Case Number **1301548/2021**

EMPLOYMENT TRIBUNALS

Claimant Respondent

Mr John Walton **v** **Staffordshire Fire and Rescue Service**

FINAL MERITS HEARING
(CONDUCTED IN PERSON AND AS A HYBRID HEARING VIA THE CLOUD VIDEO PLATFORM)

Heard at: **Birmingham** On: **25-28 July2022 and in chambers 29 July 2022**

Before: **Employment Judge Perry, Mrs R Forrest & Mrs S Bannister**

Appearances

For the Claimant: **Ms A Fadipe (counsel)**

For the Respondent: **Ms H Winstone (counsel)**

JUDGMENT

1 The claimant's complaint of discrimination because of something arising from disability is dismissed on withdrawal.

2 The claimant was not discriminated against in contravention of part 5 of the Equality Act 2010. His complaints concerning the failure to make reasonable adjustments and indirect discrimination are dismissed.

3 The claimant's complaints that he was constructively and unfairly dismissed and for unlawful deductions from wages are not well founded and are also dismissed.

REASONS

References below in circular brackets are to the paragraph of these reasons. Those in square brackets to the page of the bundle or where preceded by a document reference or the initials of a witness, that document or witness statement. A number after a paragraph mark symbol '¶' refers to the paragraph number of a witness statement or document.

Background and Issues

1. This is a claim against the respondent ("SFRS") for indirect discrimination, the failure to make reasonable adjustments, wages and constructive unfair dismissal that was presented by the claimant, Mr Walton, on 14 May 2021 [9-35]. At the submissions stage a discrimination because of something arising from disability (s.15 Equality Act 2010 ("EqA")) complaint was withdrawn.
2. The disability and wages elements of the claim centre on SFRS's Modified Duties Policy ("MDP") (see (45)) that it is accepted was applied to Mr Walton, in particular its effects on his pay. In turn it is alleged that fed in to his resignation and the consequent constructive unfair dismissal complaint.
3. Early conciliation started on 4 January 2021 and ended on 15 February 2021. It was agreed any conduct prior to 5 October 2021 is potentially out of time.

4. SFRS concedes that Mr Walton was disabled by reason of osteoarthritis of the right knee at all material times and that it had knowledge of disability from 4 September 2019. The additional knowledge issues that are required for the failure to make reasonable adjustments complaint were not argued by SFRS.

5. During the latter part of SFRS's witness evidence Ms Fadipe confirmed that Mr Walton no longer pursued an argument the MDP was not part of a collective agreement and instead sought to argue clause 6.2.2 of the MDP did not apply to him. We return to that below (61).

6. A s.123(1) Employment Rights Act 1996 ("ERA") just and equitable ("Polkey") issue was raised. No contribution point was pursued for either ss. 122 or 123 ERA.

7. Given a number of claims have been raised against the respondent about the subject of some of the matters raised here by other claimants the respondent specifically asked for written reasons. We thus reserved our decision.

The Evidence

8. We heard oral evidence from Mr Walton and on his behalf, Mr Robert Moss, a Fire Brigade Union (FBU) official. For SFRS we heard from Mr Daniel Keeling, the Station Manager who conducted a disciplinary investigation, Mr Damian Armstrong, one of SFRS's Station Managers who heard Mr Walton's grievance about non payment of sick pay, Mr Ian Read SFRS's Head of Strategy and Intelligence, who heard Mr Walton's grievance appeal and Mrs Sarah Baddeley (nee Fynney) one of SFRS's HR managers. All provided written witness statements.

9. A witness statement was also provided for Mr Howard Watts, the intended chair of the disciplinary hearing concerning Mr Walton. Mr Watts was SFRS's Director of Prevent and Protect at that time. He worked for SFRS from August 2019 until his retirement in April 2022 and given the disciplinary hearing did not proceed a decision was made by SFRS not to call him as a witness. We indicated we would give his evidence such weight as we deemed appropriate.

10. We had before us an agreed bundle of 621 pages (we are grateful that the pagination and size of the e-bundle and hard copy married), a chronology and cast list had been provided but were not agreed and not referred to. A supplemental bundle [S/xx] of 39 pages was provided and agreed. An application to rely upon an additional bundle of documents was not pursued by SFRS.

The Law

The duty to make reasonable adjustments

11. Section 39(5) EqA imposes a duty to make reasonable adjustments upon employers. Where such a duty applies sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that the duty comprises three requirements. Insofar as is relevant for us, where the absence of an auxiliary aid, or where a physical feature or a provision, criterion or practice ('PCP') applied by the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

12. A substantial disadvantage is one which is more than minor or trivial [1].

13. Paragraph 6.10 of the EHRC Code suggests that *'provision, criterion or practice'* should be construed widely to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications and in line with authorities pre dating the EqA this includes one-off decisions and actions and may also include decisions to do something in the future, such as a policy or criterion that has not yet been applied.

14. Paragraph 20 of Schedule 8 EqA provides:-

[1] s. 212(1) EqA. That reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people. see paragraph 8 of Appendix 1 EqA, EHRC Code; *Sheikholeslami [49]*

"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -

…

(b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

15. To amount to knowledge of a disability, there must be knowledge, whether actual or constructive, of the matters set out in s. 6(1) EqA :

(i) the impairment (whether mental or physical);

(ii) the impairment is long term [2]*;*

(iii) the impairment has had a substantial (non trivial) adverse effect on the individual's ability to carry out normal day-to-day activities

16. If engaged the duty requires steps to be taken that were reasonable to avoid the disadvantage. Whether a particular adjustment is reasonable is to be judged objectively; it is not simply a question of deciding whether the process of reasoning by which a possible adjustment was considered was reasonable [3]. The focus is on the practical result of measures that can be taken [4]. The EHRC Code ¶7.29 states that what is a reasonable step *"depends on all the circumstances of the case*." before giving a list of factors to be considered. The question of whether, and to what extent, the step would be effective to avoid the disadvantage will always be an important one [5]:

"18. … given the language of section 20(3) - where the steps required are those that are reasonable to avoid the disadvantage - the question whether, and to what extent, the step would be effective to avoid the disadvantage, will inevitably always be an important one 6. Thus if there was no prospect of the proposed step succeeding in avoiding the disadvantage, it would not be reasonable to have to take it; conversely, if there was a prospect - even if considerably less than 50 per cent - it could be 7. The reasonableness of a potential adjustment need not require that it would wholly remove the disadvantage in question: an adjustment may be reasonable if it is likely to ameliorate the damage [8]*; a, or some, prospect of avoiding the disadvantage can be sufficient* [9]*. All that said, the uncertainty of a prospect of success will be one of the factors to weigh in the balance when considering reasonableness* [10]*."*

17. To put it another way:

"… in our judgment an adjustment which gives a Claimant 'a chance' to achieve a desired objective does not necessarily make the adjustment reasonable. The material question for an ET in considering its effect, which is one of the factors to which regard is to be paid in assessing reasonableness, is the extent to which making the adjustment would prevent the PCP having the effect of placing the Claimant at a substantial disadvantage. That enquiry is fact sensitive." [11]

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[2] That it has lasted or is likely to last at least 12 months or the rest of the life of the person affected (Schedule 1 paragraph 2 of the EqA)
[3] *Firstgroup Plc v Paulley [2014] EWCA Civ 1573, [2015] 1 WLR 3384, [2014] EWCA Civ 1573*
[4] *Royal Bank of Scotland v Ashton* UKEAT/542/09, [2011] ICR 632 at [24].
[5] *South Warwickshire NHS Foundation Trust v Lee [2018] UKEAT 0287/17* the EAT at [37] (albeit a case on s.15 EqA) repeating the guidance given in *Birmingham City Council v Lawrence [2017] UKEAT/0182/16*
[6] *see per HHJ David Richardson Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341 EAT at [59]*
[7] *per HHJ Peter Clark Romec Ltd v Rudham UKEAT/0069/07 at [39]*
[8] *Noor v Foreign & Commonwealth Office [2011] ICR 695 EAT per HHJ David Richardson at [33]*
[9] *per HHJ McMullen QC in Cumbria Probation Board v Collingwood UKEAT/0079/08 at [50] and Keith J in Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10 at [17]*
[10] *see per Elias LJ in Griffiths [29] and per Mitting J in South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/ 0341/15 at [18]*
[11] *Lancaster v TBWA Manchester* UKEAT/0460/10 at [46] (Slade J presiding)

18. On day 2 the Employment Judge referred the parties to an EAT decision from July last year, *Aleem v E-ACT Academy Trust Ltd* [12]. Mrs Aleem was a science teacher. She became unable to continue in her teaching role by virtue of a disability and had significant periods of sickness absence. OH advice was that Mrs Aleem was long-term unfit to return to her teaching role but was fit to carry out a cover supervisor's role, which attracted a lower rate of pay. She returned to work in the role of cover supervisor but continued to be paid at a teacher's rate of pay. She eventually accepted an offer to continue in that role going forward at the rates applicable to it. The Tribunal dismissed her claim that the Trust failed to comply with the duty to make reasonable by not continuing to pay Mrs Aleem at a teacher's rate of pay thereafter.

19. The EAT concluded that

    19.1. it was not reasonable to expect the respondent, by way of an adjustment, to continue to pay Mrs Aleem at the rates associated with the old role, once a probation period and grievance processes had been completed.

    19.2. the Tribunal had properly found that it was a reasonable adjustment to do so, during those processes, to support her return to work; but that these considerations thereafter no longer applied.

    19.3. The tribunal was not wrong to take account of the significant additional cost that would be involved in continuing to pay Mrs Aleem at teachers' rates indefinitely and it had not erred in also taking account of the evidence of a witness that the respondent was facing financial pressures at the time, among other factors, when concluding that the proposed adjustment was not reasonable.

20. Factually, *Aleem* differs to the case before us because there the PCP required Mrs Aleem to work either four days per week as a science teacher, or as a cover supervisor at the lower rate applicable to that role but it provides a helpful summary of the caselaw with regards to pay and adjustments:-

> *"30. In O'Hanlon v HM Revenue and Customs UKEAT/0109/06, 4 August 2006, the disabled employee was off long-term sick, leading to her pay falling to half-pay after six months. She contended that it was a reasonable adjustment to maintain her pay at full pay. The EAT, at [67]-[75], held that it would be a very rare case in which such an adjustment was reasonable. It would require exceptional circumstances. That was, in part, because this would be a usurpation of the management function of considering the costs implications. But it was also because "the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce." It was not "simply to put more money into the wage packet of the disabled" but to "enable them to play a full part in the world of work." Further, the decision in the earlier case of Meikle [2005] ICR 1, did not bespeak a different analysis. In that case the underlying liability was for a failure to accommodate a sick-absent and disabled teacher back into the classroom. Liability in respect of her pay had flowed from that failure. The EAT's decision in O'Hanlon was upheld by the Court of Appeal [2007] ICR 1359.*
>
> *31. In G4S Cash Solutions (UK) Limited v Powell, UKEAT/0243/15, 26 August 2016, the disabled employee returned to work in a new role but with his old (higher) pay rate maintained. The Tribunal found that he was led to believe that the new arrangement was long-term. Some months later, following a review, the respondent ultimately concluded that it could only keep the employee on in the new role permanently at a lower rate of pay. The Tribunal held that it was a reasonable adjustment to continue to maintain the previous rate. The EAT could see no reason in principle why that could not amount to a reasonable adjustment. Nothing in O'Hanlon ruled that out as wrong in principle. The EAT could not say that the Tribunal was wrong in law to reach the conclusion that it did on the facts of this particular case"*

[12] [*2021*] *UKEAT 0099/20*

21. *Like here Meikle was a complaint of disability discrimination and constructive unfair dismissal. For context G4S said this:-*

> *59. I do not think that [Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11] can or should be read as saying that the law can never countenance a package of adjustments which includes a payment to an employee for time not worked. Policies relating to "disability leave", "rehabilitation leave" and "phased return" are now common in the employment field; it is not unusual (though by no means universal) for them to contain some payment for time not worked.*
>
> *60. I do not expect that it will be an everyday event for an Employment Tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent — but I can envisage cases where this may be a reasonable adjustment for an employer to have to make as part of a package of reasonable adjustments to get an employee back to work or keep an employee in work. They will be single claims turning on their own facts: see O'Hanlon . The financial considerations will always have to be weighed in the balance by the Employment Tribunal: see Cordell [13]. I make it clear, also, that in changed circumstances what was a reasonable adjustment may at some time in the future cease to be an adjustment which it is reasonable for the employer to have to make; the need for a job may disappear or the economic circumstances of a business may alter.*

Indirect discrimination

22. Section 19 EqA provides :-

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> > *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> >
> > *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> >
> > *(c) it puts, or would put, B at that disadvantage, and*
> >
> > *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

Wages

23. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to s.23 ERA.

