.5. By doing so, did it subject the claimant to detriment?

7.3.6. If so, was the claimant subjected to the above detriment(s) because they had done a protected act, or because the respondent believed that the claimant had done, or may do, a protected act?

Procedure, documents and evidence heard

8. This hearing was listed to determine issues of liability only, with remedy to be dealt with at a later date if relevant.

9. The claimant had requested a reasonable adjustment in the form of a hearing loop. This was discussed at the start of the hearing. The Tribunal room had a hearing loop facility available. The claimant was wearing hearing aids and said that she did not need a hearing loop. She confirmed that she could hear everything that was being said and agreed to inform the Judge immediately if she was struggling to hear. During her oral evidence, she indicated that she was struggling to hear, and said that she found it easier to hear if the person speaking faced her as they spoke but that the hearing loop would not assist. This was agreed. Following the lunch break, she explained that her hearing aid batteries had needed changing before the break and, now that they had been changed, she could hear everything. She again agreed to inform the Judge immediately if she was struggling to hear. There were no further difficulties.

10. Reasonable adjustments were discussed, but no other adjustments were requested.

11. The bundle and witness statements had been exchanged on 4 June 2025. The delay appeared to have resulted from difficulties in finalising the bundle.

12. At the start of the hearing, we had a bundle of 2216 pages. Page references in the reasons below are to the page numbers from the bundle. The claimant had raised issues about documents having been omitted from the bundle by the respondent. Miss Clayton submitted that the respondent's position was that everything that the claimant had sent to the respondent had been included. If any documents had been omitted, Miss Clayton submitted that this was accidental and resulting from the claimant's disclosure being sent to the respondent on a piecemeal basis.

13. Miss Clayton submitted that the respondent's position was that the relevant documents were in the first section of the bundle, but that the respondent had

agreed to include additional documents at the claimant's request – these were in a separate section labelled 'Documents requested to be included by the claimant'. Miss Clayton raised concern about additional photocopying costs which the respondent had borne as a result of the size of the bundle.

14. At the start of and during the hearing, the claimant identified some documents which had not been included in the bundle. Other than one privileged document, those additional documents were added during the course of the hearing.

15. The claimant had provided CDs with the recording of the capability hearing in March 2024 and the body camera footage from February 2022. The Tribunal had a transcript of the capability hearing and it was not necessary to listen to the recording. It was not necessary for the Tribunal to view the body camera footage as the Claim One judgment made findings about the matters shown on the footage and it was not directly relevant to the issues to be determined by the Tribunal in Claim Four.

16. We had written and oral witness evidence from:

    16.1. The claimant;

    16.2. Christine Chisholm – Senior Head of People;

    16.3. Lyn Younger – Head of Finance and Procurement; and

    16.4. Michelle Richardson – Head of HR.

17. Upon reading the statements on the morning of the hearing, the panel noted that the claimant's witness statement included two very similar versions of her statement, one after the other, and did not include page numbers from the bundle. An email was sent to the parties, ordering the claimant to provide a list which clearly identified, for each paragraph of her statement, which pages of the bundle were referred to. The Tribunal directed that the claimant must not amend her witness statement which had already been provided. The list had not been provided by the start of the hearing.

18. This was discussed at the start of the hearing. Mr Cahill informed the Tribunal that the bundle and witness statements had been exchanged at the same time and so it had not been possible for page numbers to be included in the claimant's statement at the point of exchange. It was agreed that the claimant would provide the list, as directed, before the start of day 2 of this hearing. In the event, the claimant added the page numbers to her witness statement – some page numbers were in the first version of her statement, with others in the second version. The Tribunal expressed concern that the claimant had not done as she was directed to do (provide a list), and had taken the course of action which she had been directed not to take (amending her statement). The claimant assured the Tribunal and the respondent that she had not amended the statement other than to add page numbers. Steps were taken to check the statements and no changes were identified at the time but, during the hearing, one such change was identified.

19. Notwithstanding the above, it appeared that the claimant had still not specified the relevant page numbers for all documents referred to in her witness

statement. The Tribunal made it clear to the parties that it would only read and take into account the documents in the bundle for which specific page numbers were provided in the witness statements and in oral evidence. The claimant had had ample opportunity to provide the relevant page numbers and it was not proportionate to delay the hearing further or search for any pages which she had not specified.

20. A list of agreed facts had not been produced. The parties confirmed that those facts which had already been determined by the (differently constituted) Tribunal in Claim One were accepted and not in dispute. The respondent had produced a draft chronology and sent it to the claimant. Mr Cahill agreed to check the respondent's draft and confirm whether there were any areas in dispute. This was raised again on 12 June, when Mr Cahill confirmed that he had no issues with the respondent's chronology, but informed the Tribunal that the claimant had provided her own more detailed chronology, which had not been included in the bundle but was meant to be read alongside the claimant's witness statement. Following discussion, Mr Cahill confirmed that the claimant's witness statement included the chronology as far as it was relevant and there was no need for the Tribunal to read the claimant's chronology (which was not before the Tribunal in any event).

21. Following preliminary discussions, both parties confirmed that they were ready and content to proceed.

22. Having heard the evidence and submissions, there was not time for deliberations. We listed a further hearing on 24 July 2025 to deliver our oral judgment and, if relevant, to make directions to deal with remedy.

Findings of fact made in Claim One judgment

23. The claimant's employment by the respondent began in January 2009. She was employed as a firefighter.

24. The respondent is a fire authority.

25. We set out relevant extracts from the Claim One judgment in italics, using the paragraph numbers from the judgment. It appeared to us that the reference to December 2022 at paragraph 10 might be an error such that the date was 2021, but we made no finding to that effect:

9. She had a period of sick leave from 14 September 2020 until 15 February 2021. Upon her return to work, she was placed on modified duties. While on such duties, she did not attend on operational runs on the respondent's fire engines.

10. In December 2022, the claimant informed the respondent of her intention to raise a grievance. She did not lodge a grievance at that time but intended to complain about various matters, including complaints of alleged discriminatory treatment, on dates stretching back over the previous decade and beyond to 2009.

11. On 22 December 2021, the claimant undertook her first day back on operational duty.

26. On 15 February 2022, the claimant called in sick just after 7.30am. At this time, she was struggling with anxiety and had been prescribed anti depressant medication by her GP. She was not at home, though her daughter (aged around 21) was in her house, asleep in her bedroom. About an hour after the claimant had phoned in sick, an employee of the respondent attended at her property. When he obtained no answer at her door, he entered the claimant's property and searched all rooms. The claimant was not aware at the time that the manager had searched all rooms in her property. The claimant's daughter slept through the incident.

27. The individual asked the claimant's neighbour to monitor her home and to inform him when the claimant returned. Her neighbour complied with this request. Soon after, when both she and her daughter were home, Station Manager Haggath and another employee of the respondent attended at the claimant's property. The claimant and her daughter watched the pair from the window. The claimant went down to the first floor and heard someone had entered her front door and was shouting her name up the stairs. She and her daughter felt frightened and intimidated by the uninvited entry. She could not understand why a senior manager of the respondent was attending her property when she had called in sick.

28. She heard WM Haggath or his colleague open her garage door then close it again. WM Haggath then walked to his car, where he wrote notes for the claimant. He put one through her letter box. He then walked round the back of the claimant's house, opened the sliding doors, and left the other note inside her property on the kitchen floor. They then left in their cars.

29. Both the claimant and her daughter were shaken by the incident. The claimant's daughter went downstairs to pick up the note. As she returned upstairs, WM Haggath returned to the claimant's house, unaccompanied. He walked to the rear of the claimant's property and banged on the kitchen door. The claimant's daughter went downstairs to answer the door. He said that whoever had taken the call from the claimant that morning thought she had booked fit for work but then not turned up. The claimant's daughter told him the claimant had booked sick and was in bed. WM Haggath asked her daughter to get the claimant up. Her daughter refused. He then told the claimant's daughter to tell the claimant to call a colleague, Stu Simpson, when she woke. He provided Mr Simpson's number, then left. The claimant was extremely concerned by these events and called the police. They said they would get back to her. When she chased up the matter, they indicated they would not pursue the matter because it did not appear that the respondent's station manager and his colleague had intended to take anything from her property. They observed that they may have been trespassing and suggested the claimant pursue this as a civil matter.

30. Later the same day, the claimant sent a message to Mr Simpson on the number given to confirm she had booked sick, not fit. As soon as she sent the message, the claimant received a missed call from Mr Simpson who asked her to call him. The claimant, who was feeling very anxious, decided not to return the call.

31. The following morning (16 February 2022), the respondent's WM Smith attended at the claimant's property. He knocked her front door and looked through her window.

This Tribunal's Findings

26. Having considered all the evidence, we find the following facts on a balance of probabilities. Some of our findings on disputed factual issues are dealt with further in our conclusions. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

27. That day (16 February 2022), Mr Smith put a note through the claimant's door with his mobile number, inviting her to get in touch if she needed support.

28. The Tribunal had before us a series of emails sent from the claimant to herself, setting out the date, time and content of text messages between herself and Mr Smith (965-977). Although screenshots of those text messages were not before us, there was no evidence that the emails were not an accurate reflection of the text messages which had been sent. However, we have found that the messages which were before us were not a complete record of the contact between them. We deal with this further below.

29. On 16 February 2022, the claimant was aware that on that day two individuals from the respondent had entered her property via her kitchen and her garage without invitation, and returned to her property and spoke to her daughter. That is clear from her text message to Mr Smith on that date, timed at 11:07 (966). We accept the claimant's evidence that she was not aware that there was bodycam footage of the visit, which showed every room being entered, until she received her grievance outcome in June 2022.

30. On 16 February 2022, the claimant was asked to identify a welfare officer for her to engage with. This was in connection with her period of sickness absence which had begun the previous day. At the time, and perhaps understandably given that she was upset that individuals from the respondent had entered her property the previous day, the claimant did not want to engage with anyone at the respondent. This is clear from her text message to Mr Smith on that date, timed at 11:07 (966). However, the claimant was informed that she needed to engage with a welfare officer and, at her request, Mr Smith was allocated to her. This is clear from the minutes of the capability meeting which took place on 1 March 2024 (229).

