EMPLOYMENT TRIBUNALS

Claimant : Mr G Wood

Respondent : North East Ambulance Service NHS Foundation Trust

Heard at: Newcastle CFCTC (by CVP) **On:** 23, 24, 25, 26, 27 January 2023
16 February 2023 & 10 March 2023 (deliberations)

Before: Employment Judge Loy
Mrs A Tarn
Mr S Carter

Appearances
Claimant: Mr L Mann, solicitor
Respondent: Mr R Stubbs, counsel

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:

1. The complaint of unfair dismissal contrary to section 94/98 Employment Rights Act 1996 is not well-founded and fails.

2. The complaints of failure to make reasonable adjustments contrary to sections 20 & 21 Equality Act 2010 are not well-founded and fail.

3. The complaints of harassment related to disability contrary to section 26 (1) Equality Act 2010 are not well-founded and fail.

4. The complaint of discrimination arising from a disability contrary to section 15 Equality Act 2010 is not well-founded and fails.

REASONS

The claimant claims

1. By a claim form dated 6 December 2020, the claimant complains of unfair dismissal; disability-related harassment; a failure to make reasonable adjustments and discrimination arising from his disability.

2. The respondent denies all claims.

Evidence

3. The parties relied upon an agreed bundle of documents running to 1104 pages.

4. Both parties produced written statements for each of their witnesses which had been exchanged.

5. The claimant called the following witnesses:

    a. Himself;

    b. Ms Stevenson, his wife.

6. The respondent called the following witnesses:

    a. Mr Douglas McDougall, Strategic Head of Operations until his retirement in 28 January 2022;

    b. Mr Alan Potts, Clinical Operations Manager for Stockton Cluster – South Division at the time of the events in these proceedings; and now Emergency Preparedness Resilience and Response Training Manager;

    c. Dr Matthew Beattie, Medical Director;

    d. Ms Karen O'Brien, Director of People Development since 23 March 2020; and

    e. Mr John O'Neill, Clinical Care Manager from August 2018 to March 2021, and currently Clinical Team Leader.

7. Each statements was admitted into evidence and each witness was cross-examined by the other party's representative.

8. Mr Mann accepted that the reason for the claimant's dismissal was capability, but said the dismissal pf the claimant for that reason was unfair under section 98(4).

9. Mr Mann withdrew the allegations of disability-related harassment at paragraphs 18(b), 18(c), 18(f), 18(g) and 18(i) during the course of the hearing.

10. All references to numbers in square brackets [ ] in this judgement are references to pages in the bundle.

Issues

11. The agreed issues to be determined by the tribunal are as follows.

Unfair dismissal; section 98 employment rights act 1996 (ERA)

12. What was the reason, or principal reason, for the claimant's dismissal? Section 98 (1) ERA? The respondent asserts that it was capability; section 98 (2) & (3) ERA **(NB: that the reason was capability was accepted at this hearing by the claimant)**.

13. Was the claimant's dismissal fair or unfair (having regard to the reason shown by the respondent) depending on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; section 98 (4) (a) and;

14. in accordance with equity and the substantial merits of the case; section 98 (4) (b)

15. in relation to paragraphs11 and 12 above:

    a. did the respondent follow the proper absence management procedure in relation to the claimant's absence?

    b. Did the claimant reach stage 3 in the absence management process taking into account he was placed on special leave from 12 July 2019 and was not on sick leave?

    c. Did the respondent take account of any periods of disability-related absence when considering the length of the claimant's absence?

Failure to make reasonable adjustments; sections 20 & 21 equality act 2010 (EQA)

16. Did the respondent apply any of the following provisions, criterions all practices (PCPs) in relation to the claimant? **(NB: the respondent accepted at this hearing that all PCPs were applied to the claimant's job role as a Paramedic)**

    a. full-time working;

    b. patient facing roles;

    c. the requirement to drive;

    d. the requirement to attend training.

17. Was the claimant put to a substantial disadvantage in comparison to persons who are not disabled by any of these PCPs? **(NB: the substantial disadvantage was conceded by the respondent at this hearing)**

18. Did the respondent discriminate against claimant by failing to make any of the following adjustments; section 21 (2) EQA:

    a. Phased return with gradual increased hours;

b. Part-time work

c. Observation role

d. Position within training department

e. Position as an assessor

f. Working as a paramedic with a driver

g. Home-based working

h. Provision of time to attend medical appointments

i. Provision of clean facilities for the delivery of treatment

j. Mentorship, coaching, training is required

k. Regular meetings to offer on-going support

l. Ability to take scheduled breaks

m. Use of accrued annual leave to work reduced hours

n. Adjustments to tasks non-clinical work, audit, emails, mandatory training

o. Allocation of base to minimise travel to and from home.