24. Section 13(1) ERA provides that an employer shall not make a deduction from wages unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his/her agreement or consent to the making of the deduction.

25. Section 27(1) ERA defines wages as any sums payable to the worker in connection with his/her employment including (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise. It includes other categories such as statutory sick pay but excludes any payments within section 27(2). Subsection (2) defines the excluded categories as (a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (b) any payment in respect of expenses incurred by the worker in

[13] *Cordell v Foreign and Commonwealth Office [2012] ICR 280 EAT at [30]* per Underhill P as he then was

carrying out his employment, (c) any payment by way of pension, allowance or gratuity in connection with the workers retirement or as compensation for loss of office, (d) any pay referable to the workers redundancy and (e) any payment to the worker otherwise than in his capacity as a worker.

Constructive Unfair Dismissal

26. In cases such as this where the respondent denies that the claimant was entitled to treat him/herself as constructively dismissed it is for the employee to show that s/he was entitled to do so.

27. The classic authorities identify four conditions that must usually be met [14]:

    27.1. there must be an actual or an anticipatory breach of contract by the employer, unreasonableness is not enough. This may be of either an express or implied term.

    27.2. the breach must be sufficiently serious (repudiatory) to justify the employee resigning, or it must be the last in a series of incidents which justify resignation.

    27.3. the employee must leave in response to the breach and not for some other unconnected reason.

    27.4. the employee must not delay too long terminating the contract in response to the breach, or s/he may be deemed to have waived the breach or agreed to vary the contract.

28. Here Mr Walton points to a breach of a specific term of his contract the failure to pay his sick pay.

29. Mr Walton did not seek to rely upon breach of the term so called "*Malik"* term implied into all contracts of employment that employers (and employees) will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties [15]. Any breach of that *term* will amount to a fundamental breach because the very essence of the breach is that it is calculated or likely to destroy or seriously damage the relationship.

30. The seriousness of an alleged breach is assessed by the Tribunal by :-

> *"[61]… looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."* [16]

31. The most recent guidance of the Court of Appeal for judging cases of constructive dismissal suggests it is normally sufficient for a tribunal to ask itself the following questions [17]:

    31.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation ?

    31.2. Has he or she affirmed the contract since that act ?

    31.3. If not, was that act (or omission) by itself a repudiatory breach of contract?

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[14] paraphrasing the summary by Simler P in Conry v Worcestershire Hospital Acute NHS Trust [2017] UKEAT 0093/17 in turn stems from the classic guidance given by Lord Denning MR In Western Excavating (ECC) Ltd v Sharp *[1978] 1 QB 761.*

[15] see *Courtauld's Northern Textiles Ltd v Andrew [1979] IRLR 84*

[16] What constitutes a repudiatory breach in the commercial as opposed to employment arena was considered in Eminence Property Developments Ltd. v Heaney [2010] EWCA Civ 1168, where Etherton LJ restated the view of Lord Wilberforce in Woodar Investment Development Ltd v Wimpey Construction UK Ltd *[1980] 1 WLR 277 HL* which in turn approves the view of Lord Denning in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1978] QB 949 (CA), [1979] AC 757 (HL) at CA [979F] as to the legal test for repudiatory conduct. See also Tullett Prebon Plc v BGC Brokers LP *[2011] IRLR 420* in the words of Langstaff P in Bethnal Green v Dippenaar *UKEAT/0064/15 [22]*

[17] Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, [2018] EWCA Civ 978 per Underhill LJ at [55]

31.4. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term ? [18] (If it was, there is no need for any separate consideration of a possible previous affirmation [19])

31.5. Did the employee resign in response (or partly in response) to that breach ?"

32. If we find Mr Walton was entitled to treat himself as dismissed SFRS asserts [51 ET3¶47] that was for a potentially fair reason namely some other substantial reason and specifically "*the breakdown in working relationships between the Claimant and Respondent*". It is for the employer to show that was the reason on the balance of probabilities.

33. If a potentially fair reason is shown by the employer, the Tribunal must then go on to assess the fairness of the dismissal. The starting point for that determination is the words of s.98(4) ERA. The burden of doing so for s.98(4) is neutral:-

> *"…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."*

s.123 ERA - Polkey.

34. Where an employer argues that the employee would or might have ceased to be employed in any event had a fair procedure been followed, or alternatively would not have continued in employment indefinitely, the task of the Tribunal is to assess, using its common sense, experience and sense of justice how long the employee would have been employed but for the dismissal.

35. The assessment is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer *would* have done so? The chances may be at extreme but ordinarily will fall somewhere between the two. The Tribunal is required to assess the chances of what the actual employer would have done, on the assumption that the employer would this time have acted fairly, even though it did not do so beforehand [20] not what the Tribunal would have done if it were the employer or a hypothetical fair employer.

36. The appellate courts have repeatedly referred to the distinction drawn by Lord Bridge in *Polkey* that the Tribunal is not called upon to decide the question on the balance of probabilities but instead to reduce compensation by a percentage representing the chance of losing employment. It is a hypothetical enquiry that may have to be undertaken, owing more to assessment and judgment than it does to hard fact [21].

37. The tribunal is entitled to take into account evidence of misconduct which came to light after the dismissal [22] but it is for the employer to bring forward relevant evidence. The Tribunal must however have regard to any material and reliable evidence which might assist when making that assessment, including any evidence from the employee [23].

38. It is acknowledged by the appellate courts that there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that no sensible prediction based on that evidence can properly be made.

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[18] applying the approach explained in Waltham Forest v Omilaju [2005] IRLR 35 at [14-22]

[19] Kaur per Underhill LJ at [45]

[20] Hill v Governing Body of Great Tey Primary School *UKEAT 0237/12, [2013] IRLR 274* per Langstaff P

[21] V. v Hertfordshire County Council *UKEAT/0427/14 per Langstaff P at [1 & 21-25]*

[22] *Devis v Atkins [1977] IRLR 314* at [39] HL

[23] Software 2000 Ltd v Andrews *[2007] IRLR 568 at [54]*

39. A degree of uncertainty is an inevitable feature of this exercise and the Tribunal must recognise there are limits to the extent to which it can confidently predict what might have been. The mere fact that an element of speculation is involved however is not a reason for refusing to have regard to the evidence. The tribunal must however take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely. It may also be that the evidence available to the Tribunal is so riddled with uncertainty and so unreliable that no sensible prediction can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal but a finding the employment would have continued indefinitely should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored [24].

Our Findings

We make the following primary findings of fact on the balance of probabilities and from the information before us. It is not our role to attempt to resolve every disputed issue that has emerged during this hearing. What follow are our findings relevant to the principal issues in the claim.

40. Mr Walton was employed as a Wholetime Firefighter from 27 February 1997. At the time of matters that concern us he worked at Leek Community Fire Station. His contract of employment [559-563] was issued on 1 April 2002. It was agreed that the National Joint Council for Local Authority Fire and Rescue Service Scheme of Conditions of Service [80-169] (known as the "Grey Book") were incorporated into the Mr Walton's employment contract.

41. By paragraph 2 the Grey Book covered *"all uniformed employees of Fire and Rescue Services in the United Kingdom in the roles of Firefighter to Area Manager"* [84]. We find that the Grey Book related to *operational* firefighters, as opposed to other staff. Specifically, the definition of employee the Grey applied to, included the roles of Firefighter, Crew Manager, Watch Manager, Station Manager , Group Manager (and for those already listed their equivalent positions in Control) and Area Manager [92] and so reinforces that view.

42. To ensure the safety of colleagues and in turn, the public they serve, *operational* firefighters are required to maintain high levels of fitness. They undergo regular fitness tests and gyms are provided on site to assist in that process.

43. Under Grey Book terms firefighters were entitled to 6 months full pay and six months half pay. That was payable by reference to *"13. … the aggregate of periods of paid absence during the twelve months immediately preceding the first day of absence." [120].*

44. We also had before us SFRS's Attendance Management Policy [196-208] and Disciplinary Policy [170-195].

45. The MDP was adopted alongside a package of measures introduced in 2015 including amongst others, adoption, fostering, maternity, parental, paternity and shared parental leave [619]. It was adopted only following SFRS having consulted on its contents [209-220]. It provided:-

> *"1. INTRODUCTION*
>
> …
>
> *1.3 The Service has an obligation to consider reasonable adjustments for employees who experience a condition which would be deemed as a disability under the Equality Act. Any adjustments as a result of a disability are not covered by this policy and will be considered in accordance with medical advice.*
>
> *2. SCOPE AND OBJECTIVES*
>
> …

[24] Software 2000 *as above*

2.2 The objectives of this policy are to:

2.2.1 Provide procedures which will support staff and assist in their return to work after illness or injury.

2.2.2 To provide a reference point for employees and managers in respect of modified duties.

3. MANAGING THE PERIOD OF MODIFIED DUTIES

3.1 If an employee has a medical or clinical reason why they cannot undertake the full range of duties, then consideration should be given to modifications to their role to facilitate them being able to continue to work until they reach full fitness. These "amended" duties will be agreed under the scope of this policy and in conjunction with Occupational Health advice.

…

3.3 Modifications to a role can include amended duties, a change in location or a change in hours. These changes would be agreed on a temporary basis while the employee regains their full fitness.

3.4 Any period of modified duties will be agreed with Occupational Health and will be monitored by the Line management and Human Resources.

3.5 … This should be documented and a copy sent to HR for inclusion in the sickness records. The duties undertaken should be reviewed on a regular basis to ensure they are still at the appropriate level.

…

3.7 Where changes to an employee's role are impracticable, have been unsuccessful or are inappropriate and when supported by medical advice, the Service will consider alternative employment opportunities for an employee on a temporary basis during their period of recovery.

…

3.10 A period of modified duties will not normally exceed 6 months unless there is medical evidence that a return to full duties is likely within a reasonable time frame. Each case will be considered on its merits and managed accordingly, however, indefinite modified duty arrangements are not sustainable for the Service.

4. MEDICAL RE-DEPLOYMENT

4.1 Where the medical evidence indicates that a return to full duties is unlikely and the employee does not satisfy the criteria for ill health retirement, the Service will consider if there are any suitable alternative positions available for re-deployment of the affected employee before considering dismissal on capability grounds. Any consideration will relate to vacant positions only, there is no requirement to "create" a position for redeployment.

4.2 Where a suitable position is identified, the employee may be re-deployed into that position without a competitive process taking place. The employee may wish to consider roles at a lower level or on different terms and conditions.