31. The same day (16 February 2022), Mr Smith contacted the claimant to ask for further details relating to her absence, stating that there had been, "*a breakdown in communication when the WM took your phone call sick/fit and subsequently when we've tried to contact you to confirm this.*" He went on to say that they had concern for the welfare of all staff and were certainly not trying to cause the claimant any distress. He said that the respondent has many support services that can be offered and put in place, and said that they were contacting the claimant to ensure that, if anything were to be required, it was in place. He concluded by saying, "*We would look to arrange occupational health appointments etc quickly to support our staff when required if the illness/injury needs. We are here to support and if you don't want to speak to anyone currently I will look to contact you next week.*"

32. The following day, 17 February 2022, the claimant responded, clarifying that her sickness absence was due to stress and anxiety. She went on to say that

she was in touch with the Firefighters Charity and was in the process of receiving counselling, and she had been prescribed medication by her doctor. She said that she was unable to give a date for her return to work at that point (968).

33. The same day, Mr Smith responded (969), saying, "*Thanks for letting me know Julie. Take care and if you need anything I'm here to help.*"

34. The claimant responded (970), "*Thank you.*"

35. On or around 23 February 2022, Mr Smith messaged the claimant again. His message is not in the bundle but the claimant's reply is (971). She responded, "*I'm okay thanks Mick, I have a fit note and I'll email that across to HR today. Thank you.*"

36. The same day, the claimant submitted a fit note to Emma Doubooni, the respondent's Head of HR. Ms Doubooni responded on 24 February 2022: her response stated, "*If you wish to discuss anything further or I can be of any assistance please do not hesitate to contact me.*" It was clear from Ms Doubooni's email (978) that there was an open door for the claimant to contact the respondent's HR team if she wished.

37. At paragraph 33 of the Claim One judgment, the Tribunal found, in summary, that the claimant raised a grievance on 27 February 2022 which, amongst other things, set out allegations concerning the events of 15 and 16 February 2022. The claimant subsequently brought a sex discrimination claim about the events of 15 and 16 February 2022; this was the subject of Claim Two.

38. On 21 March 2022, Mr Smith contacted the claimant again, asking how she was, inviting her to call him if she needed anything and reminding her to send a further fit note to HR (972). The claimant responded the same day, thanking Mr Smith for the reminder and saying that she would now send it to HR (973).

39. On 12 April 2022, Mr Smith contacted the claimant again (974), saying, "*Hi Julie. How are you? Just texting to say I'm available if you need anything, just phone. Take care. Mick.*" The following day, the claimant responded (975), "*I'm okay thanks Mick.*"

40. On 22 April 2022, the claimant messaged Mr Smith in response to his voice recording. She agreed to contact IT to follow up on an issue (976).

41. There were no messages before us of any contact between the claimant and Mr Smith in May 2022. On balance we find that there was some further contact between them in May 2022, taking into account that there was a pattern of contact between the claimant and Mr Smith on a monthly basis up to that point in time and that the messages before us were not a complete record of contact between them.

42. As set out in paragraphs 48 and 49 of the Claim One judgment, on 17 June 2022, Mr Brown sent his grievance outcome letter. On 20 June 2022, the claimant lodged a written appeal against the grievance outcome.

43. On 21 June 2022, the claimant messaged Mr Smith about being unable to access her work emails (977). We accept the claimant's evidence that he did

not respond.

44. There was no further contact between the claimant and Mr Smith after June 2022. As such, the claimant did not have contact with a welfare officer from then until the grievance appeal outcome meeting on 1 November 2022.

45. At the start of the claimant's period of sickness absence, the sickness absence management policy and procedure which states 'October 2020' on the first page applied to the claimant (78-112).

46. This policy provides for employees on sickness absence to have a 'nominated contact officer'. This is the same as the welfare officer and we have used the term 'welfare officer' in this judgment as this reflects the term used at the time. The policy states that the frequency of contact between the absent employee and the welfare officer should be determined on a case by case basis but, "*there should never be more than 7 days between contact.*" However, taking into account the claimant's clear indication on 16 February 2022 that she did not want to talk to anyone from the respondent (966) and the tone of the messages, we are satisfied that the claimant was happy with the level of contact between herself and Mr Smith during the period when they were in contact. Further, the claimant accepted that she was quick to raise things that she was unhappy about: had she been unhappy, she would have raised it.

47. Paragraph 4.8 of the policy required that a referral to occupational health must be made immediately if the absence appeared to be stress-related or related to mental health issues.

48. On 1 July 2022, Ms Doubooni contacted the claimant to offer a referral to occupational health. The claimant declined. Although the claimant disputed that she declined this, she accepted under cross-examination that she had declined this. Further, Ms Doubooni's letter to the claimant of 26 June 2023 (171-173) stated that, "*due to the nature of some of your grievances you had raised that you did not wish to engage with occupational health.*" The claimant's concession (that she had declined the offer) is also consistent with no referral having been made at the time.

49. In or around September 2022, the respondent implemented an updated sickness absence management policy and procedure which thereafter applied to the claimant. The updated version of the policy which applied from that point in time states 'updated September 2022' on the front page (416-451).

50. As set out in paragraph 58 of the Claim One judgment, on 1 November 2022, the claimant attended a grievance hearing appeal outcome meeting, chaired by S Weastell. Mr Weastell told her that her grievance appeal was not upheld.

51. We were referred to the grievance appeal report (1726-1882). We note from the management case report for the appeal hearing, which appears at Appendix 3 to that report, that the claimant was informed that the respondent was satisfied that all of the staff involved in the decision to enter her home did so through nothing other than concern for her. However, there was also an acknowledgement that more could have been done to explore her safety before entering her home and an apology was given by Mr Brown, the Investigating Manager.

52. At the outcome meeting, after delivering the outcome, Mr Weastell sought to explore how the respondent could get the claimant back to work and said that arrangements would now be put in place to facilitate that. Mrs Richardson added that the first step would be to get an Occupational Health opinion on the claimant's fitness to return and put a return to work plan in place.

53. The claimant was asked whether she would like to continue with Mr Smith as her welfare officer or whether she would prefer it if she (Mrs Richardson) stepped in. It is clear from Mrs Richardson's question that her understanding was that Mr Smith was still the claimant's welfare officer, even though there had been no contact between them for several months. The claimant did not respond directly to Mrs Richardson's question, instead saying that she had been told to make no comments.

54. The claimant's union representative stated that they thought that the claimant just wanted to arrange an occupational health appointment. The claimant repeated that she could not think and needed time, and it was agreed that Mrs Richardson would contact her in a week's time. Mrs Richardson acknowledged that for the claimant to return to working with Mr Colman would be difficult, but that the respondent would work with the claimant to determine a suitable place of work, that would be done as part of the return to work discussions/plan and the claimant would be fully involved.

55. Following the grievance appeal outcome meeting, Mrs Richardson wrote to the claimant, stating that she would contact the claimant the following Tuesday to discuss how to move forward with the return to work plan, the first step being an occupational health review, and asking the claimant to give her a call if she felt able to have that discussion before then (1367).

56. The claimant was then referred to occupational health for an assessment. On 8 November 2022, Mrs Richardson wrote to the claimant with details of the occupational health appointment. Mrs Richardson advised the claimant that she had by that point exhausted her entitlement for six months' full sick pay, and that the contents of the occupational health report would inform the respondent's decision-making as to whether the claimant's sick pay would be reduced to half pay.

57. Mrs Richardson also stated that, as agreed with Karl Wager, the claimant's trade union representative, Mrs Richardson would act as point of contact between the claimant and the respondent (1370). This meant that, in substance but not in name, Mrs Richardson had stepped in to act as the claimant's welfare officer at that point in time.

58. The claimant's occupational health assessment took place on 21 November 2022. A report was produced, dated 6 December 2022 (198). The report noted that the claimant had been on sickness absence since February 2022 following a deterioration in her mental health. The report stated that the claimant had reported work-related factors as the cause for this decline in her health. The report stated that the claimant had sought help from her GP who had trialled medication and had received primary care mental health support. The report author opined that, "*Ms Wilkinson is currently unfit for her substantive role or a modified role at the present time. Once her health improves then a return will be possible and temporary role adjustments are likely to be helpful in ensuring a successful return to work (e.g. modified role, phased return, additional*

support)."

59. The report gave management advice as follows: "*Ms Wilkinson is currently unfit for work and plans to discuss alternative treatments with her GP. I would be grateful if you could refer her for psychological therapy/treatment through the employee assistance programme. Regular contact with management as a form of support (e.g. every fortnight) is also likely to be helpful.*"

60. On 7 December 2022, Mrs Richardson wrote to the claimant. In her email, Mrs Richardson referred to the occupational health report and stated that she would make the wellbeing referral for the claimant that day, and that there would then be a telephone appointment during which psychological therapy/treatment options would be discussed with her to determine the best route. Mrs Richardson also recognised that, in light of the concerns that the claimant had raised about her line manager (the details of which were not before us), it would not be appropriate for the line manager to be the claimant's point of contact. Although Mrs Richardson had stepped in temporarily, she asked the claimant to identify a member of the management team that she thought may be best to support the claimant with regular contact with management on an on-going basis (1385).

61. On 9 December 2022, Mrs Richardson wrote to the claimant in relation to her sick pay entitlement (166-167). The letter set out that the claimant was eligible to receive full sick pay for six months, which had expired on 16 August 2022.

62. The respondent's extant sickness absence policy set out the sick pay entitlement for employees on Grey Book provisions as follows:

"*3.6 An employee on authorised sick leave shall be entitled to full pay for six months in any twelve month period. Therafter the Fire Authority may reduce pay by up to half for six months.*

3.7 An employee on authorised sick leave as a result of an illness or injury arising out of authorised duty shall be entitled to full pay for twelve months. Thereafter the Fire Authority may reduce pay by up to half for six months."

63. It is clear from Mrs Richardson's letter of 9 December 2022, which summarises the basic entitlement to full sick pay for the first six months of sickness absence, that the respondent was applying paragraph 3.6 of the policy to the claimant at that point in time.

64. The claimant was advised by this letter that her entitlement to full sick pay expired on 16 August 2022, but the letter continued to state that, "*a decision was made to defer reducing [the claimant's] sick pay until [the respondent] had an updated medical opinion on [her] fitness to return to work.*" The letter referred to the recent occupational health report and stated, "*As Occupational Health have deemed you unfit for work and that they do not foresee any change to your situation for at least 3 months, this letter provides you with the notice required by the Brigade's Sickness Absence Management Policy that your pay will be reduced to half with effect from 6th January 2023, should you not be in a position to return to work by that date.*" The letter provided the claimant with the right of appeal against the decision.

65. On 14 December 2022, the claimant appealed to Ian Hayton, Chief Fire Officer,

against the decision that her sick pay would reduce (168). The claimant's position was that she should be entitled to the more generous sick pay entitlement provided for at paragraph 3.7 of the policy because, in summary, her sickness absence resulted from unwanted discrimination, bullying, harassment and intimidation that she was subjected to whilst on authorised duty and reducing her pay amounted to disability discrimination.