19. Were any of these adjustments reasonable?

Harassment; section 26 equality act 2010 (EQA)

20. Was the claimant subjected to any of the alleged conduct, as listed in the claimant's further information of 26 April 2021:

a. Craig Fox and John O'Neill stage I absence meeting written warning requiring 100% attendance for December 2018;

b. Alan Potts failure to carry out an internal fact find of paramedics complaint 10 December 2018; **NOTE: this allegation was withdrawn by the claimant during the hearing**

c. Formal investigation of paramedics complaint by Alan Potts the claimant's line manager 9 December 2018; **NOTE: this allegation was withdrawn by the claimant during the hearing**

d. Darren Green and Lesley Ellison's referral of the claimant to HCPC 15 January 2020;

e. Alan Potts harassment and sickness absence meetings and letters to attend meetings during a period when the claimant was diagnosed with serious physical and severe mental ill-health 4 April 2019, 10 May 2019 and 24 May 2019;

f. Alan Potts and John O'Neill failure to carry out an internal investigation in a timely manner or provide updates on internal investigation between December 2018 and 22 October 2019; **NOTE: this allegation was withdrawn by the claimant during the hearing**

g. Alan Potts erroneously informing the coroner's hearing that the second paramedic did not see a monitor attached to patient A and that a memory card taken from the regulator confirmed it had not been switched on 23 April 2019; **NOTE: this allegation was withdrawn by the claimant during the hearing**

h. Karen O'Brien, Dr Matthew Beattie and Jane Horner's harassment with regard to meeting the respondent's legal team, attendance at the second coroner's inquest and to consent to the release of medical records to the coroner, legal team and patient A's family between 19 August 2020 and 3 October 2020;

i. John O'Neill's attendance at claimant's ICU bedside at North Tees hospital in uniform without consent to inform claimant of press attendance at coroner's hearing 23 April 2019; **NOTE: this allegation was withdrawn by the claimant during the hearing**

j. Alan Potts, Karen O'Brien, Dr Matthew Beattie's leaking of the claimant's personal information to the coroner without consent and then to patient A's family on 23 April 2019, 5 and 6 October 2020;

k. Douglas McDougall calling a final review meeting when the claimant was not in a fit mental or physical state to attend such a meeting 15 May 2020;

l. Douglas McDougall, Darren Green and Annette Gibson's final review document for stage 3 hearing no hard copy provided and no appendices attached to email version 14 and 15 May 2020;;

m. Douglas McDougall's refusal to allow Susan Wood claimant's wife and paramedic employee of the respondent time off to attend the stage 3 capability hearing 22 May 2020

n. Karen O'Brien's untrue statement to coroner on 5 and 6 October 2020 that the claimant had received full re-training and a risk assessment was carried out by John O'Neill before his return to work on 4 December 2018;

o. Caroline Edward's untrue statement to HCPC that the claimant was dismissed after a disciplinary meeting and that there were adverse findings made regarding his practice leading to a suspension of his registration for 18 months on 9 October 2020;

p. John O'Neill and Alan Potts interference with the claimant's personal property in a work locker – personal possessions, prescription drugs and controlled drugs audit book removed and destroyed 17 August 2020.

21. Did that conduct have the purpose or effect of

a. Violating the claimant's dignity section 26 (1) (b) (i) EQA or

b. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant section 26 (1) (b) (ii) EQA?

22. Was that conduct related to the claimant's disability**?**

Discrimination arising from a disability; section 15 Equality Act 2010 (EQA)

23. What was the "something" arising as a consequence of the claimant's disability?

24. Did the claimant's dismissal amount to unfavourable treatment?

25. Was the respondent's holding of the absence review meeting on 22 May 2020 unfavourable treatment?

26. Did the respondent, in each case, subject the claimant to the unfavourable treatment because of that "something"?

27. Were the respondent's actions in each case a proportionate means of achieving a legitimate aim?

Time limits; section 123 Equality Act 2010 (EQA)

28. Have the claimant's claims been made within the 3 month time limit in section 123 (1) (a) EQA?

29. Is the respondent's conduct extending over a period to be treated as done at the end of the period, further to section 123 (3) EQA?