4.3 In order to assess the employee's suitability for the role, a trial period of up to 3 months should take place prior to confirming the appointment. The employee will remain on their original terms and conditions during the trial period but will transfer to the appropriate terms for the re-deployed role once the appointment is confirmed.

5. PHASED RETURN TO DUTIES

5.1 Where the employee is returning on a phased basis, the Line manager will liaise with Occupational Health to manage the return to full duties appropriately.

…

6. PAY DURING MODIFIED DUTIES

6.1 It is not the Service's intention for employees to suffer any financial detriment due to returning to work when compared to continuing to be absent on certified sickness.

6.2 Where an employee is unable to fulfil their full duties, they will be remunerated as follows:

6.2.1 For an employee returning from absence who is still within their entitlement to sick pay:

Whole-time and support staff

i) For the hours worked, full salary will be paid

ii) For the balance of hours that are not worked, they will still receive full pay for the duration of their entitlement to full sick pay

iii) If the entitlement to full sick pay has expired and the sick pay entitlement has dropped to half pay, then they will receive full pay for the hours worked and half pay for the balance of normal working hours they are unable to work

…

6.2.2 For an employee whose entitlement to sick pay has expired, they will receive full pay for hours that are worked (for staff on the On-Call duty system payment will be made only up to the equivalent of their "normal" hours as described in iv) above, irrespective of the number of hours worked) but no payment will be made for the balance of normal working hours that they are not able to work. This applies to:

- *Employees returning to work after a prolonged absence and the duration of the absence as been such that their sick pay has expired*
- *Employees who have returned to work and their period of absence plus their period of modified duties has been of such a length that their entitlement to sick pay would have expired had they remain absent*
- *Employees who have gone straight onto modified duties with no sickness absence but the period of modified duties has exceeded the period they would normally be entitled to sick pay.*

6.3 Recording of modified duties

…

6.3.2 When the entitlement to full sick pay has expired and payment is reduced to half (or nil pay if half pay entitlement has expired), employees need to complete a time sheet (Appendix 1 Modified hours claim form) which should be authorised by the Line manager and submitted to payroll on a weekly basis. Pay will be adjusted in line with the hours recorded.

6.3.2 [incorrectly numbered in original] If you do not submit a timesheet, then pay will default to the rate of sick pay you are eligible for and any additional hours may not be included.

6.4 Where an employee receives enhanced pay for carrying out specific duties and they are unable to carry out those duties, they shall continue to receive the enhancement on the same basis as above. i.e. they will receive it in full for the duration of their entitlement to sick pay, 50% for the duration of any entitlement to half pay and it will cease thereafter.

…

6.6 The Service reserves the right to consider exceptional cases on their merits and exercise discretion in the rate of pay for modified duties. Consideration may be given, for example, to extending a period of pay where an individual has continued to work their full hours undertaking modified duties following an injury but whilst awaiting surgery. Any discretion exercised will only be applied with the approval of a member of the Executive team."

46. The MDP was thus aligned with Grey Book sick pay entitlement. SFRS allege that effect of the MDP in Mr Walton's case was that:-

    46.1. Whilst on modified duties, Mr Walton was entitled to be remunerated for any hours he worked at the rate of his substantive post prior to commencing modified duties

    and for any hours not worked (unless a discretion was exercised by SFRS to pay more (or less))

    46.2. from 14 May 2019 (6 months after he commenced modified duties) half remuneration for hours not worked at his substantive post rate prior to commencing modified duties

    46.3. from 14 December 2019 (12 months after he commenced modified duties) no pay for hours not worked.

47. Mr Walton initially argued that the MDP was not adopted as a collective agreement. There were at least three difficulties with that. It was adopted following a consultation in 2015 and the first time we were told an issue was raised by the FBU with that was on 5 May 2020 [S/24], secondly, the Grey Book provided for a dispute resolution procedure and there was no evidence that had ever been invoked and thirdly, any challenge to the MDP would necessarily called into doubt the range of other measures which in general provided benefits to staff that were adopted at the same time. We were ultimately told that no argument was raised as to the validity of the collective agreement but instead an argument raised that clause 6.2.2 did not apply to Mr Walton. We address that below (see (61-64)).

48. Mr Walton told us orally that in 2015 he applied for a role as a Community Safety Officer ("CSO") on Grey Book terms. Mr Walton accepted a summary of that role given to OH in July 2020 albeit referencing what it entailed during COVID19 was a fair one. That summary stated the role included carrying a large tool box (around 10kg) and step ladders - driving a vehicle, climbing stairs and ladders / stretching upwards to fit equipment (usually on ceilings) and fitting letterbox protection [328]. At the time at which that summary that was provided to OH (July 2020) Mr Walton was also delivering food supplies and PPE across the county, which involved the loading and unloading of boxes / crates of varying sizes and weights, driving of vehicles, essentially repetitive manual handling. The summary identified during normal business times, there would be more to consider [328].

49. Mr Walton orally accepted that his CSO role required him to be fit for operational duties as a firefighter. We found above that the Grey Book applied to operational firefighters rather than other staff (see (40-42)). His confirmation that his CSO role was on Grey Book terms reinforced that.

50. In contrast we were told that a CSO role was normally on Green Book (non operational firefighter) terms, was remunerated at a far lower rate (in the region of £22,500-25,000 rather than £32,000-35,000 pa for an operational firefighter) and it also attracted different pension benefits although we heard no evidence to that end).

51. We find that in undertaking the Grey Book CSO role Mr Walton was required in addition to maintaining his operational competencies (complying with such matters such as training requirements etc), to be operationally fit to undertake duties as a firefighter. That was subsequently repeated to Mr Walton (see (55)).

52. On 14 December 2018 SFRS's in house occupational health advisor, Mr Bernard Payn, certified that Mr Walton was not operationally fit as a firefighter *"… given the current levels of pain and discomfort despite pain relief medication and physio, I would recommend that John is put on mods for up to three months with a further OH review in March."* and that Mr Walton was *"Fit with temporary job modification"* [234]. Save for two brief sickness absences in

    52.1. 29 January to 1 February 2019 due to a chest infection, and

    52.2. 8 to 12 July 2019 due to knee pain

Mr Walton continued to work full time undertaking modified duties, in his case essentially desk-based duties aligned with the CSO element of his role, until August 2020. We return to that below (66).

53. On 6 June 2019 Mr Walton wrote to Ms Baddeley (as she now is known) [241]:-

> *"I am aware my Modified Duties is nearing the 6 month period very soon, can you confirm what my sickness entitlement looks like after this period please. You will be aware that during this time I have been working my full hours every week & taken no sickness days."*

54. She responded the following day:-

> *"I am aware that there has been previous discussions around this and I can confirm that the Modified duties policy and the parameters around the sick pay will apply to you should you go off sick. However, if you are in the unfortunate circumstances where you do require time off for sickness we will review the situation at that point based on your personal circumstances."*

55. On 16 August 2019, the Head of HR at SFRS, Sue Wilkinson, emailed Mr Walton to outline what had been discussed at a meeting earlier that day between him, her and Ian Housley, Group Manager and Head of SFRS's Northern Service Delivery Group ("NSDG"). She also set out the options open for Mr Walton [248-249]:-

> *• You stated that you do not feel that you wish to remain obliged to maintain your operational competence and associated fitness standards due to the discomfort this caused you in your knee.*
>
> *• You did however wish to continue working with the Service and felt able to undertake the CSO role*
>
> *• It was confirmed that you would need to maintain your operational status to continue under your grey book conditions*
>
> *• We agreed that there was currently a green book vacancy based in NSDG*
>
> *• Ill health retirement was not an option for you as you were of retirement age and therefore there would be no enhancement to your pension benefits*
>
> *• The two options were to:*
>
> - *either retire and take your pension – this would mean that you would need to take a break in service of at least one month and one day. It would also mean you would need to apply for the CSO role as an external applicant and go through the normal recruitment process*
> - *seek medical redeployment into the green book role as a result of you not being fit to continue in the grey book role. This would need to be supported by medical evidence*
>
> *• You shared with us that you have a consultant's appointment at the beginning of September and this would give you an indication of the prognosis with your knee.*
>
> *• It was suggested that you made contact with Irina Volkova-Heath to gain more information on the pension benefits you may be due. If you haven't managed to do this, her number is 8869*
>
> *Can I suggest that we meet again at the beginning of September to discuss a way forward. We would like to support you in your request to undertake the CSO role but hope that you appreciate this post has been vacant for sometime and we do need to fill it as soon as possible to assist the wider team. If we can bring this to a conclusion at the beginning of September, then I hope this will help yourself and the team going forward."*
>
> *Our emphasis*

56. While Mr Walton argued before us that he was told he could not take a pension. We find that was not so. Ms Wilkinson's email stated that "*Ill health retirement was not an option for him as you were of retirement age and therefore there would be no enhancement to his pension benefits*." For completeness nor did Mr Walton lead evidence showing that he was entitled to an enhancement and that was wrong.

Furthermore, he was also given the contact details of the person who dealt with pensions and invited to contact them with any queries. He did not do so.

57. Given he was not fit for operational duties Mr Walton was given two options (although as the email makes plain a combination of the two was also offered). We find that Mr Walton understood the options, had an opportunity to clarify them and take advice on them. For reasons we will come on to next, he took neither option. That he did not do so and continued to be paid under the MDP led us to conclude that he decided that the status quo under the MDP was more favourable to him than the alternatives (or the combination of them).

58. On 1 September 2019 Mr Walton was referred for knee replacement surgery (although this did not take place until a year later due to various cancellations including the COVID19 pandemic).

59. From 4 September 2019 SFRS admitted knowledge of disability.

60. We were told that it was hoped after the operation Mr Walton could return to full operational duties. Mr Walton orally confirmed that was so. We find that was the case.

61. As we state above during the latter part of SFRS's witness evidence Ms Fadipe confirmed that Mr Walton no longer pursued an argument the MDP was not part of a collective agreement and instead sought to argue clause 6.2.2 did not apply to him. That was not pleaded to or identified as an issue. He argued that clause only applied to employees *"… whose entitlement to sick pay has expired …"* and his had not.

62. We find that requires reading of that clause that ignores the later part of it and which requires the definition of what is meant by "*sick pay has expired"* to be read by reference to the words *"This applies to: …"*. The effect would be like reading a contract which concludes with an interpretation and definitions section at its conclusion by ignoring any clarification provided within them. Whilst that clause of the MDP could have been structured better we find that clause 6.2.2 should be read as a whole and as a result references to "*sick pay having expired"* included "*Employees who have gone straight onto modified duties with no sickness absence but the period of modified duties has exceeded the period they would normally be entitled to sick pay."*

63. Mr Walton also sought to suggest he was unclear what that clause meant. We find he was clear at the time (and later) both as to the meaning and effect.

    63.1. His specific reference in his email of 6 June to not having been off sick leads us to conclude he was aware of the effect of clause 6.2.2 and Mrs Baddeley's response made it clear that he had been told the position previously in discussions, that the MDP applied to him and that if he did go off sick SFRS would "*review the situation … based on your personal circumstances"* (see (53-54)).

    63.2. In his subsequent grievance appeal meeting of 10 March 2021, he stated to Mr Read the grievance appeal officer that he understood that but believe it would not apply to him because he had not been absent on sick leave [513]

> *"JW - … I get the policy it is all black and white. I am not asking to be made a special case but overall the organisation need to look at what is really going on.*
>
> *IR – So you knew it could happen but you didn't expect it to*
>
> *JW – Yes because I had not been sick …"*

    63.3. Had Mr Walton believed that to be so there would have been no need for him to write to Mrs Baddeley on 6 June 2019 because he would have known he had not been off sick in the previous 12 months he was still entitled to 6 months full and 6 months half pay. We find on balance the reason why he asked was that he understood the impact of clause 6.2.2 of the MDP as is reinforced by the timing when it was sent (6 months into his modified duties). Further if his assertion were correct and he was still entitled to sick pay there would have been no need for SFRS to "*review the situation … based on your*

personal circumstances" had he gone off sick because he would have been entitled to sick pay.