66. On 9 and 16 December 2022, the claimant informed Ms Doubooni that she thought that Katie Love would be best to support her with regular contact with management. The claimant notified Ms Doubooni (rather than Mrs Richardson) about her preference because by that point she had raised two grievances against Mrs Richardson for treating her unfairly (1383). The claimant also complained about Ms Doubooni during the claimant's sickness absence, although it was not clear when.

67. On 16 December 2022, Mr Hayton responded (170) to the claimant. Mr Hayton said that he would consider her appeal and then write to confirm the outcome, but in the meantime he suspended the decision to reduce her pay.

68. The respondent referred the claimant for a psychological assessment, in line with the recommendations from occupational health. The report following that assessment was dated 19 December 2022. The report states:

"*Management Advice*

Given her scores today, and her anecdotal presentation, I feel that Ms Wilkinson would benefit from a course of up to six sessions of telephone counselling, as she does not currently have an appropriate emotional outlet in place, and I recommend that management make a referral for Ms Wilkinson, via the OHIO system. This would likely serve to reduce her emotional burden, and help her to manage her levels of anxiety and depression.

Based on her general presentation today, I felt it necessary to contact her GP surgery, in order to make them aware of my concerns regarding her emotional wellbeing.

I would also strongly advise management, upon her eventual return, to endeavour to offer Miss Wilkinson a supportive environment, with opportunities for open dialogue as required, and a flexible approach to duties. Specifically, she would benefit from practical support at work from management, or failing this, perhaps consideration could be given to a change of work location, if operationally feasible.

Work status: I would advise that Miss Wilkinson is not fit for duties today, in line with her current GP fit note."

69. The claimant received the recommended counselling and, although she had engaged well, and the discharge report indicated that some progress had been made in therapy, the opinion was that she would benefit from further therapeutic intervention and recommended a further 10 sessions (which had been agreed by that point)(202).

70. On 27 January 2023, Mrs Richardson told the claimant that Katie Love was unable to take on the role of welfare officer. We accept Mrs Richardson's

evidence that this was because Ms Love did not want to take on the role. On 3 February 2023, Ms Doubooni asked the claimant if she was able to identify anyone else for the role (1381-2).

71. On 6 February 2023, the claimant raised concerns to Ms Doubooni about the lack of support she had received. Her email included the following text, "*since going through the whole grievance and appeal process, I have had absolutely no support from any manager, whether HR, HQ or Operational, unfortunately this includes you, the head of HR.*"

72. On 8 February 2023, Ms Doubooni advised the claimant that Ms Love was unable to support the request for her to act as management contact (571) and invited the claimant to confirm any other preferred person for this role. The claimant responded the same day, raising concerns about who she could trust, and saying that she was open to suggestions for a management contact (570). The claimant did not suggest anyone herself.

73. On 17 February 2023, Ms Doubooni emailed the claimant to inform her that she had identified Mrs Younger, Head of Finance, as a possible welfare officer. She asked the claimant to confirm whether she was agreeable to this proposal, and then she would make the arrangements (570). We were not referred to any document in which the claimant responded to this suggestion, but it is clear from the fact that Mrs Younger was not appointed as the claimant's welfare officer that the claimant did not agree to the suggestion. Ms Doobooni's subsequent letter indicates that the claimant declined (171).

74. There was a further occupational health assessment on 15 May 2023. The claimant asked to see the report before consenting to its release (203). We heard evidence from the claimant that there were difficulties in granting this consent, which we accept. It was unclear whether this report was ever received.

75. On 21 June 2023, the claimant was discharged from the occupational health counselling service. The discharge report stated that the claimant had engaged well but, because of a severe level of anxiety and depression, their opinion was that there had been no progress in therapy. There was a recommendation for further therapeutic intervention and they had signposted the claimant to alternative services (204).

76. On 26 June 2023, Ms Doubooni wrote to the claimant (171-173). The letter stated that the respondent had taken the decision not to reduce the claimant's sick pay with effect from 16 August 2022. One of the reasons for that decision was stated to be that, "*due to the nature of some of your grievances you had raised that you did not wish to engage with occupational health.*"

77. The letter records that the respondent did not, at that point, have the occupational health advice following the appointment on 15 May 2023. Ms Doubooni informed the claimant that the respondent presumed that the claimant was not fit to return to work. This position must have been consistent with the fit notes that the claimant was submitting at the time as a condition of her receiving sick pay, although we were not referred to those. On that basis, Ms Doubooni informed the claimant that a decision had been made to reduce the claimant's sick pay to half pay with effect from 24 July 2023. Ms Doubooni recognised that the claimant had, by that point, received 17 months' full sick

pay, and noted that that was an additional 5 months of full sick pay over and above the maximum 12 months' full pay. Ms Doubooni advised the claimant that the position with the claimant's pay would be reviewed in one month's time and nil pay would be a consideration. Ms Doubooni encouraged the claimant to attend an occupational health appointment so that the respondent could have an accurate picture of the claimant's current health.

78. On 28 June 2023, the claimant appealed against the decision in relation to her sick pay. Mr Hayton responded to the claimant on 30 June 2023 (175-176). In Mr Hayton's letter, he referred to the more generous entitlement to 12 months' full sick pay. Although Mr Hayton did not state that the claimant was eligible for this, he noted that she had nevertheless received more than that. He confirmed that the claimant's sick pay would be reduced to half pay with effect from 24 July 2023, and then reviewed in August 2023. He reassured the claimant that no decision had yet been taken to reduce her sick pay to nil in August 2023, and the situation would be reviewed at that point. Mr Hayton's letter noted that the respondent was progressing internal processes and described the involvement of occupational health. The letter ended by saying, "*please do not hesitate to contact Human Resources on 01429 874020 should you require any additional support or assistance.*" This made clear to the claimant that the door was open for her to contact HR.

79. In fact, the claimant continued to receive half sick pay until her employment terminated.

80. In an occupational health report by Dr McGill dated 26 July 2023, it was noted that the claimant felt that she was not fit to work. The report stated (205):

"*OH Opinion*

Julie is currently unfit for work. She is having panic attacks which would impact her ability to attend and function at work. She has unfortunately not responded well to medication and talking therapies and is not currently functioning with day to day tasks.

Management Advice

Julie is currently unfit for her role as a firefighter and not fit for another role either at present either and a date to return to work is currently unknown and there is no plan to return to work in the near future."

81. On 27 July 2023, Ms Doubooni wrote to the claimant, attaching the recent occupational health report. The claimant was informed that a meeting would need to take place to discuss the report, and asked the claimant to provide details of her availability in the week commencing 7 August 2023 (2233).

82. The following day, the claimant emailed Ms Doubooni (2234) to ask her to explain the purpose and agenda of the meeting, and who the meeting was to be with. The claimant informed Ms Doubooni that, "*the mental health nurse has just changed my medication to help with my panic attacks and I am in no fit state mentally to attend any meeting at my workplace, as identified in the attached Occupational Health Consultation Report.*" The most recent report, dated 26 July 2023, stated that Miss Wilkinson was unfit for work and was having panic attacks which would impact her ability to attend and function at

work, but did not clearly state that she was unable to attend any meeting about her absence, if that meeting were to take place on the respondent's premises.

83. On 2 August 2023, the claimant chased Ms Doubooni for a response to her email (2235). The same day, Ms Doubooni responded to the claimant and confirmed, "*the meeting is to discuss the report in general and the management advice. It would be in line with our Sickness Absence Management Policy under capability where we have Occupational Health advice that states that an individual is unfit for their role or any other role and there is not date of return.*" The letter therefore alludes to stage 3 of the sickness absence management policy (as to which, see further below).

84. On 9 August 2023, Ms Doubooni emailed the claimant again, attaching the sickness absence management policy (2238). Ms Doubooni informed the claimant that the relevant information was under the formal stage, from paragraph 6.21 onwards. We accept the claimant's unchallenged evidence that the October 2020 policy was attached to this email. As the September 2022 policy was in place by then, we find this to have an error on Ms Doubooni's part. In both policies, paragraph 6.21 deals with redeployment.

85. In the same email, Ms Doubooni emphasised that, "*we do need to be able to discuss the advice from Occupational Health, however as you have stated below that you are in no fit state mentally to attend a meeting in the workplace I will ask for further advice from Occupational Health as to how we might best facilitate this.*"

86. By the time of that email, the respondent had made a decision to implement stage 3 of the sickness absence management policy. We find that decision to have been made by Ms Doubooni as the Head of HR and the person writing the correspondence to the claimant at that time. This is supported by Mrs Chisholm's evidence, which we accept, that this decision would usually be made by the Head of HR. We also find Ms Doubooni's reasons for implementing stage 3 of the policy to have been as set out in the correspondence; in summary, the claimant's sickness absence and the occupational health advice which stated that she was unfit for her role or any other role and there was no planned date of return in the near future.

87. On 23 August 2023, following a further assessment of the claimant, Dr McGill wrote a further occupational health report (207). The report included the following statements:

"*Current Issues*

88. *Julie is currently off sick due to anxiety and depression and is seeing her GP and the mental health services regularly and has started some new medication for anxiety and depression since her last appointment which will take time to work/adjust dosages of, and is suffering from some side effects from this.*

OH Opinion

Julie is currently not fit to attend work, or for her role as a firefighter and she is also not fit to attend a work place based meeting. No date for return to work is available at present.

Management Advice

Julie has agreed that she would be willing to attend an online teams meeting."

89. Following that report, there were emails with a view to arranging a meeting with the claimant. Ms Doubooni sent a letter to the claimant on 21 September 2023 inviting her to a meeting via MS Teams on 29 September 2023 (177-178). The meeting was said to be to discuss her recent occupational health appointment. The letter stated that, "*the meeting is an investigatory meeting under stage 3 of the Capability Policy based on the information that was shared in your latest Occupational Health report, where it details you are currently not fit to attend work, or for your role as a firefighter and that no date for return to work is available at present.*" A copy of the September 2022 sickness absence policy was attached to the letter. The letter drew the claimant's attention to paragraph 6.22 onwards of that policy, and informed the claimant that the meeting would result in a 2 month monitoring period during which the Investigating Manager would have the opportunity to consider the following:

    - "*adequate recent medical evidence is available which indicates that a return to work in any capacity or to their role is unlikely within a reasonable timescale*
    - *Ill health retirement has been considered but they do not meet the criteria*
    - *Any feasible modification to the role/workplace have been explored and are either not possible or have not worked*
    - *Redeployment has been considered but there are no vacancies, no suitable alternative employment or the redeployment opportunity has not worked*
    - *There has been full and meaningful consultation with the individual in respect of their sickness and opportunities to return to work.*"

90. These are referred to as 'the 5 bullet points' and are copied from paragraph 6.24 of the sickness absence management policy. Dave Preston, Head of Operational Policy and Planning, was to chair the meeting.