30. Can an extension of time be allowed for such other period as the employment tribunal thinks just and equitable, further to section 123 (1) (b) EQA?

Findings of fact

31. The claimant commenced employment with the respondent on 4 August 1991 as a Paramedic. Latterly, the claimant worked on rapid response vehicles due to a number of medical conditions.

32. On 4 December 2018, the claimant was required to attend a sickness absence stage I meeting with Mr Fox (Clinical Care Manager) and John O'Neill (Clinical Care Manager). By letter of the same date [317 to 318], the claimant was given a stage I written warning for six months and required to meet 100% attendance.

33. It was common ground that this warning related to 7 separate periods of absence over a period of 12 months. It was also common ground that, as stated in the third paragraph of the letter [318], disability-related absences were excluded by Mr Fox. The disability in question was diabetes.

34. During cross-examination the claimant accepted that it was perfectly reasonable for the respondent to have issued the warning at that time and in the terms set out in the letter.

35. On 9 December 2018, the claimant attended an incident in the rapid response vehicle. Patient A was being attended to by two police officers when the claimant arrived. The claimant pronounced the patient as Recognition of Life Extinct upon examination. Some 10 minutes after the claimant arrived in the rapid response vehicle, a double crewed ambulance arrived. The incident details relating to this matter are at [325 to 326]. This incident is referred to in this judgement as the "9 December 2018 incident".

36. The 9 December 2018 incident led to a number of investigations and to a Coroner's Enquiry which placed significant pressure on the claimant and had a significant impact on his health and well-being.`

37. On 10 December 2018, an information gathering meeting was held in relation to the 9 December incident. After that meeting the claimant's mental health deteriorated and he was admitted to Rosebery Park Hospital on 24 December 2018 [210]. The claimant was discharged on 11 January 2019.

38. On 20 December 2018, claimant was informed by the respondent that it would not be able to perform the role of Clinical Lead pending the finalisation of the investigation into the 9 December incident.

39. On 24 January 2019, the claimant attended an Occupational Health review meeting with Dr Fraser, Consultant Occupational Physician. Dr Fraser advised that the claimant was not yet fit for all his usual duties, but that the claimant was fit to return on a phased basis with a gradual reintroduction of his hours of work provided he could be supernumerary as third man on a two-man vehicle or second man on a rapid response vehicle. A further occupational health meeting was scheduled for 6 March 2019 with Dr E McCarthy.

40. On 4 February 2019, the claimant met with Alan Potts (Clinical Operations manager) and Jane Horner (HR Adviser). A risk assessment was completed and it was proposed that the claimant would return to work on 11 February 2019 and on the basis recommended by Dr Fraser. The claimant did not return.

41. On 11 February 2019, Mr Potts met with the claimant by way of review and clarification of ongoing support. The meeting considered when the claimant might be able to start a phased return to work. The claimant said he was in "great spirits"

42. As an alternative to returning to response vehicles, Mr Potts confirmed at the meeting that he was also happy for the claimant to begin a return to work as part of the Clinical Audit Team based at Winter house in Stockton which was relatively close to the claimant's home. There were therefore two propositions which would allow the claimant to return to work: to return as a temporary supernumerary person on schedule care vehicles (rather than emergency care); or to return to a temporary position in the Clinical Audit Team.

43. It was agreed between the claimant and Mr Potts that the claimant would return to work on 15th February 2019, starting with a meeting with Mr Shane Woodhouse, the Clinical Audit team lead at Winter House, Stockton.

44. Unfortunately, the claimant did not attend the training day at the Clinical Audit Team as arranged for 15 February 2019. Mr O'Neill (Clinical Care Manager) told Mr Potts that he had been contacted by the claimant at 02:30 in the morning of 15 February 2019. The claimant had told Mr O'Neill that since he was not feeling in the best place and had been drinking alcohol overnight he would not be able to attend the clinical training. Mr Potts then contacted Mr Woodhouse to rearrange a further day (18th February 2019) for the claimant's required training. A laptop was also sourced to help the claimant to work remotely.

45. On 17 February 2019, Mr O'Neill (Clinical Care Manager) met with the claimant and the claimant's wife, Ms Stevenson. The claimant confirmed his attendance for the following day. However, the claimant did not return as planned. The claimant's wife told Mr O'Neill that she was concerned about the claimant and that he had left home early in the morning to obtain alcohol. Welfare support was provided to the claimant by the Care Management Team. The claimant's status was changed from sick leave to absence due to the claimant's inability to complete the phased return to work.