63.4. We find that not only did he know the MDP was being applied to him but he also knew its effects.

63.5. Those findings are supported by Mr Walton completing time sheets [301]. They were only required if clause 6.2.2 had the effect SFRS allege, namely after 6 months on modified duties he would only be paid his full non modified duties pay for days he was working. He was only required to lodge those time sheets because the MDP applied. His lodging them is further support that he understood that the MDP applied, and he understood and agreed to its terms. We find he was aware of the effects of clause 6.2.2 of the MDP and indeed had followed them by submitting timesheets.

64. That view is reinforced by Mr Walton's decision following the meeting on 16 August 2019 (see (55)). Having been reminded that he would need to maintain his operational status to continue under the Grey Book conditions, he made an informed choice based on options outlined not to take the alternative role that had been left open for him having had an opportunity to take pensions advice. We find he rejected those roles because he understood that not only did the MDP apply but its terms were beneficial to him in real monetary terms on the basis he was able to continue to attend work in that he would be paid his full substantive (non-modified duties) pay but also because that he continued to accrue pension benefits under the Grey Book and it allowed for the possibility he was able to return to his substantive post if the operation was successful.

65. An occupational health assessment in or about July 2020 identified that home working options should be considered. On 9 July (the day the occupational health report was received) Mr Walton contacted his manager, Ben Sourbutts asking for that to be considered [294]. The following day Mr Sourbutts asked Mr Walton to clarify whether he felt able to continue the physical activities he had been undertaking up till then [297]. Later that day (10 July) Mr Walton confirmed *"my ability to maintain most of the tasks I have been recently involved in, is now becoming unachievable."* [296] and then on 13 July *"Due to my inability to walk very far, walk up/down stairs, climb, I would not be able to safely continue to fulfil my role as it presently stands."* [303]. Occupational Health advice was sought later that day (13 July) [328-329]. A response was received on 24 July [332-333] the essence of which was thus:-

> *"… from my clinical perspective, I'd have significant concerns regarding John currently undertaking the physical components of his CSO role as outlined below which I surmise you do also.*
>
> *I understand that a business case can be put together with a view to John being payed [sic.] sick pay, as at this juncture and factoring in John's potentially imminent surgery next month; in my clinical opinion John needs to refrain from work until he has his surgery and I would recommend that consideration be given to extending John's sick pay to enable a full recovery rather than him returning back to work not fully recovered after his surgery."*

66. Mr Walton then commenced a period of sickness absence from 3 August. On 11 August, his station manger Helen Chadwick made a recommendation that he continue to receive full sick pay albeit on terms [348]:-

> *"I recommend that John Walton currently continues to receive pay due to his continued performance of the CSO role during an extended modified duties period.*
>
> *This would be with the following conditions;*
>
> *1. John communicates/forwards any correspondence in regards to surgery dates, further cancellations. These need to be the actual correspondence from NHS and health professionals and not verbal updates from John.*
>
> *2. John gives consent to consultant reports in particular around John's recovery, what this looks like and length of recovery/rehabilitation.*

3. Sick notes from GP need to cover all sickness period.

4. Engaging with line management regularly to update and contact monitoring.

5. This should be reviewed monthly through the period pre and post-surgery.

However, the Claimant continued to receive the enhanced pay benefits and accrual of pension rights that were associated with his Wholetime Firefighter role."

67. No evidence was provided that that was communicated to Mr Walton although he accepted conditions could be imposed and they were imposed. He also accepted that up to that point Ms Chadwick and Mr Sourbutts had been generally supportive of him.

68. By this point we were told that several operations had been scheduled and cancelled. Surgery had by then been rescheduled for Wednesday 9 September 2020 and Mr Walton had relayed to Mr Sourbutts that he had to socially distance or self-isolate before the operation.

69. Mr Sourbutts was working from home on Friday 4 September 2020 due to there being a COVID case in his immediate family. His wife called him whilst taking his daughter for walk on the pretext of asking him to bring a comforter for his daughter but also to say she had seen Mr Walton at the local football ground (in Poynton). Mr Sourbutts went there, saw Mr Walton with other men, that Mr Walton was lifting and moving sacks of grass and operating a sit on grass cutter/roller. Mr Sourbutts accepts he did not challenge Mr Walton about this at the time but he (or his wife) took a short video clip of Mr Walton operating the mower. That clip lasted between 10 and 20 seconds but did not show Mr Walton getting onto or off the vehicle (and thus the ease or otherwise with which he was moving or how long he operated the cutter/roller for).

70. On Wednesday 9 September 2020 Mr Walton underwent knee replacement surgery.

71. Mr Sourbutts told us he felt in a difficult position, stating that he knew from experience Mr Walton would not take kindly to being challenged. He spoke to the station manager, Ms Chadwick, and then to HR. He told us he was instructed that what he had seen needed to be raised with Mr Walton.

72. It was not disputed that the conversation Mr Sourbutts was instructed to have with Mr Walton took place. We find that was on Tuesday 15 September 2020, and not as Mr Walton alleges on 8 September [JW/15]. We say that because two emails of the following day (16 September) [354 and 500-501] refer to and thus support Mr Sourbutt's version of when that occurred.

73. It was common ground that during that conversation on 15 September, Mr Sourbutts told Mr Walton what he had seen, challenged Mr Walton about him undertaking such activities whilst he was absent, and that Mr Walton responded that he was permitted to take exercise by his consultant/medical advisors. Large parts of what were said were in dispute. Mr Sourbutts states that following him raising how those activities were compatible with what Mr Walton had told him about the need to self isolate, there was a silence before Mr Walton asserted that Mr Sourbutts was not the right person to be speaking to him (at that time), that henceforth he wanted to speak to someone else, that he would deny everything that was alleged and *"I should watch myself as he'd get others from Poyntons [sic.] to corroborate and say that I'd not seen what I clearly had seen"*.

74. Whilst Mr Walton accepted before us he had been driving mower and had moved grass in bags (by sliding them along the ground) he disputed the reminder of Mr Sourbutt's account.

75. On 16 September 2020 SFRS HR emailed Ms Bryant, SFRS's Chief Fire Officer ("CFO") [500-501] concerning the question whether Mr Walton's pay should be extended. It summarised that terms had been imposed and Mr Walton had been co-operating to a degree before going on to address Mr Sourbutts account of the events of 4 & 15 September. Ms Bryant responded *"Thanks for getting in touch, based on this latest information I am not prepared to carrying on with an extension of pay. The*

reaction that John has made is not in line with our cultural framework at all and I am pleased that an investigation will be undertaken." [500]

76. As a result, on 17 September 2020 Mr Sourbutts sent an email was sent to Mr Walton's internal SFRS email address *"I regrettably have to inform you that the service has made the decision to cease your sickness payment as of the end of the month of September 2020. This means that as of the 1st October 2020 you will not receive any sickness payment"* [355-356].

77. Ms Bryant was not asked about her rationale for her decision by HR or as part of the internal grievance or appeal that followed. She was later (29 September) [499] asked to clarify if Mr Walton's pay was to drop to half pay or zero pay. Having set out the background again the reason behind the question was put thus *"Since the beginning of his mods and throughout any sickness periods, John has remained on full pay. As his modified duties period began in December 2018, we're at almost 2 years of full pay. In line with the policy he has exhausted his combined sick/mods pay and should be going to zero pay. However, having never dropped to half pay, we're debating whether the fairest thing to do, would be to drop him to half pay for the appropriate period and then look to decrease this to zero pay (bar any SSP he is entitled to)."*

78. Ms Bryant responded the following day [498] *"I think based on the information above we would drop him to half pay in the first instance and then review the situation in a month."* We are thus left to take her words at the face value. We find the reference to *"reaction"* and SFRS *"cultural framework"* (and by that we understood that to mean the behaviours expected of staff) to refer to the way Mr Walton responded to Mr Sourbutts on 15 September.

79. We find that whilst the email exchange with Ms Bryant makes plain a decision had been taken to investigate Mr Walton by 16 September it had not commenced at that point. Mr Keeling was subsequently appointed to investigate the allegations that Mr Walton had :-

> *1 Taken part in activity which may be deemed to have contravened paragraph 2.4.8 of the Respondent's Attendance Management Policy which states that employees must:*
>
> > *"Not abuse the sickness absence procedures or sick pay scheme. False claims for sickness are not tolerated and may result in disciplinary, civil and/or criminal sanctions."*
>
> *2 Taken part in activity which may constitute misconduct under the Respondent's Disciplinary Policy namely:*
>
> > *2.1 Failure to comply with a reasonable instruction, order, policy, rule or contractual requirement, and;*
> >
> > *2.2 Whilst reportedly sick, working or indulging in activities which are inconsistent with the reason for absence or are not conducive to recovery.*
>
> *3 During a subsequent telephone conversation with his line manager, Mr Walton behaved in a manner that does not comply with the Respondent's Cultural Message and does not adhere to the Respondent's values, by using language that was perceived to be threatening.*

80. On 29 September Mr Sourbutts and Ms Chadwick were interviewed by Mr Keeling at 9:45 [362-366] and 11:40 [359-361] respectively.

81. Based on the documents we saw there was a concern on SFRS's part that Mr Walton had not picked up the email of 17 September 2020 (76) so a letter dated 5 October was sent to Mr Walton informing him that from 1 October he would be on half pay [377]. Mr Walton stated [JW/17] that letter was received on 9 October.

82. Mr Walton complains [JW/17] that he had no sickness during the 12 month period leading up to him going off sick on 3 August 2020, his sickness absence had lasted two months by that point in

time and so under the Grey Book terms he should have received his full sick pay for another 4 months, and half pay for a further six months.

83. Mr Walton went on to say he was not aware that his sick pay would be reduced until he received this letter. We return to this at (86 & 87).

84. For context, any conduct prior to 5 October 2020 is potentially out of time.

85. On 15 October Richard Williams of the FBU emailed to Ms Bryant [474] asking her to review her decision concerning Mr Walton's reduction in pay [474].

86. At 13:12 on 21 October 2020 Mr Walton raised a grievance copying in Mr Williams [383]:-

> *"I am currently absent from work following a knee replacement operation which took place on the 9/9/2020. I reported sick on the 3/8/2020.*
>
> *On the 9/10/2020 I received written confirmation that my pay was being reduced to 50% from the 1/10/2020, the letter dated 5/10/2020.*
>
> *This would equate to me receiving sick pay for 2 months. My understanding stated in the National Terms & Conditions is that I am entitled to 6 months full pay sick, thereafter can be reduced by up to 50%.*
>
> *Prior to me going sick I have been on modified duties working 42hrs a week as per my contract in my full time role as a CSO in Prevent.*
>
> *Having spoke with you on the 12/10/2020 to get some understanding of why this action has been taken, I have been left bewildered, upset & anxious about why this has been imposed on me.*
>
> *During my time on modified duties I have recieved [sic.] no communication/information either verbally or written regarding my modified duties status."*
>
> *Our emphasis*

87. We find the sentence we emphasise was not true for the reasons we give at (63 & 64).

88. At 14:28 that day (21 October) Mr Walton was told by SFRS's HR his request would not be dealt with as a grievance and that instead he could make what was essentially an application (supported by information) to the CFO to review her decision [456].