91. The section of the sickness absence management policy which deals with termination of employment due to ill health cross-referred to the capability policy (128-131, 448), and stated that the process to be used was the formal stage 3 hearing from the capability procedure.

92. The claimant asked for the meeting to be postponed for health and wellbeing reasons. On 4 October 2023, the claimant also asked that another chair was allocated due to her perception that the allocated manager was not objective.

93. The respondent agreed to reschedule the meeting and change the chair of the meeting. On 18 October 2023, Ms Doubooni sent a letter to the claimant, rescheduling the meeting to 25 October 2023 and informing her that there had been a change to the chair of the meeting - Mrs Younger was to chair it in place of Mr Preston (179). This letter reiterated that this was an investigatory meeting

under stage 3 of the sickness absence policy and the other information from the previous letter.

94. The meeting went ahead on 25 October 2023. The respondent's minutes of the meeting were before us (181-182). The claimant recorded this meeting and her transcript was also before us (184-190). At the meeting, Mrs Younger clarified that the meeting was a stage 3 capability meeting. The claimant did not want to be accompanied.

95. Mrs Younger noted that the most recent occupational health reports (26 July and 23 August 2023) stated that the claimant was unfit for work in her role as a firefighter or for another role at present; and a date for a return to work was currently unknown and there was no plan to return to work in the near future. Mrs Younger asked the claimant if anything had changed and whether she would be able to be redeployed into another role. The claimant responded that she, "*couldn't possibly even think about coming to work at the minute.*" The claimant also made it clear that she could not think about returning to work (either into her firefighter role or another role) until the Employment Tribunal claims had finished. We find on balance that the claimant told Mrs Younger that her medication had recently been doubled to help her to function day to day, as reflected in the respondent's minutes (181). Although not all of our findings are referred to in the claimant's transcript, that is not a complete transcript (there are references to sections being inaudible, and the claimant was only asked to provide vital details she believed to be missing from the respondent's notes) and there was no persuasive evidence that the minutes had been fabricated by the respondent.

96. At the meeting, the claimant raised concern that her mental health difficulties started from when the respondent broke into her home, and that the respondent was trying to dismiss her because she had brought claims against different people. In response, Mrs Younger said that she had not been involved in anything that had gone before, and just wanted to focus on the occupational health reports, whether the claimant was capable of doing her job at that point in time and the five bullet points. The claimant interpreted that to mean that the respondent was not interested in the reason for her absence – her written evidence was that, "*during the meeting I tried to explain the reason for my absence and I was told they weren't interested, all they were interested in was if I could return to my role that day*." However, we find that Mrs Younger was simply focussed on carrying out the role that she had been appointed to – in summary, to deal with the investigatory meeting under stage 3 of the capability policy (117).

97. Mrs Younger explained to the claimant, that, following the meeting, there would be a 2 month monitoring period during which information pertaining to the five bullet points would be reviewed and a further occupational health report would be obtained. Mrs Younger asked whether there was any other welfare support that could be offered to the claimant while that process was underway, and the claimant said that there was nothing that she could think of and that she was already receiving support from outside the Brigade (182, 186).

98. The claimant asked why the respondent had proceeded straight to the formal stage and had not dealt with her absence under the informal stage first. Mrs Younger thought that the policy stated, at paragraph 6.22 onwards, that where capability was due to ill health, the matter proceeded straight to stage 3 (stage

3 is a reference to the formal stage where termination of employment is considered). Mrs Younger acknowledged that, although the first email about the meeting referred to paragraph 6.21 (which deals with redeployment), that was an error and it should have referred to paragraph 6.22 as the two subsequent letters had stated.

99. There was a discussion about redeployment. The claimant had stated that, "*it would depend what it was and when it was offered to me, because whilst I'm going through with the claims with the Employment Tribunal, I couldn't possibly think about returning to work until that has finished.*" Mrs Younger noted that it would depend on the vacancies at the time and what the claimant could do. Mrs Younger agreed to keep that under review during the 2 month monitoring period.

100. We accept Mrs Younger's evidence that she was to investigate and monitor the information pertaining to the 'five bullet points' (to the extent that they were relevant – it had already been established that ill health retirement was not) and produce a report (as to which, see paragraph 112 below).

101. There was an appointment on 15 November 2023 for the claimant to have a further occupational health assessment by telephone. This appointment did not go ahead. Three attempts were made to contact the claimant over a period of fifteen minutes, and a voicemail message was left on the first attempt (208). This is set out in the letter of 17 November 2023 (193). The claimant gave evidence that she did not answer the telephone because the call came from a London telephone number and not from a 01429 area code, as her previous appointments had been: we do not accept that that was a reasonable explanation for not answering the telephone three times, at the scheduled time of her appointment and despite an explanatory voicemail message having been left on the first attempt.

102. On 17 November 2023, the respondent sent a letter to the claimant (192-193) to confirm what had been discussed during the 25 October 2023 meeting. The letter stated that:

"*As per the Brigade's sickness absence management policy and procedure the meeting was arranged due to information shared in the recent occupational health reports of the 26th July and 23rd August 2023 and under section 6.22 which states: 'When an individual has been absent from work and there is no agreed date for return or where the individual is unable to undertake their role due to medical issues then the Brigade will need to consider terminating the employment of the individual on the grounds of capability.'*

You have been absent from work since the 15th February 2022 and recent occupational health reports were discussed form the 26th July 2023 and 23rd August 2023 and these state that you are unfit for work in your role as a firefighter or for any other role at present and a date to return to work is currently unknown and there is no plan to return to work in the near future. We clarified with you whether this information was correct and you stated at the meeting that nothing has changed with regard to these statements in your occupational health reports. You confirmed that at present you couldn't possibly think about coming back to work."

103. The letter confirmed that there would be a 2 month monitoring period during

which the five bullet points would be kept under review and a further occupational health assessment would take place. The 15 November appointment was re-arranged for 28 November 2023.

104. Following that appointment, a report dated 28 November 2023 was produced by Jan Rogers (OHA) (209-210). This report includes the following statements:

"*Current issues*

...

With regard to work, and as you are aware, Julie continues to struggle to contemplate a return to work whilst legal proceedings remain ongoing. However, and in any event, she feels that her current level of functioning is a barrier to her return at this stage.

OH Opinion

Despite her difficulties, Julie engaged quite well in the consultation today, although her low mood was evident as we spoke. In an attempt to discern her level of functioning, I completed a well-validated mental health evaluation, and she is demonstrating a severe depressive response and a moderate anxiety. As she continues to struggle with her sleep, I have suggested some resources that she is keen to pursue, and I have also suggested some ideas to address her poor appetite. My sense is that Julie would struggle to make the transition back into work at this stage, especially as her personal reserves and resilience also appear to be low, and it will be helpful for her to have the opportunity to stabilize her mental health, and for these issues to be resolved, before a return to work is considered. It is encouraging that she is receiving appropriate personal and medical support, which appears to be the priority at the moment.

Management Advice

As a result of our assessment today, I advise that Julie remains unfit for work and it is difficult to discern a date for her return, at least until she has the opportunity to stabilize her mental health and until these work-related issues are resolved. However, I suggest a further OH review when a return appears to be realistic, at which stage we may be better placed to advise on a plan to support her return. It is possible that her condition could impact on her ability to carry out her duties if she were to return to work at this stage and if any existing or arising issues are not addressed. It is difficult to discern whether Julie's condition is likely to reoccur in the future, it depends on how things are managed, both personally and professionally."

105. This report opined that the claimant remained unfit for work and was unable to give a date when she would be able to return to work.

106. A further occupational health assessment took place on 23 January 2024, this time with Dr Ong. Dr Ong's report dated 29 January 2024 (212-213) stated:

"*Current issues*

I note the contents of your referral. Ms Wilkinson confirms going on sick leave

on 15 February 2022 and we discussed the following:

Anxiety and depression - this was diagnosed in 2021 following worsening work issues. I believe the issues are to do with a hostile working environment and you are aware of the details. It is my understanding the issues remain unresolved and she informs me there is an employment tribunal case on-going. These issues have also led to financial stress. As these are organizational issues, it would be for management to explore in greater detail with Ms Wilkinson.

Her anxiety and mood were significantly affected leading to panic attacks. She is on high dose anti-depressant and anti-anxiolytic medications. A mental health nurse at her GP practice follows her up every two weeks and she has been referred to Impact, a psychological service, to discuss therapy and social support.

Ms Wilkinson does not feel able to resume working with staff members who were involved in the grievance procedures she took out. However, once the employment tribunal case concludes, she does hope to be able to resume in other types of gainful employment as this would aid her rehabilitation by giving her a sense of routine and purpose again and improving her finances.

OH Opinion

During consultation, Ms Wilkinson was anxious and low but she did give a good history and insight. Her mental health continues to be affected as she feels her work issues have not been addressed. As this is the main reason for the deterioration in her mental health, should there be no resolution, her mental health symptoms would continue to be significant.

It is clear she does not feel able to resume working with staff who were involved in the grievance she took out but once the employment tribunal case is concluded, she does hope to resume some form of work.

We did discuss redeployment on medical grounds and she was open to this as she is keen to resume some form of work to regain routine and purpose. She would benefit from:

- *redeployment on medical grounds to a role which would not involve her working with staff members involved in her grievance procedures*

I fully accept that any recommended adjustments would be subject to organisational feasibility and Ms Wilkinson would be keen to discuss this further with you.

Management advice

In response to the questions which you posed in your referral letter:

<u>Does the condition render her incapable of performing any of the duties of the role in which last employed and whether this is likely to continue until the normal pension age (age 60).</u>

As long as her work-related issues remain unresolved, her mental health

symptoms would continue to be significant and this would be the main barrier to her resuming her contractual role prior to the age of 60.

Does the condition render her incapable of undertaking regular employment, i.e. employment for at least 30 hours a week on average over a period of not less than 12 consecutive months, beginning with the date on which the issue of the person's capacity for employment arises and whether this is likely to continue until normal pension age (age 60).

Once the employment tribunal case concludes, it is my opinion, she is likely to be able to undertake regular employment prior to the age of 60 and management should explore options for redeployment with her."

107. The report invited the respondent to re-refer Ms Wilkinson once a new role has been identified, to assess whether any adjustments would be required.