46. On 19 February 2019, the claimant was readmitted to Rosebery Park Hospital following the intervention of the Crisis Management Team [400]. As a result, the claimant was not able to attend a planned Occupational Health Consultant appointment on 20 February 2019.

47. The claimant attended a psychiatric appointment on 21 February 2019. The claimant was discharged from hospital on 26 February 2019 following a change in medication and with increased support in the community. A review meeting at Rosebery Park Hospital was arranged for 29 February 2019, a medication review was arranged with the Community Psychiatric Nurse on 4 March 2019 and a review with Occupational Health was arranged for 6 March 2019. This was followed by a psychiatrist appointment on 11 March 2019 and an update on 3 April 2019 that counselling was continuing. Dr McCarthy's opinion after the Occupational Health review on 6 March 2019 was that the claimant was not fit to return to work at that time. A further OH appointment was arranged for 10 April 2019 [218-219].

48. On 10 April 2019, Dr McCarthy again assessed the claimant and provided a further report [220-222]. Dr McCarthy's opinion was the claimant would be fit to return to work at the end of his current fit note which was due to expire shortly. A number of practical suggestions were made by way of accommodations for the claimant, one of which was that the investigate process into the 9 December 2018 incident was concluded as soon as reasonably possible. It had been the claimant's understanding that the investigation into the 9 December 2018 incident would take approximately four weeks, a time estimate which had already been exceeded.

49. On 11 April 2019, a further sickness absence review meeting was held. Mr Potts letter of 10 May 2019 [446-447] sets out what was discussed at the meeting. The claimant was clear at the meeting that he believed that the exacerbation of his symptoms was related to the prolonged stress caused by the ongoing investigation into the 9 December 2018 incident which still not been resolved. Mr Potts told the claimant in the meeting [430-432] and in his letter summarising it [446-447], that there would be no disciplinary consequences for the claimant arising out of the investigation, although there may be some learning points moving forward. Mr Potts says, and the tribunal accept, that the claimant was reassured by Mr Potts clarification that this was not a disciplinary matter.

50. The claimant was also told by Mr Potts that he would be required to attend a coronial inquest which the claimant, whilst appreciating why he would be so required, thought his involvement would be detrimental to his health and wellbeing. The claimant's fit note was due to expire on 10 April 2019 and Mr Potts agreed with the claimant to extend it until 14 April 2019. Mr Potts also undertook to make enquiries to see if the role in the Clinical Audit Team at Stockton was still available given it had been arranged two months previously. The role at Stockton, if available, would allow for all the recommendations made by Dr McCarthy in her Occupational Health Report to be complied with.

51. A further return to work plan was put in place for the claimant. It was to commence on 14 April 2029 over a period of six weeks. Mr Fox (Clinical Care Manager – Stockton Cluster) met with the claimant on 15 April 2019 to complete a stress risk assessment. Mr Fox was able to report that the claimant's appearance was improved and that the claimant had said he was feeling better and not suffering from any ill effects from return to work. Mr Fox arranged for the statutory and mandatory training to be completed by the claimant between 23 April 2019 and 25 April 2019 which would then be followed by clinical audit training in preparation for his phased return to work.

52. Unfortunately, the claimant was admitted to University Hospital North Tees on 22 April 2019 with a suspected tonic/clonic seizure (epilepsy). His status was changed to absent on 22 April 2019 given the change in circumstances.

53. The first coronial inquest took place on 23 April 2019. The claimant was unfit to attend. Mr Potts was the appointed investigating officer and he attended the inquest in that capacity. The claimant alleges that Mr Potts erroneously informed the coroner that at the 9 December 2018 incident the attending second paramedic had not seen a monitor attached to patient A and that a memory card from the defibrillator confirmed it had not been switched on. The claimant also says that Mr Potts leaked

the claimant's personal information to the coroner without his consent and also did the same by disclosing that information to the patient A's family.

54. Mr Pott's evidence to the tribunal, which the tribunal accepted, was that he told the coroner what the respondent had found as a result of his investigation, no more and no less. In particular, Mr Potts told the coroner that the second paramedic had said that they did not see a monitor attached to the patient and that was reported to the coroner. Mr Potts also reported that the paramedic on the dual-crewed ambulance asked to see the rhythm strip which will show 30 seconds of activity from the ECG monitor but that the claimant had not provided the strip.