89. About half an hour later Mr Williams repeated his request (85) to the deputy CFO, Mr Rob Barber (it appears Mr Williams was aware Ms Bryant may not have picked up his request as she was on leave) and him to address this in her absence. Mr Barber responded about 90 minutes later saying he had looked into it that Ms Bryant had made her decision and Mr Walton had been written to. He asked Mr Williams to let him know if he required anything further [473].

90. We heard from Mrs Baddeley that the senior management team of SFRS at the time comprised two directors, one of whom was Mr Watts, the deputy CFO, Mr Barber and the CFO, Ms Bryant and only those four had power to dismiss. We were told in practice hearings at which dismissal could be considered were heard by one of the two directors, so the CFO and her deputy were kept free to hear appeals if required.

91. We enquired why the pay discretion decisions were made by the CFO, rather than one of its two directors or deputy CFO thereby ensuring that there could be an internal appeal route. We were told that was because the CFO was personally required to account to the Fire & Rescue Commissioner for those decisions and any appeal route was to the Commissioner. SFRS were unable to explain why given it transpired a number of factors were as standard taken into account by the CFO in exercising her discretion (they are set out in the grievance outcome report of Mr Read (124)) that neither they nor the rationale for her decision were sent to Mr Walton). We find they would have been necessary to allow him a meaningful basis upon which to appeal. However, we should also state that neither Mr Walton nor his union sought the rationale or the factors on which the decision was made.

92. Two investigation meetings were held with Mr Walton. Both were minuted and appeared at at least two points in the bundle. The first was held on 30 October 2020 and the second held on 27 November 2020 (respectively [441-448 & 451-452]). We find there was a delay in the first meeting being held because Mr Walton was recovering from his operation and then scheduling issues. The second was held to allow Mr Walton to view the video clip. We were told Mr Sourbutts had initially been reluctant to release that clip because he wanted Mr Walton to put his version of events first, that he may have been concerned about the nature of the recording and when those points had been resolved there were then problems uploading it to SFRS's system due to the usual security concerns.

93. Mr Keeling reported the outcome of his investigation on 15 December 2020 [421-427].

94. By a letter dated 24 December 2020 Mr Walton was invited to a disciplinary hearing on 20 January 2021 to be chaired by Mr Howard Watts [467-468].

95. Before us Mr Walton was asked why he believed the outcome of the disciplinary process was that he would be dismissed. He told that this because that was one of the potential outcomes given it was classed as a "level 3" and that Mr Watts had a reputation with firefighters. Mrs Baddeley told us Mr Watts heard 14 cases concerning disciplinary or capability matters during the period of his employment with SFRS and dismissed the member of staff in 4 of them.

96. On 31 December 2020 Mr Walton submitted a Subject Access Request ("SAR"). It appears at least one other may have been lodged but it is unclear when.

97. Early conciliation commenced on 4 January 2021.

98. It appears from the subsequent email chains that Mr Walton received the invitation to the disciplinary hearing and evidence pack on 8 January 2021. He subsequently raised concerns about the allegations and sought the hearing be rescheduled as he has received insufficient notice of it. On 18 January 2021 Mr Walton again sought that his grievance be addressed [472]. We address both that and the notice issue at (102).

99. By a letter dated 20 January 2021 a member of SFRS's HR team, Ms Steph Cooper, attempted to reassure Mr Walton about his concerns about the disciplinary allegations and investigation, and she rescheduled the disciplinary hearing for 1 February 2021 [476-477].

100. On 26 January 2021 the disciplinary hearing was again rescheduled to 8 February 2021 at Mr Walton's request [480-481 & 483-484].

101. On 3 February 2021 Mr Walton states he received some of the replies to an earlier subject access request ("SAR")

> *"… Contained within that SAR was an email confirming that the Chief Fire Officer ("CFO") Bryant dated 16 September 2020 which stated that based on "this latest information" (the disciplinary allegations) "I am not prepared to carrying on with an extension of pay. The reaction that John has made is not in line with our cultural framework at all and I am pleased that an investigation will be undertaken". CFO Bryant initially decided she wanted my pay dropping to nil pay, but subsequently decided to drop it to half pay and review it in one month. (pages 500 to 501). I believe that this is evidence that the outcome of the disciplinary investigation was pre-determined." [JW/29]*

102. On Thursday 4 February 2021 Mr Walton was invited to a grievance hearing [485]. It too was scheduled for 8 February 2021. Given that request had previously been refused, SFRS's witnesses were asked about the change in approach. They suggested that by that point the grievance was perceived to be a matter concerning process rather than substance.

103. If the grievance had concerned substance the only person who could have addressed that was either the CFO (as a review) or Fire Commissioner. Thus, on SFRS's case, which we accept, all a grievance officer could do was to refer a decision back to the CFO if process had not been followed. If so that was not made clear to Mr Walton and reinforced SFRS's error at (91) above.

104. Mr Walton responded later that day (4 February 2021) requesting the video clip and a postponement of disciplinary hearing for 21 days (the period SFRS's disciplinary procedure required as advance notice of a disciplinary hearing involving gross misconduct [173 ¶3.4, 174 ¶4.8] and 182 App.1 ¶3.2). He confirmed that he would attend the grievance but asked that it take place by video.

105. Ms Cooper responded 2 hours later (at 5:40 pm) enclosing the video clip, and stating that the hearing would go ahead as planned, would not be re-scheduled and asked him to confirm his attendance. SFRS gave its rationale that the clip was not new evidence, he had seen the clip at the second investigation meeting (70 days prior to the re-scheduled hearing), had acknowledged he had received the evidence pack on 8 January (35 days before the re-scheduled hearing) and he would be able to raise any points at the hearing [486-487].

106. On 5 February 2021 Mr Walton emailed Ms Cooper to say that he would be attending the grievance hearing but not the disciplinary hearing stating he had not had the disciplinary investigation documents in sufficient time before the hearing, indicated how colleagues elsewhere had been given evidence 21 days in advance, alleged that evidence had been tampered with and ignored and those actions by SFRS *"… would lead me to assume that any outcomes from a hearing would be clearly untrustworthy, bias, unfair & the outcomes questionable."* [488-489].

107. Ms Cooper asked Mr Watts how he wished her to respond. Whilst we were not taken to his response he instructed her to inform Mr Walton that the hearing will be conducted in his absence if he did not attend.

108. On Saturday 6 February 2021 Mr Walton resigned stating he would follow that up in writing the following week [502-503]. He was asked on 8 February if he did want to resign and if so, if he was giving 1 months notice [502]. He affirmatively responded on both points later that day [502]. The following day Sunday 7 February 2021 Mr Walton set out his reasons [493]:-

> *"To clarify I am unable to attend hearing, Monday 8th at 14.00 hrs.*
>
> *Your response does not address my previous respectful requests regarding important information, evidence being omitted/inserted and not released until the end of last week.*
>
> *I have clearly being disadvantaged by this all through the process and now discriminated against bordering on bullying & harassment.*
>
> *Over the weekend this behaviour has led me to resign my position from the service following health concerns exasperated by these actions."*

109. In his witness statement he said this

> *"31. In my resignation letter I stated I was forced into resigning as a result of the Respondent's conduct – assuming I was guilty of the allegations and unilaterally stopping my sick pay before an investigation was conducted, questioning my honesty and integrity and not being open and transparent during the disciplinary process, removing crucial pieces of evidence which would support me and refusing to add relevant supporting evidence. I also stated I felt discriminated against. (pages 544 to 546)*
>
> *32. It was clear and obvious that there would not be a fair disciplinary process, where unsubstantiated accusations were made, lies about my integrity/honesty, hearsay used by managers to qualify unproven accusations against me. These allegations were raised with me in a phone call four days after undergoing complex major surgery with the following day a decision made to reduce my pay to 50%. I was also covertly videoed by Ben Sourbutt's partner, who must have known about my sickness status which was sensitive personal information. My initial denial of a grievance hearing made me believe that the decision by the Chief Fire Officer to reduce my pay was never going to be overturned. I also believe that it was clear and obvious from the email from CFO dated 16 September 2020 that a decision had been made that I was guilty of the allegations as this email stated* ***'Based on the latest information, I am not prepared to carry on with the extension of pay, the reaction that John has made is not in***

line with our Cultural Framework at all and I am pleased that an investigation will be undertaken' *(page 500 of the bundle)."*

110. Mr Walton told us orally the final straw was that following receipt of the SAR response there was absolutely clear bias and people did not want to engage in the process, he had always been suspicious of the process as the trail of emails demonstrated, that in the notes of the meeting words had been inserted in his statement from the interview against his will, the video had then turned up, and it appeared that he would not receive a fair and honest process.

111. Mr Walton accepted when asked about it that his statement had not been tampered with and nor had he made that assertion at the time. What we find he did was to confuse the findings of the Mr Keeling's investigation report for his own statement. Whilst Mr Keeling accepted he had inserted a word into his findings that Mr Sourbutts had not alleged had been used *"you'd better watch yourself"* [426] instead of *"I should watch myself"* [366] and again that demonstrated failures on the part of the managers concerned, that is something that could and should have been addressed at the disciplinary hearing. Similarly the disciplinary hearing could have considered Mr Walton's view that the comment to Mr Sourbutts that he *"should watch yourself"* was not threatening whereas *"you'd better watch yourself"* made matters sound worse. Matters did not get to that stage.

112. Mr Walton's assertion that his statement had been tampered with, demonstrated at best confused thinking on his part and at worst suggested he was prepared to make serious allegations that were baseless without checking the facts that underlay them.

113. Whilst Mr Walton told us he had previously asked for the video at the second investigation meeting he did not give that detail in his witness statement nor did her refer us to documents where that was done.

114. We find that whilst Mr Walton was required to be given 21 days notice of the disciplinary hearing SFRS disciplinary policy did not specify a period by which any documents would be provided in advance of the disciplinary hearing. Further, the disciplinary policy stated [174 ¶4.7]:-

> *"If appropriate evidence will then be prepared and information exchanged with the employee, their representative, and relevant Managers. In exceptional cases, the name of a witness may not be disclosed in order to protect the identity of that individual. In this event, the employee will be given as much information as possible, while maintaining confidentiality."*

115. Thus, SFRS's duty to provide evidence/information was in certain circumstances qualified. Whilst the circumstances concerning protecting the identity of witnesses did not apply here, the qualification remains - the requirement for SFRS to provide evidence was not absolute and further whilst a time period was specifically stated for notice being given of the hearing (and implicitly the charge(s) to be faced) no such period was stated in relation to the evidence.

116. We find that the notice period was to allow sufficient time for a union representative to be arranged and be present. Whilst clearly a reasonable period had to be given for evidence to be considered, how long was required is a matter of degree. If as here that had already been viewed and thus Mr Walton was aware of it and any issues it raised for over 2 months that period might reasonably be quite short. Further, it was unclear from the email correspondence we saw that SFRS was intending to rely upon it (given by that point Mr Walton had accepted he had been sitting on the mower). That was a decision SFRS was entitled to come to and something that could have been addressed further at the disciplinary hearing if the point was pursued.

117. Whilst the disciplinary hearing did not proceed on 8 February 2021 Mr Walton's grievance hearing did, albeit remotely. It was chaired by Mr Damian Armstrong and minuted [253-260]. He told us and we accept that he was not aware Mr Walton had resigned at the time.