108. Although the report does not say so in terms, taking into account the recommendation that redeployment be considered, we find that Dr Ong opined that the claimant remained unfit for work in her firefighter role at the time of the assessment. Dr Ong also opined that it was likely that the claimant would be able to undertake regular employment (specifically, employment for at least 30 hours a week on average over a period of not less than 12 consecutive months) once the Employment Tribunal case concluded and recommended that redeployment options be explored with her. The report noted that the claimant felt unable to resume working with staff who had been involved in the grievance procedures and recommended that the respondent explored redeployment on medical grounds, noting that the claimant was keen to resume some form of work to regain routine and purpose.

109. Taking into account the recommendation in relation to redeployment, we find that the 29 January report opined that it was likely that the claimant would be able to undertake regular employment (specifically, employment for at least 30 hours a week on average over a period of not less than 12 consecutive months) in a different role once the Employment Tribunal case concluded. The report did not state expressly that the claimant would not be able to undertake any work in another role until after the Employment Tribunal case had concluded – but that it was the main barrier to her returning to her contractual role and her symptoms would continue to be significant while work-related issues were unresolved. The report, accordingly, recommended that the respondent discussed with the claimant the workplace issues and explored options for redeployment, although also noted that she felt unable to work with managers involved in her grievance procedures. The report noted that the claimant was keen to resume some form of work to regain routine and purpose. This indicated that the claimant was moving closer to a return to work.

110. There was no evidence that Dr Ong had been asked for an opinion about the causes or exacerbating factors for the claimant's symptoms, but the report lends some support to the claimant's position that the work-related issues at least played a part in the deterioration in the claimant's mental health.

111. On 31 January 2024, Ms Claire Reed (HR Adviser) sent a letter to the claimant, inviting her to a meeting on 21 January 2024 (196-197). This was a typographical error, and we accept Mrs Chisholm's evidence that the meeting was scheduled for 21 February 2024. This letter stated that the meeting was

to be a stage 3 capability hearing. The letter stated that Mrs Chisholm was to be the hearing manager, and Mrs Younger would present the management statement of case. The letter encouraged the claimant to read the information enclosed with the letter, particularly in relation to the process to be followed and the outcomes that may be available to the hearing manager under a stage 3 capability hearing which may be up to and including dismissal. The claimant was advised that she may bring a trade union representative or work colleague to accompany her to the meeting.

112. Enclosed with the letter was Mrs Younger's capability investigation report (214-219), with its attachments. The report sought to address the five bullet points, although her comments did not neatly follow each heading and there is some overlap between each section.

113. Mrs Younger noted that ill-health retirement was not an option as the claimant was not part of the firefighter pension scheme.

114. Mrs Younger referred to the occupational health reports from July, August and November 2023. Mrs Younger stated that a further occupational health report had been obtained from another physician who had not previously dealt with the claimant's case – this was the most recent report from 29 January 2024. She quoted part of that report. In her section on 'any feasible modification to the role/workplace' (the third bullet point), Mrs Younger stated that, "*it has been advised that JW is not currently fit to return to work,*" and went on to set out the claimant's comments made on 25 October 2023 that she could not possibly think of returning to work at that time.

115. As to redeployment, Mrs Younger quoted the opinion given in the January 2024 occupational health report that the claimant was likely to be able to undertake regular employment once the Employment Tribunal case concluded and the recommendation that management explored options for redeployment with her. Mrs Younger noted that, as the claimant did not feel able to resume working with staff who were involved in the grievance she took out, this would cause a barrier in finding a suitable role for the claimant and also noted that the Employment Tribunal hearing was not due to take place until June 2024 (218).

116. As to 'full and meaningful consultation (the fifth bullet point), Mrs Younger referred to the claimant being supported by occupational health, consulted at the meeting on 25 October 2023 and responses had been given to the claimant's enquiries about the process. Mrs Younger noted, however, that the claimant had not engaged with the welfare officers assigned to her.

117. The claimant asked for the capability hearing to be postponed to allow her FBU representative to attend. Her request was granted and the meeting was rescheduled for 1 March 2024 (221).

118. Between the meeting on 25 October 2023 and the hearing on 1 March 2024, as we have found above, there had been two further occupational health appointments, following which reports had been produced. Mrs Younger had responded to the claimant's enquiries about the process. Although the policy refers to a two month monitoring period at paragraph 6.24, (447), other than obtaining those reports, there was no persuasive evidence that the respondent carried out any other investigation or monitoring of the claimant during that period. We accept the evidence of the claimant and Mrs Younger that the

respondent held no further consultation meetings or discussions with the claimant during that period. The respondent had not, during that period, discussed with the claimant or carried out any other investigation relating to whether there were any options for redeployment. In the claimant's email of 10 January 2024, she had stated that she remained open to redeployment as an option (1564-1565).

119. We also accept the claimant's evidence that the respondent did not follow the "stage 3 – final stage" of the capability procedure in full. As that policy is for capability due to poor performance, it deals with agreeing and reviewing progress against a Performance Improvement Plan ("PIP") and this would not be relevant to capability related to ill-health. However, the respondent did not explain to the claimant that the PIP review process was not relevant to ill health and this could have confused her.

120. The capability hearing took place on 1 March 2024 via MS Teams. The minutes were before us (223-231), as was the claimant's transcript of the meeting (which she had produced from the recording). The claimant was accompanied to the meeting by Mr Cain, her FBU representative.

121. At that hearing, the claimant asked why she had not been supported prior to December 2022 and raised that she did not agree that she had had multiple welfare officers. Mrs Chisholm asked Mrs Younger to look into this after the meeting concluded.

122. The claimant told those present at the meeting that Mrs Younger had told her in the 25 October meeting that she was not going to look at redeployment, as they were looking at paragraph 6.22 of the sickness absence policy onwards (which deals with termination of employment on the grounds of capability due to ill-health), and not paragraph 6.21 which deals with redeployment. The claimant was incorrect about this, as we have set out in our findings relating to the 25 October 2023 meeting above. At the meeting on 1 March 2024, Mrs Younger reiterated that redeployment is considered under paragraph 6.24 (this is the fourth bullet point) and Mrs Chisholm said that the most recent occupational health report stated that the claimant was not fit to return to work in any capacity and provided no date to return to work.

123. Mrs Chisholm asked the claimant to confirm how many people she felt unable to work with on the basis that they had been involved in the grievance procedures. The claimant said she was unable to work with 6 or 7 people, who were mainly managers. These individuals were not identified during the meeting.

124. The claimant again queried why the informal stage of the sickness absence policy had not taken place prior to the formal stage (stage 3). Mrs Younger again explained that when capability is to do with ill health it goes straight to stage 3. Mrs Younger was not correct about this; the sickness absence procedure has an informal stage before formal stages. The purpose of the informal stage, however, is to afford an employee the opportunity to improve their attendance and to be provided with the necessary support and assistance in relation to their health difficulties. In light of this, the informal stage is geared towards improving intermittent short term absence.

125. Towards the end of the meeting, Mr Cain told those present that he had

spoken to the claimant a lot over the preceding few weeks and it had been a long 18 months for her. Mr Cain said that the claimant now thought that she could do some work and suggested options of working in control or tech hub stores, and asked if the respondent would look at redeployment for her and obtain an updated occupational health report. Ms Anderson, HR Adviser, noted that the 29 January report included advice about redeployment and so another one was not needed. Mrs Chisholm observed that the 29 January report stated that once the employment tribunal case was over, redeployment could be explored because the claimant may be in a position for redeployment.

126. The capability hearing was adjourned so that the points that the claimant had raised about welfare support and why the matter had gone straight to the formal stage could be looked at and for a decision to be reached. Mrs Chisholm looked into both of those points.

127. Mrs Chisholm reached the decision that dismissal was the appropriate outcome. However, she did not have the authority to dismiss an employee. So, having reached that decision, Mrs Chisholm had to speak to Mr Hayton – who did have the necessary authority - about the decision and her reasoning. Subsequent to that, the respondent's letter to the claimant dated 7 March 2024 (232-235) confirmed her dismissal.

128. There was an issue about whether Mrs Chisholm or Mr Hayton made the decision to dismiss. Having heard all of the evidence, we find that Mrs Chisholm reached the decision to dismiss the claimant and this was authorised by Mr Hayton. The dismissal letter was signed by Mr Hayton but had been written by Mrs Chisholm, which supports our finding that it was Mrs Chisholm's decision to dismiss. The letter set out Mrs Chisholm's reasons for dismissing the claimant. In light of our findings about the reality of whose letter it was, we shall refer to the letter as being from Mrs Chisholm.

129. In the 7 March letter, clarification was provided to the claimant about why the process had not started at the informal stage. The letter set out paragraphs 6.22 and 6.23 of the policy which provide, in summary, that when an individual has been absent from work and there is no agreed date for return or where the individual is unable to undertake their role due to medical issues then the Brigade needed to consider terminating the employment of the individual on the grounds of capability, and that a meeting must be arranged as soon as possible to investigate the matter under stage 3 of the capability policy. The letter clarified that this process had started following receipt of the July 2023 occupational health report which stated:

"*Julie is currently unfit for her role as a firefighter and not fit for another role either at present either and a date to return to work is currently unknown and there is no plan to return to work in the near future.*"

130. In the letter, Mrs Chisholm set out her reasoning.

131. Mrs Chisholm was satisfied that the criterion in the first bullet point (that adequate recent medical evidence was available which indicated that a return to work in any capacity or to their role is unlikely within a reasonable timescale) was met. Mrs Chisholm noted that Dr Ong had not given a definite decision on the claimant's return, but a likelihood of return once the Employment Tribunal case concluded. She noted that the claimant had been absent from work for

over two years, since 15 February 2022. Mrs Chisholm also noted that the Employment Tribunal hearing was due to take place in June 2024 which was still over three months away.

132. As to the second bullet point, Mrs Chisholm stated that the ill health retirement was not an option as the claimant was not a member of the pension scheme.

133. As to the third bullet point (that any feasible modification to the role/workplace had been explored and were either not possible or had not worked), Mrs Chisholm stated that this had not been possible as the claimant was not fit for work at that time. Mrs Chisholm also noted that the claimant had stated in the 25 October 2023 meeting that she was unable to perform her firefighter role due to medication she was taking. Although Mrs Chisholm did not state this in the letter, it was implicit from Mr Cain's request for redeployment to be considered that the claimant was not saying that she was fit to return to her firefighter role by the time of the 1 March meeting, with or without adjustments.

134. As to the fourth bullet point (that redeployment had been considered but there are no vacancies, no suitable alternative employment or the redeployment opportunity has not worked), Mrs Chisholm stated that the respondent was not in a position to consider any possible redeployment opportunities. She said this was because of Dr Ong's advice that the claimant was not fit to return to work. The respondent only explores redeployment opportunities once an individual is fit for some work and Mrs Chisholm took the view that, because occupational health advice had not specified a date for the claimant's return to work in any capacity, redeployment was not an option that could be explored at that point in time. In the letter, Mrs Chisholm did not specifically address Mr Cain's submission that the claimant now thought she could do some work (such as in control or tech hub stores) and requests for the respondent to look at redeployment and obtain an updated occupational health report to reflect her position.

135. As to the fifth bullet point (that there has been full and meaningful consultation with the individual in respect of their sickness and opportunities to return to work) this heading is not in the letter and Mrs Chisholm did not specifically address whether there had been full and meaningful consultation with the individual, taking into account that there had been no consultation meetings or discussions between the respondent and the claimant between October 2023 and March 2024.

136. Mrs Chisholm did deal with the issue of welfare support. She had looked into the points made by the claimant about a lack of support and did not agree with the claimant's position. Mrs Chisholm noted that the claimant had been in contact with Mr Smith, her designated welfare officer, from 16 February to 21 June 2022 and, as far as the respondent was concerned, that arrangement remained in place until the conclusion of the grievance in November 2022. Mrs Chisholm also stated that, as part of this welfare support, the claimant had been offered support and access to occupational health but declined this as she was receiving support elsewhere. Mrs Chisholm took the view that the claimant had been in regular contact with the HR department from February to December 2022 and therefore had the opportunity to inform them if she did want to access occupational health. Mrs Chisholm also stated that, after confirming that Ms

Love would not act as the claimant's welfare officer, the claimant had been offered Mrs Younger but did not take the offer forward.

137. In conclusion, Mrs Chisholm stated that the claimant had been absent for over two years, the respondent did not have a definite date for her return, and also had no assurance that her health concerns would improve and that she would be able to return to work. Mrs Chisholm believed that some leniency had been applied in terms of continuing to support the claimant's absence from work due to ongoing work concerns but took the view that this could not be indefinite. Mrs Chisholm noted that claimant's continued absence was impacting on the organisation in terms of operational cover for the community and the claimant's colleagues.

138. In assessing the likelihood of the claimant returning to work after June 2024, Mrs Chisholm took into account that the claimant had already had two Employment Tribunal claims (one successful for the claimant, one unsuccessful) and had not returned to work. Mrs Chisholm also considered that there was no guarantee that the on-going Employment Tribunal case would be concluded in June 2024. Mrs Chisholm had not previously dealt with a case where sickness absence had lasted two years; the respondent would normally start the stage 3 process after 6-9 months and move to dismissal within around twelve months.

139. Mrs Chisholm did not provide the detail of this in her letter, but we prefer her cogent oral evidence that the claimant's absence was being covered by way of overtime and redeployment from other stations. We did not accept the claimant's evidence that the claimant's long-term absence was covered by a pool of firefighters who were, in essence, on paid on-call shifts each day. Mrs Chisholm had given clear and cogent evidence about how the claimant's absence was being covered; the so-called pool was raised by the claimant for the first time towards the end of her oral evidence; and Mrs Chisholm was not asked about it during cross-examination.

140. We also do not accept that the claimant's absence had no cost to the respondent. The claimant had been in receipt of full sick pay for 17 months and then half pay until her dismissal. There was an additional, significant, cost to the respondent in terms of paying the salary and other benefits of the redeployed firefighter, or in respect of overtime worked.

141. As we have set out above, the respondent only explores redeployment opportunities once an individual is fit for some work, although there was no evidence that this practice was set out specifically within the policy or the separate redeployment policy (158). The reason for this practice was that, to redeploy an individual into a role who does not then return to work, would create resourcing and cost implications for the receiving team and the individual still has to face potential dismissal later down the line.

142. Although not addressed specifically in the dismissal letter, Mrs Chisholm decided not to seek further occupational health advice in the light of Mr Cain's submission made on the claimant's behalf. She considered that Dr Ong's advice was that a return to work was likely after the conclusion of the Tribunal proceedings. She also considered that Dr Ong, having spoken to the claimant, had been unable to give a clear return to work date and Mrs Chisholm could not see what had changed since Dr Ong's assessment. Mrs Chisholm

considered that the claimant's position that she felt unable to work with 6 or 7 members of staff involved in the grievance procedures could well limit opportunities for redeployment within the 'control' room as such a role would require her to be in contact with operational colleagues.

143. The respondent was aware that the claimant had done the protected acts as it had been involved in both sets of proceedings. Mrs Chisholm was aware that the claimant had brought both claims. She also knew that Claim One had been decided in the claimant's favour and assumed that the claimant would have given evidence in that claim. She was not, however, involved in either claim and had no detailed knowledge of either. We accept Mrs Chisholm's cogent evidence that the claimant was dismissed because of her sickness absence from her role as a firefighter due to ill health, and not because she had brought Claim One and Claim Two or given evidence in Claim One in the Employment Tribunal.

144. The claimant was given the right of appeal against her dismissal. She appealed against her dismissal (236-250).

145. The claimant asked for her appeal to be heard by an external organisation. Ms Doubooni responded to this request on 12 April 2024 (253-254), informing the claimant that the respondent's constitution stated that the Fire Authority hears appeals against dismissal as they have had no prior involvement or knowledge of the case.

146. On 19 April 2024, Ms Doubooni wrote to the claimant with details of her appeal hearing on 13 May 2024 (251-252). Ms Doubooni stated that the appeal would be heard in accordance with the capability policy by Cleveland Fire Authority's Executive Committee, advised by Mr Devlin (Legal Adviser and Monitoring Officer) and Karen Winter (Assistant Chief Fire Officer Strategic Planning and Resources). The claimant was informed that Mr Hayton would be in attendance to present the response to the appeal, accompanied by Mrs Chisholm, and someone from Democratic Services would take notes.

147. On 30 April 2024, the claimant withdrew her appeal (253-254).

148. On 2 May 2024, Ms Doubooni wrote to the claimant to confirm that the appeal hearing was cancelled. She reiterated that appeals were heard and determined by the Fire Authority as they had no previous knowledge or involvement in her case. She explained that Mr Devlin and Ms Winter would advise on process, and Mr Hayton and Mrs Chisholm would present the case related to the dismissal.

149. Although Ms Doubooni did not set this out in terms in her correspondence at the time, we accept Mrs Richardson's clear and cogent evidence that the appeal panel would have been made up of between 3 and 7 elected members of the Executive Committee. Those elected members were councillors who work for one of four local authorities, and who were not employees of the respondent, did not deal with grievances, and would not have had day-to-day interaction with the claimant. It was to be a completely independent panel.

150. The claimant accepted in oral evidence that she had withdrawn her appeal because she had misunderstood the identity of the panel and thought that it was made up of those individuals who had been named, and who had been

involved in her case previously.

151. The claimant gave evidence that, if she could have worked from home (doing the modified duties she had done in 2021), she could have worked throughout her period of sickness absence from February 2022. We do not accept this evidence; it was entirely at odds with what she told the respondent and occupational health at the time and the fit notes she had provided. In late 2022, the respondent explored the claimant's wish to be redeployed but we find that the claimant was not saying that she was well enough to return to work at that stage; what she meant was that she would like to be redeployed when she was well enough to return to work.

152. A temporary vacancy had been advertised in March 2023, but the claimant confirmed that she had been unfit for work at that stage and she had remained on sickness absence for the following year until her dismissal the following March. The claimant's position at the 1 March meeting was that she was now fit for some work and asked for redeployment to be considered. Although the claimant accepted during cross-examination that her request for redeployment at the 1 March meeting had been a last ditch attempt to save her job, that did not mean in and of itself that it was not genuine and she was not cross-examined on whether she was in fact able to do some work at that particular point in time. She accepted that her health had not improved after the hearing in June 2024 and that she was still too unwell to work at the time of the liability hearing.

153. However, it had not been established on the evidence that exploration of redeployment at the time of the claimant's dismissal would have proved futile – whether because the claimant was not in fact fit to work at that time as Mr Cain had submitted, or because no appropriate vacancies existed. We note our findings on the 29 January report. The claimant's position at the 1 March meeting was that she was now fit for some work and asked for redeployment to be considered. Although the claimant had said at the 25 October 2023 meeting that she could not possibly think of returning to work until the ongoing Employment Tribunal case had concluded, her medication had only recently changed at that point and the 1 March 2024 meeting was over four months later. The respondent did not consult with her about what she thought that she could do at that point in time. Mrs Chisholm had not looked at redeployment opportunities at the time for the reasons set out above.

Law

154. We will now turn briefly to the law.

Unfair dismissal

155. In relation to the claim of unfair dismissal, the Tribunal must take as its starting point section 98 ERA.

156. Section 98 of ERA provides, so far as is relevant:

(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 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, …

(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.

157. The burden of proof is upon the employer to establish that the sole or principal reason for dismissal fell within the potentially fair reason of "capability" under the ERA.

158. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson [1974] ICR 323, CA*.

159. In a capability (ill health) case, if a potentially fair reason for dismissal is established, the key question for the Tribunal is whether the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee. The precise wording of the test is in section 98(4) ERA. The focus is upon the employer's reasons for dismissal and the employer's conduct of matters. This involves considering a "band of reasonable responses", whereby the Tribunal must not decide the case on the basis of what it would have done had it been the employer, but rather on the basis of whether the employer acted in a reasonable way given the reason for dismissal. Dismissal can be a reasonable step even if not dismissing would also be a reasonable step. The burden of proof relating to this issue is a neutral one.

160. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the claimant. It requires the Tribunal to apply an objective

standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a Tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the Tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions.

161. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. That process must always be conducted by reference to the objective standard of the hypothetical reasonable employer: *Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA*. The Tribunal must not substitute its own view as to what was the right course of action.