118. Mr Armstrong identified three parts to the grievance:-

118.1. The reduction in Mr Walton's occupational sick pay from full to half from 1 October 2020

118.2. Whether the MDP had been fully consulted upon with the Fire Brigades' Union

118.3. If Ms Bryant had predetermined the outcome of Mr Walton's disciplinary process

119. On 15 February 2021 early conciliation concluded.

120. On 19 February 2021 Mr Walton provided further details of his resignation to Mrs Baddeley [545-546 & 547-548].

121. Also on 19 February 2021 Mr Armstrong provided the grievance outcome [506-508]. He did not uphold any of the elements of the grievance. He determined that the period of Mr Walton's modified duties reduced his sick pay entitlement, that the CFO had exercised her discretion, that SFRS had communicated with him on numerous occasions regarding that and had previously exercised its discretion to enhance his pay. Mr Armstrong also addressed the collective agreement. That is no longer pursued before us but in that respect both Mr Armstrong (and the grievance appeal officer Mr Read (see (124))) appeared to us to take HR at their word, that a collective agreement had been reached rather than investigate it as they should have done. Finally, as to the concern the CFO had pre-determined the outcome of the disciplinary process prior to the investigation, Mr Armstrong concluded the CFO had a discretion whether to grant a further extension of full sick pay and declined to do so and that was not a pre-determination of any investigation.

122. By an undated document Mr Walton appealed the grievance outcome [566-567]. He gave three grounds:-

122.1. He did not understand how his occupational sick pay entitlement had been eroded when he was maintaining his contractual hours, and he felt this amounted to an unlawful deduction from his wages

122.2. that the MDP had not been agreed by the FBU, and

122.3. that Ms Bryant, Chief Fire Officer, had pre-determined the outcome of the disciplinary policy when she exercised her discretion to reduce his occupational sick pay from full to half on 1 October 2020

123. On 10 March 2021 Mr Walton's grievance appeal was heard by Ian Read. The appeal was minuted [509-514] and Mr Walton was accompanied by his union representative.

124. Mr Read's appeal outcome was dated 17 March 2021 [515-517]. He did not uphold the appeal based on much the same grounds as Mr Armstrong. As to pay he did not accept that Mr Walton was not aware of the policy given the conversations that had been had and whilst Mr Walton may not have believed the MDP would be applied to him that was no reason not to apply it. We address Mr Read's failure regarding the collective agreement point above (121). In relation to the exercise of discretion Mr Read outlined 4 criteria used by the CFO. Unlike Mr Armstrong who did not set out these criteria we find Mr Read's reference to *"On this basis I trust that CFO Becci Bryant took into consideration all aspects of the case in order to use her discretion based on the parameters above."* could only have been based on an assumption by him, given he did not speak to Ms Bryant. As to the final point that that Ms Bryant had no influence in relation to the investigation whilst he found no evidence (other than an assertion) to support that, again he should have spoken to Mr Keeling and did not do so. Had he done so he would have discovered given our findings that Mr Keeling was not aware of Ms Bryant's decision

125. In the interim by a letter dictated on 23 February 2021 but not stating the date of the assessment, Mr Walton's Consultant Orthopaedic Surgeon, Mr Syam Morapudi, recorded Mr Walton's circumstances thus:-

> *"This is to say that Mr John Walton has had a complex right total knee replacement. He has had multiple surgeries on the right knee. He has worked in the Fire Department for a long time and he is 64 now. Following his right knee surgery and the other multiple surgeries that he has had I do not think that he will be able to get back to working as a fireman at full capacity. This gentleman is looking to take retirement soon and I think it would be a good idea for him to do that as I do not think he will be able to get back to full time work."*

126. Taking that in conjunction with Mr Walton having been unable to perform his CSO role prior to the operation we find that suggests on balance that not only would he have been unable to return to a role that required him to be able to undertake duties as an operational firefighter but also unable to return full time to any role.

Mr Walton's evidence

127. During the course of the hearing a variety of new points were raised on Mr Walton's behalf where for the most part the factual basis for which had not been led in evidence and/or this argument was not advanced/pleaded to/identified as an issue prior to the trial starting. Mr Walton has been represented throughout by a large national law firm and is supported by his union. The ever changing nature of the case the respondent was asked to address, by virtue of new facts being introduced, reflect badly on him and in turn his account.

128. That aside on a number of occasions Mr Walton sought to raise points that were at odds with what actually occurred. In our judgment they demonstrated that he was prepared to make serious allegations without checking the facts that underlay them and had he taken care to check rather than merely make an assertion he would have discovered they were baseless. Whilst this is not an exhaustive list these included asserting words had been put into his statement against his will (112), arguing that he was told he could not take a pension when that was not so and adopting a position before us that suggested he did not need to be operationally fit for his substantive role when he had been told he did (see 55-57)).

129. Beyond that the assertion in his grievance of 21 October 2020 that he had received neither verbal nor written no communication or information regarding his modified duties status was not true. We found that communications had been relayed to him, he had understood the terms and complied with them (63, 64 & 86). That being so, his assertion that he did not understand how his occupational sick pay entitlement had been eroded when he was maintaining his contractual hours, and that he felt this amounted to an unlawful deduction from his wages (122) when he knew what the terms of the MDP were and had complied with its effects was frankly untenable.

130. For those reasons save where supported elsewhere we give Mr Walton's evidence no weight.

Our Conclusions

131. The discrimination and wages complaints form elements of the cumulative breach argued as part of the constructive unfair dismissal complaint so we turn to them first.

132. We are required to take into account the EHRC Code of Practice "*in any case in which it appears to the court or tribunal to be relevant*" [25]. Given the Code provides

> *"5.21. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified …"* [26].

we address the failure to make reasonable adjustments complaint first.

The duty to make reasonable adjustments

133. Knowledge is no longer disputed as to any of the required elements.

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[25] s.15(4)(b) EqA 2006

[26] See *City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746* at *[57]*

134. Given the third requirement relating to adjustments in the EqA, auxiliary aids, is not argued here (nor for that matter is a physical feature of premises) we can adopt the staged approach in Environment Agency v Rowan *[2008] IRLR 20* without modification.

The PCPs

135. Whilst it was agreed the second PCP, the MDP was applied, the first PCP alleged *"Counting time spent on modified duties, thereby reducing the entitlement to occupational sick pay during subsequent periods of sickness absence"* was disputed.

136. We found that Mr Walton's contract required him to be able to undertake duties as an operational firefighter and that in order to ensure the safety of firefighters and in turn the public, high levels of fitness are required (see (42 & 49)). Thus, whilst a firefighter may not have been fit to carry out his/her duties as a firefighter that does not necessarily mean he/she may satisfied the normal day to day activities element of the s.6 EqA test. In our judgment the fitness levels required of him to undertake his duties as an operational firefighter exceeded normal day to day activities.

137. Mr Walton's impairments at the relevant time prevented him from undertaking his duties as an operational firefighter and disabled and non-disabled persons alike would have been treated in the same way under the MDP and outside it, we find that both PCPs bite harder on the disabled, or a category of them (here those with osteoarthritis and thus have impaired fitness) and thus Mr Walton and those with osteoarthritis are more likely than those without those impairments to have to undertake modified duties.

138. In our judgment whilst the first PCP is capable of being a PCP it mixes cause and effect, combining the PCP with the disadvantage that is alleged to flow from the application of the PCP namely *"his occupational sick pay was reduced from full to half on 1 October 2020"*. We therefore also consider that under disadvantage which we turn to next.

Disadvantage

139. Whilst both PCPs are worded differently they rely upon the same provisions and effects. The MDP (PCP2) is asserted by SFRS to provide that time spent on modified duties counts against sick pay entitlement as does PCP1. Similarly the effect of the MDP and PCP1 is that during subsequent periods of sickness absence the entitlement to occupational sick pay potentially reduced. As both PCPs rely upon the same provisions and the adverse effects alleged are essentially the same we intend to address them together.

140. Unlike for direct (s.13) or indirect (s.19) discrimination, s.23(1) EqA, which sets out the nature of the comparison for those provisions, does not apply to the duty to make reasonable adjustments. According to ¶6.16 EHRC code the purpose of the comparison exercise is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question.

141. In Griffiths v The Secretary of State for Work And Pensions [2015] EWCA Civ 1265 Elias LJ giving the leading judgment stated

> *"58. First, the language of section 20 is very different from the language in section 24 of the Disability Discrimination Act 1995. The nature of the comparison exercise in the former case is clear: one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able bodied. Of course, if the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability. But if the disability leads to disability-related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by that category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled*

differently than the non-disabled would be treated, in order to remove the disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant."

142. The disadvantage relied upon is that Mr Walton's occupational sick pay was reduced from full to half from 1 October 2020. At first sight it might seem obvious that the loss of sick pay entitlement placed Mr Walton at a disadvantage. Indeed Mr Walton argues the reason that was so was because the MDP *"count[ed] time spent on modified duties [as] reducing the entitlement to occupational sick pay during subsequent periods of sickness absence"* and thus his entitlement to sick pay was reducing whilst he was still was working.

143. However, given the burden lies with Mr Walton to show that the duty to make adjustments arises, in order to be placed at a disadvantage by the MDP he will need to show that it *"… bites harder on the disabled, or a category of them, than it does on the able bodied."* and *"… the fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant."*.

144. Two issues flow from this:-

144.1. Firstly, given the disadvantage relates to pay (and by that we include loss of entitlement to sick pay) Mr Walton would need to show absent the MDP he would have been paid or was entitled to be paid in excess of the sums he was actually paid by virtue of the MDP (or the discretion granted by it). That could arise in a number of ways but includes through some combination of his entitlement to pay and/or occupational sick pay.

144.2. Secondly, the reasonableness of the MDP itself, which we return to under reasonableness below

145. Turning to disadvantage, the difficulty for Mr Walton is that to show the MDP bites harder the benefits the MDP provides have to be ignored from the exercise and Mr Walton therefore needs to be able to rely upon a contractual entitlement and/or the exercise of a discretion to show he was disadvantaged.

146. If Mr Walton was unable to undertake the full range of his contractual duties and we ignore the effect of the MDP, it was not in dispute that for so long as his employment continued and he remained absent he would have been potentially *entitled* to be paid full pay for 6 months, half pay for a further 6 months and zero pay for so long as he remained absent thereafter. That equated to a maximum of 9 months' full pay in monetary terms for a continuous period of absence. However, that presupposes that Mr Walton's employment would have continued for that 12 month period and/or Mr Walton would have continued on the same terms.

147. If it is argued that Mr Walton's employment would have necessarily continued for that 12 month period that runs contrary to one of the potentially fair reasons for dismissal in s.98 ERA, capability, which in turn is subject to the s.98(4) fairness assessment. Whilst an employer has to consider within the s.98(4) assessment the employee's contractual entitlement to sick pay, it is but one factor amongst many, as for instance is the duty not to dismiss for a non conduct reason if an employee would otherwise be entitled to benefit from a PHI policy.

148. If that is being suggested it also runs counter to the actuality which was that in August 2019 (see (55)) Mr Walton was told if he could not undertake operational duties he would need to chose from one of the options given (or the combination of them). We find that consideration was done at about that time because clause 3.10 of the MDP provided that the MDP ordinarily only applied for 6 months and that 6 month period had come to an end. The rationale for the limit imposed by clause 3.10 was stated to be *"… indefinite modified duty arrangements are not sustainable for the Service."* and in turn SFRS is a public body and as such is accountable for use of the monies made available to it.

149. If the MDP had not applied SFRS would have still been required to consider making adjustments, that would have included a consideration of undertaking alternative duties, the question whether Mr Walton was likely to be able to return to his substantive post and if so, when and also the

question of a capability based dismissal and/or early/ill-health retirement (if they were option(s)). Absent the MDP we find that that consideration of alternatives would have taken place at least by the same point. That view is reinforced by the factors we refer to at (148).

150. By August 2019 Mr Walton had not been referred for knee replacement surgery but was due to see his consultant in September. In practice a decision was deferred until after that consultation. In September he states was referred for knee replacement surgery. We were not provided with medical evidence of that but we find that SFRS proceeded on the basis that was the case and continued to exercise its discretion to pay Mr Walton his full non-modified duties salary (albeit on terms see (66)). Further that Mr Walton only continued to be paid his full substantive non modified duties pay after September 2019 because by then he was awaiting an operation and the proviso in clause 3.10 where "… *medical evidence that a return to full duties is likely within a reasonable time frame".*

151. Whilst COVID intervened to extend yet further the period Mr Walton was paid his full substantive non modified duties pay that circumstance only arose because of the operation of clause 3.10 and the delay caused by COVID. Absent that clause in the MDP, again Mr Walton would need to show his full non modified duties pay would have continued whilst he was not fit to perform operational duties. Again he has not engaged with that; Mr Walton did not tell us how long his surgeon had told him the waiting list pre COVID was or how long it was expected he would need to recuperate for. What happened in practice was that he did not received a prognosis from his consultant until 5 ½ months after the operation.

152. At that point (September 2019) an alternative role was available that Mr Walton could undertake. We find that had the proviso in clause 3.10 of the MDP not applied, given by September 2019 he had been being paid for undertaking a role he was not performing for 9 months, as a public body required with fully utilising the resources available to the public purse and the prospects were that until he had had surgery that would continue notwithstanding that operation given there were alternative role she could undertake we find SFRS would have been duty bound to consider

152.1. requiring Mr Walton to take that alternative role as a permanent change,

152.2. Mr Walton being required to utilise his sick pay,

152.3. that it commence a capability dismissal, retirement or

152.4. some combination of those alternatives.

153. We know what Mr Walton's decided not to take the alternative roles that were offered in August 2019 but instead he continued to be paid his full pay under the MDP. We found he knew by that point what the alternatives and their consequences were, had the opportunity to take advice on them and chose to stay on the MDP.

154. No doubt one of the factors in his decision was that if he remained in his existing Grey Book role he would continued to accrue Grey Book pensions benefits. We were told he would lose them if he moved to a Green Book role. That aside him continuing under the MDP terms suggests to us he took the view its terms were more favourable to him than the others on offer

155. Ms Fadipe sought to canvass with us a number of alternatives, many of which were predicated on periods on modified duties far in excess of 6 months. None engage with why he would have been paid his full substantive pay if the MDP had not applied for more than the 6 months provided for by his contract.

156. Ms Fadipe also argued that the position Mr Walton was in was because osteoarthritis was a degenerative condition. The same issue that we address above (143-144.2) arises. Further, the degree of degeneration did not prevent SFRS's OH advisor accepting the information that Mr Walton had conveyed to OH about the likelihood of a return to full duties. If there was an issue here about the degree to which the osteoarthritis was degenerative that potentially opens up all sorts of questions about what Mr Walton had passed on to SFRS about the extent to which the

operation would allow him to return to full fitness . That runs counter to the way the parties were acting at the time and we find that Mr Walton was expected to return to full duties (see (150)).

157. By virtue of the proviso to clause ¶3.10 Mr Walton was paid his full non-modified duties salary from 14 December 2018 to 30 September 2020 (21½ months) and half pay from 1 October 2020 until the expiry of his notice on 6 March 2021 [27] (just over 5 months or 22 ¼ weeks). He was thus paid the equivalent of 24 months (or 2 years) full non-modified duties pay. That only occurred due to that clause and his impending operation. Absent that clause and his impending operation we find he would have been faced with one of the alternatives that he was given and did not take up in August 2019. As we state above his failure to opt for them is in itself telling as to his view whether the MDP was disadvantageous for him.

158. Undertaking a comparison between the disadvantage (entitlement to sick pay) Mr Walton would have been entitled to under the Grey Book (9 months) and that paid under the MDP by virtue of clause 3.10 (24 months) unless Mr Walton could show the discretion to pay him his full contractual pay whilst not undertaking his full contractual duties would have been exercised for the whole of that period, it is difficult to see how Mr Walton was put to a disadvantage.

159. It is for Mr Walton to show a disadvantage. He has not shown, on balance, that was so. He has not engaged with it, merely making an assumption that in the absence of the MDP applying that he would have continued to have been paid his full rate of pay.

160. Finally, and whilst this was not strictly part of his pleaded case, Mr Walton appeared to complain that he was losing his sick pay entitlement whilst he was working. That ignores the fact he was not performing his full contractual duties and that the requirement to make adjustments exists to facilitate employees to return or continue in work and only in the exceptional case to be paid for work not done, as the authorities (see (18-21)) demonstrate.

The reasonableness of the adjustment contended for

161. Firstly, we address the reasonableness of the MDP. Without it Mr Walton was entitled to 6 months full pay and six months half pay if he was not fit to undertake operational duties as a firefighter. We found he was not fit to undertake operational duties as a firefighter. As we state above that was not an absolute right to be paid for that period because Mr Walton's employment could have been dismissed earlier although his right to pay would have been a factor in any s.98(4) ERA assessment. He therefore received benefits from the MDP. Whilst the MDP therefore potentially "ate into" the time a firefighter could be paid sick pay whilst he/she was undertaking other duties the corollary for that was the firefighter's pay was protected during the period of those adjusted duties.

162. Arguably SFRS would in any event have been under a duty to consider alternatives and make reasonable adjustments so we need to consider if the MDP benefits were actually such. We consider they were. The MDP allowed for cases that fell outside it to be addressed by alternative means, for instance after 6 months on modified duties. Those cases outside the norm would in our view be assessed in the same way as a consideration of adjustments would have been made if the MDP had not applied. Thus, the effect of the MDP was that whilst it applied if the firefighter could no longer perform his/her substantive role but could undertake alternative duties [28] it provided for a right to payment of full non modified duties pay whilst the adjusted duties were being undertaken (and thus a variation of the contractual duty to perform those duties) without the need for the exercise of a discretion by SFRS **and** for the exercise of a discretion thereafter in much the same way as would have been the case had it not applied.

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[27] Mr Walton adopted a confused position regarding his termination date and had not addressed whether he was paid full pay for his notice (see (191))

[28] for completeness if the firefighter was unable to undertake modified duties the policy did not apply and so the issue does not arise.

163. Thus unlike the contractual term providing for sick pay [29], which we find did not delay a consideration of a change of role/termination/retirement etc. in contrast we find the MDP varied the obligation upon a firefighter to perform his/her contractual duties whilst it applied.

164. Whilst the effect of the MDP whilst working on adjusted duties could have been, as here, that a firefighter was "eating into" his/her sick pay entitlement meaning that had sick pay entitlement been exhausted any return on adjusted duties would not be entitled ordinarily to sick pay, under the MDP that would have still required a consideration of the exercise of a discretion whether to make any further reasonable adjustments.

165. Thus, in our view the MDP provided greater certainty for firefighters whilst providing the same consideration of adjustments. In doing so it protected the public purse by not providing for those protections for too long a period without the exercise of a discretion being required and aligning that to the sick pay policy adopting an already agreed period. In doing so it facilitated the purpose behind adjustments by incentivising the continuation of, or a return to, work.

166. As we state above *"the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce."* and *"enable them to play a full part in the world of work."* The caselaw makes clear that any payment of pay as an adjustment is the exception rather than the rule.

167. We find in those circumstances the policy was reasonable and the exceptional cases where potential prejudice could have been caused were counterbalanced by the continued need to consider the exercise of a discretion and the countervailing advantages of certainty.

168. We address the "comparison" exercise for the reasonable adjustments complaint above.

169. Mr Walton suggests that a reasonable adjustment would have been to allow him to remain on full occupational sick pay.

170. It was unclear to us if it was being suggested that should have been

170.1. permanent regardless of whether he could carry out any duties

170.2. continued until a prognosis had been provided if he was fit to return to his contractual role or not, or

170.3. limited to 6 months full and 6 months half pay from when he went off work sick in August 2020.

171. We find continuing to pay Mr Walton for a role he could no longer undertake was not a good use of public funds. It disincentivised him from finding a role he could do and at the same time potentially required SFRS to employ someone who could do that role. As we state above, adjustments can only normally be expected to last for a reasonable period and are there for the reasons we set out at (20). We find for the reasons we give above the period it applied for adopted the right balance and was reasonable again providing for its extension.

172. We find the adjustments contended for were not reasonable to expect SFRS to undertake in the light of its already generous MDP.

Indirect discrimination

PCPs

173. We have addressed these above (135-138).

[29] The difference if the MDP did no apply was that if incapable of performing his/her contractual duties termination of a firefighter's employment could considered, whereas if the MDP applied it provided a right to perform modified duties.

Disadvantage

174. Mr Walton alleges for both PCPs that his occupational sick pay was reduced from full to half pay on 1 October 2020.

175. Section 23(1) EqA is applicable to complaints of indirect discrimination. The comparison exercise required is that there must be no material difference in circumstances. The EHRC Code reminds us *"The circumstances of the two groups must be sufficiently similar for a comparison to be made"* and *"In relation to disability, this would not be disabled people as a whole but people with a particular disability – for example, with an equivalent level of visual impairment"* (¶4.15 & 4.16).

176. In this case the comparator is someone who was unable to carry out operational duties who was not disabled.

177. Given our findings above as to Ms Bryant's reasons for the withdrawal of full sickness pay we find that any comparator firefighter would have been treated in the same way as Mr Walton. We find there was no group or individual disadvantage.

Justification

178. Notwithstanding our findings above we address this for completeness.

179. In cases of indirect discrimination "justification" relates to the PCP in question.

180. The classic test of justification in the context of indirect sex discrimination was set out by the ECJ in *Bilka-Kaufhaus* [30]. In *R (Elias) v Secretary of State of Defence [2006] EWCA Civ 1293, [2006] 1 WLR* 3213 Mummery LJ gave the following guidance on what was required [31]:-

> *"151 … the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

181. It is important to emphasise that requires the Tribunal undertake a proportionality assessment; there is no margin of discretion or *'range of reasonable responses'* test in this context.

182. As to what that requires in practice is encapsulated thus [32]:-

> *"62. The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued ..." [33]*

183. Whilst it is for the alleged perpetrator to justify the provision, criterion or practice the authorities make clear that the alleged perpetrator is not required to provide evidence of justification; Tribunals are expected to use their common sense, reasoned and rational judgment. What may not be prayed in aid are subjective impressions or stereotyped assumptions [34].

Legitimate Aims

184. Two are relied upon:-

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[30] *Bilka-Kaufhas GmbH v Weber Von Hartz (Case 170/84) [1984] IRLR 317 at [36]*

[31] That is a repeat of his view in Hardy & Hansons plc v Lax [2005] IRLR 726 CA at [31 & 32], a view that was endorsed by Lady Hale in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704, [2012] IRLR 601 at [20-23].

[32] per AG Kokott which was adopted following a reference to the EUECJ by the Supreme Court in *Ministry of Justice v O'Brien [2013] ICR 499*

[33] *see Del Cerro Alonso (Free movement of persons) [2007] EUECJ C-307/05, [2008] ICR 145 para 58, and Angé Serrano v European Parliament (Case C-496/08P) [2010] ECR I-1793, para 44.* Albeit that is essentially a restatement of *R. (Elias) v Secretary of State of Defence[2006] EWCA Civ 1293, [2006] 1 WLR 3213* where Mummery LJ gave the following guidance on what was required :-

> *"[151] ... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

Which in turn is a repeat of his view in Hardy & Hansons plc v Lax [2005] IRLR 726 CA at [31 & 32], a view that was endorsed by Lady Hale in Homer at [20-23].