162. There are two key aspects to a fair dismissal for long-term illness or injury involving long-term absence from work. First, where an employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait any longer for the employee to return. "*Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances.*" — *Spencer v Paragon Wallpapers Ltd 1977 ICR 301, EAT*. That case also held that relevant circumstances include: "*the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do, the circumstances of the case.*"

163. *Spencer v Paragon Wallpapers* also held: "*The question in this case is whether it was reasonable to dismiss the employee on account of his inability to work. Certainly, in deciding whether or not it was reasonable one of the matters which the industrial tribunal should have considered was whether the employers could have, or whether the employers gave consideration to the question whether they could have, placed the employee elsewhere in their organisation. Obviously, we think, it would not have been right to dismiss him if suitable work was available which he could be asked to do and which could await his ability to do it.*"

164. Secondly, a fair procedure – one that is within the band of reasonable responses - is needed. In this regard the importance of consultation has been stressed in various cases. *Spencer v Paragon Wallpapers* set out that what is required is: "*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.*"

165. The case of *McAdie v Royal Bank of Scotland [2007] EWCA Civ 806*, to which we were referred, held: "*there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to 'go the extra mile' in finding alternative employment for such an employee, or to put up with a longer period of sickness*

absence than would otherwise be reasonable." The Court of Appeal approved the EAT's reasoning about this. In *L –v- M UKEAT/0382/13*, the EAT accepted that the principle in *McAdie* also applied where the employer's conduct had exacerbated the employee's illness.

166. All the above requirements need to be met for the dismissal to fall within the band of reasonable responses. If the dismissal falls within the band, it is fair. If it falls outside the band, it is unfair.

Section 15 EqA

167. The provisions of section 15 EqA are as follows:

s15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

168. The respondent had conceded that the claimant had a disability at the material time and that it knew of the claimant's disability at the material time.

169. As to the claimant's claim that the commencement of the stage 3 process fell foul of section 15, the claimant must first establish that she was subjected to unfavourable treatment because of something arising in consequence of her disability. If she does so, the respondent may go on to show that the 'justification' defence in section 15(1)(b) is made out.

170. As the respondent accepts that the claimant's dismissal amounted to unfavourable treatment and the reason for her dismissal was "something arising" in consequence of her disability (namely, her inability to perform her firefighter role due to her disabilities), the section 15 claim relating to dismissal turns on whether the respondent has established that the 'justification' defence is made out.

171. As to the 'justification' defence, there is a requirement for the Tribunal to consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim: *McCullogh v ICI plc [2008] IRLR 846*.

172. When assessing proportionality, the Tribunal must reach its own judgment which must be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer: *Hensman v Ministry of Defence UKEAT/0067/14/DM*. Budgetary considerations are unlikely to justify discrimination unless in combination with other reasons: *Cross v British Airways plc [2005] IRLR 423,*

EAT.

173. It is for the Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter: *Hardys & Hansons plc v Lax [2005] IRLR 726*.

Victimisation

174. The provisions of section 27 EqA are as follows:

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

175. As to victimisation, section 27 EqA provides that an employer victimises an employee if they subject them to a detriment because they have done a protected act. The respondent accepts that the claimant had done a protected act by bringing Claim One and Claim Two and giving evidence in Claim One. This case therefore turns on whether the claimant was dismissed because she had done a protected act.

176. For a victimisation claim to succeed, it is not necessary for the protected act to be the only reason for the detriment; where there are mixed motives, the Tribunal must consider whether the protected act had 'sufficient weight' in the decision-making process so as to be treated as 'a cause': *Nagarajan v Agnew [1994] IRLR 61, EAT* and *O'Donoghue v Redcar and Cleveland Borough*

Council [2001] EWCA Civ 701, CA.

Burden of proof

177. Discrimination can be subtle. The law recognises that there is rarely evidence of discrimination, such that much depends on inferences to be drawn from the facts. People usually do not admit to discrimination, not even to themselves. The law tries to assist in section 136 EqA which sets out the burden of proof provisions as follows:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
>
> *(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*
>
> *(5) This section does not apply to proceedings for an offence under this Act.*
>
> *(6) A reference to the court includes a reference to—*
>
> *(a) an employment tribunal;…*

178. There may be times, as noted in the cases of *Hewage v Grampian Health Board [2012] ICR 1054* and *Martin v Devonshires Solicitors [2011] ICR 352*, where we are in a position to make positive findings on the evidence one way or the other and the burden of proof provisions are not particularly helpful. When we adopt such an approach, it is important that we remind ourselves not to fall into the error of looking only for the principal reason for the treatment, but instead ensure we properly analyse whether discrimination was to any extent an effective cause of the reason for the treatment.

179. In cases where the Tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the Tribunal could properly conclude, in the absence of any other explanation, that A had – for example – discriminated against B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the Tribunal must consider all the evidence, not just that adduced by the claimant but also that of the respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At the second stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: *Madarassy v Nomura International plc [2007] I.C.R. 867, CA; Igen Ltd v Wong [2005] I.C.R. 931, CA*.

Conclusions

Jurisdiction

180. The claimant's employment ended on 7 March 2024. Early conciliation began and ended on 31 May 2024. She presented this claim, Claim Four, to the Tribunal on 31 May 2024. Her claim was presented within the time limit set out at section 123 Equality Act and s111 ERA. No issue was raised about this.

Unfair dismissal

Reason for dismissal

181. The respondent accepted that the claimant was dismissed and relies on capability as a potentially fair reason for dismissal. This was based on the claimant's ill health.

182. In light of our finding that the claimant was dismissed because of her sickness absence from her role as a firefighter due to ill health, we conclude that capability was the reason for her dismissal. This is a potentially fair reason for dismissal.

Fairness

183. We must apply the law as set out in section 98 ERA and not substitute our opinion for that of the respondent.

184. We are satisfied that Mrs Chisholm, in reaching her decision to dismiss, genuinely believed that the claimant was not capable of performing her duties as a firefighter. She relied on Dr Ong's report in coming to that conclusion. It was also implicit from the claimant's request (via Mr Cain) for redeployment to be considered at the 1 March hearing that the claimant's position remained that she remained unfit for the firefighter role. The claimant had also submitted fit notes from her GP confirming that she was unfit for work.

185. Although the respondent did not follow the informal stage of the sickness absence policy in terms, that was geared towards improving short term intermittent absence. The respondent acted reasonably in managing the claimant's sickness absence in the early stages. The respondent provided access to a welfare officer, and we found that the claimant was happy with the level of contact at the time. The claimant's grievance was complex and spanned a significant period of time, and the timescale for dealing with this was longer than set out in the respondent's policy. However, the respondent offered access to occupational health in or around July 2022, but the claimant declined. Further support was offered, but the claimant declined on the basis that she was receiving support elsewhere.

186. Although contact between the claimant and Mr Smith came to an end in June 2022, the respondent took steps to provide another welfare officer once it became aware of this in November 2022. Once the claimant's grievance appeal had been concluded, the respondent moved towards actively managing the claimant's sickness absence and getting her back to work. Mrs Richardson became the claimant's point of contact on an interim basis, and Ms Doubooni was also in contact with the claimant. Mrs Younger was suggested to the claimant as a replacement welfare officer, but the claimant did not agree to that suggestion. The respondent had provided support in the form of counselling sessions, as recommended by occupational health advice.

187. We are satisfied that regular support was offered to the claimant. The claimant was in regular contact with HR about her fit notes, and they invited her to contact them for further support if she wished. The respondent faced difficulties in providing support to the claimant as she complained about Mrs Richardson and Ms Doubooni, she did not take up the offer for Mrs Younger to be her point of contact, and one possible candidate did not want to be her welfare officer.

188. We are satisfied that the respondent's decision to implement stage 3 of the sickness absence management policy was reasonable and in accordance with the terms of the procedure, taking into account the claimant's lengthy period of sickness absence and the occupational health advice at the time.

189. The respondent held an investigation meeting, pursuant to stage 3 of the sickness absence policy and capability policy, and then held a stage 3 capability hearing. The claimant was invited to both the 25 October 2023 meeting and the 1 March 2024 hearing in writing, provided with the relevant information in advance, given the right to be accompanied by a trade union representative or work colleague, and warned that dismissal was a possible outcome. Not all of the procedures set out in stage 3 of the capability procedure were followed but that was because PIP reviews were not relevant to cases of ill-health. Following the 1 March meeting, Mrs Chisholm looked into the points raised by the claimant about the alleged lack of support and responded to those. The claimant was given the right of appeal but, as we have found, ultimately did not pursue this.

190. The claimant had been absent from work for over two years by the time of her dismissal, and had been paid sick pay in excess of the maximum entitlement. The respondent would normally consider dismissal at a much earlier stage. The respondent had been unable to recruit a permanent replacement for the claimant, and her role was being covered by overtime and redeployment from other stations. There had therefore been significant operational and financial costs to the respondent in waiting as long as it did.

191. The policy provided for a two month monitoring period following the October 2023 meeting and consideration to be given to whether there had been full and meaningful consultation with the claimant in respect of their sickness and opportunities to return to work. We found that there had been no discussions or consultation meetings between the respondent and the claimant between October 2023 and March 2024 to discuss these matters, although there had been a further occupational health report in November 2023 before the 29 January 2024 report. We accepted that Mrs Younger had responded to the claimant's enquiries about the process. Other than obtaining two further occupational health reports, the respondent had not carried out any other investigation or monitoring of the claimant between the meeting on 25 October 2023 and the hearing on 1 March 2024. The claimant had stated on 10 January 2024 that she remained open to redeployment as an option (1564-1565), but there had been no discussion with the claimant or other investigation relating to redeployment during that period. A reasonable employer would have consulted with the claimant about the further occupational health advice from November 2023, her sickness and opportunities for returning to work (neatly summarized in the 'five bullet points') during that period of over four months. Not doing so deprived the claimant of an opportunity, in advance of the hearing

at which her dismissal was contemplated, to provide her updated input into these matters and discuss how the work-related issues affecting her ability to return to work might be resolved.

192. Although the report does not say so in terms, we found that Dr Ong opined that the claimant remained unfit for work in her firefighter role at the time of the assessment, but that it was likely that she would be able to undertake regular employment after the Employment Tribunal case concluded. It was also implicit from the claimant's request (via Mr Cain) for redeployment to be considered that the claimant's position at the time of the 1 March meeting remained that she remained unfit for the firefighter role.

193. We found that the 29 January report opined that it was likely that the claimant would be able to undertake regular employment (specifically, employment for at least 30 hours a week on average over a period of not less than 12 consecutive months) in a different role once the Employment Tribunal case concluded. The report did not state expressly that the claimant would not be able to undertake any work in another role until after the Employment Tribunal case had concluded – but that it was the main barrier to her returning to her contractual role and her symptoms would continue to be significant while work-related issues were unresolved. The report, accordingly, recommended that the respondent discussed with the claimant the workplace issues and explored options for redeployment, although also noted that she felt unable to work with managers involved in her grievance procedures. The report noted that the claimant was keen to resume some form of work to regain routine and purpose. This indicated that the claimant was moving closer to a return to work.