[34] *see Elias J in Seldon v Clarkson Wright and Jakes [2009] IRLR 267 EAT at [73] affirmed by the Court of Appeal and Supreme Court and in Homer [2009] IRLR 601 EAT per Elias (now LJ) at [48] and also paragraph 4.26 of the Code.*

184.1. the Respondent has a duty of care to ensure that firefighters are fit and able to carry out the full range of duties necessary for safeguarding the public and keeping themselves and their colleagues safe.

184.2. In addition, the Claimant received significant payments whilst carrying out modified duties, as well as obtaining wellbeing benefits from continuing to attend work.

185. Whilst we accept the latter could essentially be argued as part of the proportionality assessment regarding the aim, we fail to see how it can be a legitimate aim in itself.

186. We take judicial notice that SFRS has statutory and common law duties both to the public and its staff with regards to their health and safety. In both respects it could not permit firefighters who were not fit to carry out operational duties to perform that role. Where firefighters were not fit to carry out operational duties it was required to consider suitable alternative roles and/or adjustments. Employers are required to undertake that consideration at the earliest possible point in case the opportunity to make those adjustments does not pass by and the opportunity is lost. Further that they continue to do so and amongst them, to consider alternatives to dismissal.

187. We found that SFRS did all those things. Given the purpose of the legislation (see (20 & 171) above), *"… to assist the disabled to obtain employment and to integrate them into the workforce." It was not "simply to put more money into the wage packet of the disabled" but to "enable them to play a full part in the world of work."* in our view the MDP did just that.

188. In our judgment the MDP provided support if a firefighter was unable to undertake his/her substantive role or returning to work on modified duties for a finite period but with the discretion to extend that in certain circumstances. The support it provided by guaranteeing full pay for the substantive role was in itself potentially substantial and an incentive to work/return to work, which is one of the purpose of adjustments. The period of support was also proportionate because it was defined by reference to sick pay provisions. In so doing it also addressed the opposite concern about the strain on the public purse yet provided a package of beneficial measures. The level of support was proportionate because it was tiered over time. In our judgment it adopted an appropriate balance and yet also provided for the exercise of discretion in certain circumstances. We find it was justified.

Wages

189. By the conclusion of the hearing Mr Walton no longer disputed that the MDP was part of a collective agreement. Whilst he argued that clause 6.2.2. did not apply to him we found above that the clause should not be read as he suggested but instead as a whole (see (63)). Further, we find he understood its terms. One such was that after 6 months on modified duties a firefighter would only be paid for days he/she/her worked at his substantive non modified duties rate of pay. So that could be monitored firefighters were required to submit timesheets. Mr Walton complied with that requirement. We find he did so because its terms applied to him, and he knew that.

190. Thus, when he went off sick in August 2020 he had exhausted his right to occupational sick pay. Any pay thereafter was discretionary. We find that being so there was no unlawful deduction from his wages from 1 October.

191. For completeness during his notice period Mr Walton would have potentially been able to bring a claim pursuant to Part IX ERA. Not only was that claim not pleaded but the statutory requirements for such a claim were not addressed in the required detail in the evidence led before us. That is demonstrated most strikingly in that there was confusion between Mr Walton's pleaded case and schedule of loss if his contract terminated on 6 February or on 6 March and thus he had not claimed for his statutory notice at all.

192. No amendment application was made. That is unsurprising given that could and should have been addressed earlier, no explanation was offered why not and the likely prejudice it would have caused to SFRS.

Constructive Unfair Dismissal

193. As to the matters that gave rise to his resignation Mr Walton relied upon:-

193.1. The decision to reduce the Claimant's occupational sick pay;

193.2. Unlawful deduction from the Claimant's wages; when as above pay from October 2020

193.3. The handling of the disciplinary process (including the filming of Mr Walton);

193.4. Disability discrimination.

194. We address all save the handling of the disciplinary process above and find they either did not occur or that SFRS was entitled to undertake them.

195. As to the disciplinary investigation and process Mr Walton asserted that included unsubstantiated accusations, lies being told about his integrity and honesty, hearsay being used by managers to support accusations against him, that the process was not open and transparent, that crucial evidence which would support him had been removed and SFRS had refused to add relevant supporting evidence. He stated *"32. It was clear and obvious that there would not be a fair disciplinary process…"*.

196. With regards to some of the facts Mr Walton did not dispute he had been driving the mower and sliding bags of grass. It does not necessarily follow he was being accused of dishonesty and lying but given there was a dispute it is easy to see why he thought that was so whereas a decision maker normally has to determine from two competing accounts whose version was to be preferred.

197. It remained unclear throughout the hearing why Mr Walton asserted the disciplinary investigation and process was not transparent. We found that Mr Walton was aware of Ms Bryant's decision in relation to her discretion on 9 October (81) 5 months before his resignation. Whilst SFRS did not convey to Mr Walton or the FBU at the time of Ms Bryant's decision the rationale for it or the factors behind it (see (91)), neither Mr Walton or the FBU asked for that information at the time so that did not appear to be a point that the FBU or Mr Walton were concerned about. In any event the complaint as to lack of transparency relates to the disciplinary investigation and process not the sick pay issue. Mr Walton was also told that he could supply information and it would be looked at again (see (88)). He did not, but instead again sought to grieve about it subsequently (see (98)). We address the problems with that course above (102).

198. As to assertion evidence was not included and tampered with Mr Walton had seen the video clip and thus been able to taken advice on it since 27 November (92) albeit he was not provided a copy until late on 4 February (105). Mr Walton had received the evidence pack and been aware that Mr Watts would be hearing his appeal since 8 January (98). We address the issue concerning his statement being tampered with at (111-112). That was an unfounded and baseless allegation.

199. Thus, the only factors that arose in the week leading up to 6 February were the rationale of Ms Bryant, the receipt of the video clip and SFRS's refusal to adjourn the hearing scheduled for the 8 February. Mr Walton had accepted he had been riding the mower and sliding bags of grass cuttings so the video clip added little. Whilst Mr Walton stated he wanted to take advice on it he did not point us to where he raised its use or the legality of it at the time and that was not put specifically to SFRS's witnesses. We found he had ample time in any event to take that advice as he had been aware of it since the end of November.

200. Similarly for the contents of the pack and the involvement of Mr Watts. If Mr Walton felt Mr Watts was biased or prejudged matters he could have specifically said so and objected. He did not. He told us he considered Mr Watts would predetermine his appeal. No evidence was provided to support that assertion.

201. Mr Walton received as part of the result of an SAR on 3 February Ms Bryant's rationale for her exercise of discretion regarding his sick pay. He suggests it was assumed he was guilty of the

allegations (109), as a result his sick pay was unilaterally stopped before an investigation was conducted and that Ms Bryant predetermined the outcome of the investigation. We have given this very careful scrutiny given it was made prior to any investigation commencing and related at least in part to the subject matter of the investigation.

202. As has already been pointed out, Ms Bryant's decision related to a separate issue, the exercise of the discretion in relation to sick pay. Whilst addressing similar issues the disciplinary investigation and exercise of discretion in relation to sick pay were not like for like.

203. Whilst it was argued before us that Mr Keeling had predetermined the outcome of the disciplinary process in his investigation report it was not suggested to Mr Keeling, that he was aware of Ms Bryant's decision prior to the conclusion of his investigation. The evidence before us was that Mr Keeling was not. Nor for that matter were the grievance and grievance appeal officers (Messrs Armstrong and Read) until they were told about this by Mr Walton. We find on balance that being so, Ms Bryant's decision would not have been made known to the disciplining or disciplinary appeal officers and so would not have had any influence on the disciplinary process.

204. Instead of considering if the matters under investigation warranted a disciplinary process, Mr Keeling made findings as to what had occurred on the balance of probabilities. Ordinarily what he would have been required to determine was if there was a prima facie basis for the allegations and if so, that they were sufficiently serious to warrant a formal disciplinary process (as opposed to some of the sanction being appropriate search as words of advice). The mistake he made is a common failing and is addressed as part of the disciplinary process. It is that type of issue which is why a more senior officer is required to address each stage of the disciplinary process so s/he does not feel bound by the inferior officer's decision.

205. Issues over the difference in type and nature of the decision aside, had Mr Watts being aware of Ms Bryant's decision or more specifically the rationale behind it, been a real and genuine concern for Mr Walton, he could have asked for an assurance that Mr Watts was not aware of it and if not sought that someone who was not so aware hear his disciplinary. He did not. Instead he made generalised allegations of bias.

206. With regards to the refusal of an adjournment we found that was a decision SFRS was entitled to come to for the reasons we give at (114-116) above.

207. Whilst many aspects of the disciplinary investigation findings were challenged by Mr Walton other aspects were not. Mr Walton had accepted he had been on mower and that he had been angry when speaking to Mr Sourbutts. An investigating officer in those circumstances was entitled to conclude there was a prima facie disciplinary case to answer.

208. As we say above there were failings both in the investigation, the grievance and grievance appeal (see (111, 121 & 124)). That however does not mean given a different and more senior officer tasked with chairing the disciplinary hearing would have duplicated those failings. In any event as the disciplinary process allowed for an appeal that would have allowed for any such failures to be addressed.

209. Issues would have arisen about who could hear any appeal against the disciplinary outcome. That would have had to have been heard by more senior officer than Mr Watts. The only two senior officers to him that we were made aware of, were the deputy and Chief Fire Officer. Both were aware of Ms Bryant's decision. However that was not a point raised before us or with the witnesses.

210. Looking at those matters in the round we find that viewed objectively albeit from the perspective of someone in the claimant's circumstances they do not meet the threshold for constructive unfair dismissal; Mr Walton has not shown that SFRS intended to abandon and altogether refuse to perform his contract. Even following Ms Bryant's decision it continued to exercise its

discretion to pay half pay and even after the resignation asked Mr Walton if he wished to reconsider.

211. For the most part SFRS had reasonable or proper cause for acting as it did and in the instances where there were failings, they were not conducted in our judgment in a manner that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

212. Mr Walton has not shown, the burden being upon him to do so, that he was entitled to treat himself as constructively dismissed.

S.122 & 123 ERA – Contribution & "Polkey"

213. Whilst these issues are superseded by our findings above, we have been asked in any event to address them. Contribution arguments were not raised; a s.123(1) argument was.

214. Mr Walton was unable to identify when he met Mr Morapudi, his consultant. Mr Morapudi's letter does not state the date of the consultation. It is clear that had occurred on or before Mr Morapudi's letter of 23 February 2021 was written (see (125)). The conclusion of the consultation with Mr Morapudi is clear, he did not think Mr Walton would be able to get back to full time work.

215. Notwithstanding the complaints SFRS make about Mr Walton keeping them updated we find he would have informed them of the receipt of that letter shortly afterwards. By then Mr Walton had seen SFRS's in house occupational health physician on a number of occasions. We saw those internal assessments were arranged quickly. We find an occupational health assessment would have been arranged within a week or so of the receipt of Mr Morapudi's letter by SFRS. As we saw occupational health reports were turned around straight away by SFRS's assessor so there would not have been a delay of more than a few days in that regard.

216. We note that on receipt of the OH report, alternatives including ill health retirement would have again had to be reviewed but as that had occurred already that would we anticipate have been a process of updating and would not delay matters by a couple of weeks.

217. Once that had been done a capability hearing would have been arranged 21 days thereafter.

218. On that basis we find that capability hearing would thus have taken place 6 weeks after the date of Mr Morapudi's letter. We consider that given the view of Mr Morapudi and what he said of the Mr Walton's view that it was a near certainty (say 90%) that Mr Walton's employment would have been terminated at that capability meeting and notice then given.

signed electronically by me
Employment Judge Perry
Dated: 26 August 2022