194. We recognise the respondent's position that they do not look at redeployment options until an employee is fit for some work. We also recognise that Dr Ong's report gave a likelihood that the claimant would be able to undertake regular employment in a different role once the Employment Tribunal case concluded, but Mrs Chisholm's concern that the report gave no definite date for the claimant's return and the claimant had not returned to work following the conclusion of two other Employment Tribunal claims. However, the claimant's position at the 1 March meeting was that she was now fit for some work and asked for redeployment to be considered. Although the claimant had said at the 25 October 2023 meeting that she could not possibly think of returning to work until the Employment Tribunal case had concluded, her medication had only recently changed at that point and the 1 March 2024 meeting was over four months later.

195. A reasonable employer would have consulted the claimant about the possibility of redeployment, taking into account the contents of the 29 January report and Mr Cain's submission at the 1 March meeting that the claimant now felt able to do some work and suggestion of some possible areas in which she might be able to work. A reasonable employer would as part of that discussion have consulted with the claimant about who the 6 or 7 managers were that she felt unable to work with, and the extent to which she felt unable to work with them (for example, whether she meant that she could have no contact with them whatsoever (even passing them in the corridor), or whether she was saying that she felt unable to report to them as a line manager, or somewhere between those two possibilities): this was not discussed. It was not therefore clear to what extent her position would limit the options for redeployment. We reach this conclusion notwithstanding the claimant's acceptance that Mr Cain's

submission was a last ditch attempt to save her job – it being a last ditch attempt did not in and of itself mean that it was not genuine. A reasonable employer would also have consulted the claimant about steps they might take (outside of Claim Two itself) to resolve the workplace issues – even if it meant the claimant returning to work and waiting until after the June 2024 hearing before those steps could be taken.

196. A reasonable employer would have consulted the claimant in the light of Mr Cain's submission about her skills and experience for other roles, whether there were any potential vacancies that she felt able to do at the time of the 1 March 2024 meeting and, if there were any potential vacancies, would have asked for further occupational health advice to clarify the medical picture. It was not reasonable for the respondent to take the view at the time of the decision to dismiss the claimant that exploration of redeployment would have proved futile – whether because the claimant was not in fact fit to return at that time, or because no appropriate vacancies existed.

197. The question was whether a reasonable employer, in view of Dr Ong's report, the continuing note from the GP that the claimant remained unfit for work, and the claimant's own views, would have waited longer, or whether the decision to dismiss on 7 March was within the range of reasonable responses open to such an employer. In this regard we note that the respondent is an employer with around 500 employees and a dedicated HR department. We also note Miss Clayton's submission that the respondent ought not to be punished for waiting as long as it did. In light of our earlier conclusions that a reasonable employer would have explored whether any alternative employment was available for her, however, in light of Mr Cain's submission on 1 March 2024 that the claimant now felt able to do some work, we find that a reasonable employer would have explored this before deciding to dismiss the claimant. This was particularly the case as there was an indication that work-related issues had at least played a part in the deterioration in the claimant's mental health, such that a reasonable employer would have gone the extra mile in considering alternative employment (although we would have reached this conclusion even if that were not the case). Therefore, having regard to the issues, albeit that we accept that Mrs Chisholm genuinely believed that the claimant was not capable of performing an alternative role, we conclude that the respondent did not adequately consult the claimant or carry out a reasonable investigation in forming that belief.

198. Had we not concluded that a reasonable employer would have explored redeployment before deciding to dismiss the claimant, we would have concluded that it was not reasonable for the respondent to wait until after the hearing in June 2024 for the claimant to return to work.

199. However for these reasons, as we have so concluded, we conclude that the decision to dismiss the claimant was outside the band of reasonable responses open to a reasonable employer in all the circumstances. We are not satisfied that the respondent acted reasonably in treating the claimant's capability as a sufficient reason for her dismissal in all the circumstances.

200. The complaint of unfair dismissal succeeds.

Complaints pursuant to section 15 EqA

The commencement of stage 3 of the formal capability procedure in or around September 2023

201. The respondent had decided to commence a formal stage, stage 3, of the sickness absence policy by 9 August 2023. This interacted with stage 3 of the formal capability procedure. The respondent had conceded that the claimant had a disability at the material time and that it knew of the claimant's disability at the material time.

202. The first question under S.15(1) of EqA is whether the claimant has been treated 'unfavourably'. This term is not defined in the EqA, although the Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') states that it means that the disabled person 'must have been put at a disadvantage' (see para 5.7).

203. As a matter of principle, we took the view that deciding to subject someone to an internal process will not normally, of itself, constitute unfavourable treatment.

204. An exception to this principle would arise if the procedure were being applied without any justification as an abuse, but this was not the case here. Applying the test for a detriment, it would not be reasonable for a worker to consider themselves to be disadvantaged by the initiation of a procedure where there is reasonable evidence that the procedure is applicable.

205. In saying this, we acknowledge that being taken though an internal formal procedure is inevitably stressful, but we see no reason why it should not be undertaken.

206. In this case, by the time the decision was taken to commence stage 3 of the sickness absence management policy, the claimant had been absent from work due to ill health for over a year and the occupational health advice at that time was that the claimant was unfit for her role as a firefighter or another role, a date to return to work was unknown and there was no plan to return to work in the near future. It was therefore entirely appropriate that the relevant part of that policy was applied to her. We therefore do not consider this to have been unfavourable treatment. The claimant has not therefore established that she was subjected to unfavourable treatment and this complaint therefore fails.

207. If we are wrong on that, we have gone on to consider the other parts of the test. We are satisfied that the respondent commenced stage 3 of the procedure because of something (her inability to perform her firefighter role) which arose in consequence of her disability.

208. The Tribunal concludes that the respondent's aim of ensuring an effective workforce is a legitimate aim. It is not discriminatory in itself and it represents a real, objective consideration for the respondent's organisation. It is of particular relevance in a public sector organisation where taxpayers' money is being spent. Further, the respondent operates an essential fire service to the community and the aim of ensuring that it had an effective workforce to perform that service is a legitimate aim.

209. The Tribunal concluded that the respondent had shown that its decision was a proportionate means of achieving that legitimate aim. The claimant had, by

the time of this decision in or around August 2023, been absent from work for over a year and occupational health advice was that the claimant was unfit for her role as a firefighter or another role, there was no date for a return to work and there was no plan to return to work in the near future. That followed the conclusion of the claimant's grievance and appeal process several months earlier, relating to her grievance of February 2022, and judgment in Claim One. Not all of those matters had been resolved in line with the claimant's wishes but they had been concluded and the claimant remained absent from work. We conclude that it was proportionate in all the circumstances to commence stage 3 of the procedure, and in turn consider the options under that policy which included ill health retirement, adjustments, redeployment or the possibility of terminating the claimant's employment.

210. As such, the section 15 complaint relating to the commencement of the stage 3 capability procedure fails and is dismissed.

Dismissal

211. The respondent accepted that the claimant was dismissed and that her dismissal amounted to unfavourable treatment because of something (her inability to perform her firefighter role) which arose in consequence of her disability. The respondent had conceded that the claimant had a disability at the material time and that it knew of the claimant's disability at the material time.

212. The Tribunal concludes that the respondent's aim of ensuring an effective workforce is a legitimate aim. It is not discriminatory in itself and it represents a real, objective consideration for the respondent's organisation. It is of particular relevance in a public sector organisation where taxpayers' money is being spent. Further, the respondent operates an essential fire service to the community and the aim of ensuring that it had an effective workforce to perform that service is a legitimate aim.

213. The Tribunal found, however, that dismissal was not a proportionate means of achieving that legitimate aim.

214. As to the respondent's reasonable needs, the claimant had been absent from work for over two years by the time of her dismissal, during which time her absence had been covered by overtime and redeployment from other stations. The respondent had to provide an emergency fire service to the community, but had been unable to recruit a permanent replacement for the claimant. This was a skilled role which could not be fulfilled by, for example, an agency worker. There had been a financial cost both in paying the claimant's sick pay and the salary and benefits of those covering her work on an interim basis. The claimant's sickness absence was on-going at the time of the stage 3 capability hearing. Occupational health advice from January 2024 was that she remained unfit for work as a firefighter and that it was likely that she would be able to return to regular employment in an alternative role once the Employment Tribunal case concluded – the Employment Tribunal hearing was listed for around three months after the stage 3 capability hearing and there was no guarantee that the case would be concluded at that hearing, nor was a return to work date specified.

215. However, the report did not state expressly that the claimant would not be able to undertake any work in another role until after the Employment Tribunal

case had concluded; rather, it was the main barrier to her returning to her contractual role, her symptoms would continue to be significant while work-related issues were unresolved, and it was likely that she would be able to undertake regular employment (specifically, employment for at least 30 hours a week on average over a period of not less than 12 consecutive months) in a different role once the Employment Tribunal case concluded. The report recommended discussions about redeployment. At the stage 3 capability hearing, which was over a month after the previous occupational health assessment and over four months since the meeting with Mrs Younger, the claimant had (via Mr Cain) indicated that she now felt able to do some work in a different role. The respondent did not explore this with the claimant to see what she thought she could do at the time and whether there might be a suitable alternative vacancy for her which could have avoided her dismissal.

216. The Tribunal must weigh the reasonable needs of the respondent against the discriminatory effect of the dismissal and make its own assessment of whether the former outweigh the latter. This is an objective test. The possibility of redeployment – a lesser measure – had the potential to serve the respondent's aim. However, the respondent did not give proper consideration to the possibility of the claimant returning to work in an alternative role in response to her position that she now felt ready to do some work. It had not been established on the evidence that exploration of redeployment at the time of the decision to dismiss the claimant would have proved futile – whether because the claimant was not in fact fit to return at that time as Mr Cain had submitted, or because no appropriate vacancies existed. As such, we conclude that dismissal was not proportionate.

217. As such, the section 15 complaint relating to the claimant's dismissal succeeds.

Victimisation

218. The respondent accepted that the claimant had done protected acts by presenting Claim One and Claim Two and giving evidence in Claim One. The respondent was aware that the claimant had done the protected acts as it had been involved in both sets of proceedings. Mrs Chisholm knew that the claimant had brought Claim One and Claim Two and believed that the claimant had given evidence in Claim One.

219. The respondent accepted that the claimant was dismissed. The respondent did not argue that dismissal did not amount to a detriment and we conclude that it plainly was.

220. We have made positive findings that the reason for the claimant's dismissal was the claimant's sickness absence from her firefighter role and that Mrs Chisholm was not motivated (in whole or in part) by the claimant having done any of the protected acts. The claimant's dismissal was in no sense whatsoever motivated by the claimant having done any of the protected acts.

221. As such the complaint of victimisation is not made out and fails.

Approved by:

Employment Judge L Robertson

12 September 2025