55. Mr Potts also told the coroner that the claimant had told the investigation that the defibrillator was attached to the patient and confirmed "asystole", namely a complete flatline with no disturbance. Mr Potts had only found ECG activity for a total of 16 seconds and on review that did not indicate a reading of "asystole". Mr Potts was obliged to give this evidence to the coroner and the tribunal cannot find any fault with his doing so. The fact that some of those findings did not correlate with the claimant's own recollection of events was simply a matter of fact. Mr Potts denies releasing any personal information without the claimant's consent either to the coroner onto the patient's family. No such information was put to Mr Potts during cross-examination.

56. A dispute arose, mainly one of perception rather than fact, around the events of 23 April 2019 when Mr O'Neill visited the claimant at University Hospital North Tees. This visit arose because of events that happened during the first coroner's enquiry. It was envisaged by the respondent that the claimant would have attended the coroner's enquiry had he been well enough to do so. Unfortunately, the claimant was not well enough to attend. Mr Potts therefore wanted to keep the claimant up to speed with events in which he plainly had an interest and therefore wanted him to know what had happened at the first inquest from his employer rather than for the claimant to hear about it for the first time from the media. Again, the tribunal both accepts that this was Mr Pott's thinking at the time and can find no fault with what must have been a difficult and sensitive managerial judgment call.

57. The first matter in respect of which Mr Potts wished to update the claimant, was the coroner's decision to adjourn the inquest to seek guidance from an independent expert regarding the rationale for stepping away from certain procedural guidance on resuscitation attempts. Mr Potts thought that the claimant would want to know that the coroner required an independent review (independent that is from the Trust) which was envisaged to be completed within four weeks and with a response from the respondent within 5 to 6 weeks. Mr Potts thought that the claimant should be made aware of this at the earliest opportunity, and certainly before he read about it in the press, since there was the potential that the coroner may recommend that the respondent's investigation should be reopened. Clearly that would affect the claimant.

58. Mr Potts also wanted the claimant to be aware that the press had been present at the coroner's inquest earlier in the day and had already approached the respondent for a statement on the afternoon of 23 April 2019. Mr Potts had been made aware by Mr Gallagher (Head of Risk and Regulatory Services) that the claimant might be named in a press article as Paramedic "GW".

59. For reasons of resource, Mr Potts asked Mr O'Neill to visit the claimant during the evening of 23rd of April 2019 in hospital to share this information face to face. The respondent's position was that this was to give this the claimant advance notice of what had happened earlier in the day at the inquest. Mr Potts sent an email to Mr O'Neill [907-908] setting out the information that he wanted Mr O'Neill to convey to the claimant. That email is timed at 19:50 on 23 April 2019 and the content of that email was then timed at 21:08 the same night [907-910].

60. The claimant's account of Mr O'Neill's visit is dramatically different to that of Mr O'Neill [911-915]. The claimant says that he was in ICU; he was bedbound; and that there were three other patients within earshot who were able to hear the confidential information that Mr O'Neill was imparting to him. Mr O'Neill says that the claimant was on Ward 36, a short stay ward; that the discussion took place in a private room; and that no one overheard what was said. Both Mr O'Neill and the claimant agree that Mr O'Neill was in uniform. The claimant says that was to allow Mr O'Neill access to the ICU. Mr O'Neill says that he was in his uniform because he was on duty that day and that the sight of Mr O'Neill in uniform would in any event not have been unusual in his interactions with the claimant given that they both worked for the same ambulance service Trust. The claimant says that this amounts to harassment related to disability. The respondent says it was a supportive measure to give the claimant advance notification of what he might otherwise read about for the first time in the press.

61. The tribunal prefers Mr O'Neill's account of this incident. The tone and content of the email of 23 April timed at 21:08, which is in the same terms as sent by Mr Potts to Mr O'Neill for the purposes of updating the claimant, is entirely consistent with the respondent's description of the purpose and nature of the visit. The claimant could not have anticipated that the coroner would adjourn the inquest to seek independent expert advice, effectively reinvestigating the circumstances surrounding the 9 December 2018 incident. It was also plainly helpful to the claimant to know not only that the press were present but were already proactively approaching the respondent for comment. The claimant had been understandably critical of the length of time that the respondent's own investigation into the incident had taken. It follows from that that the respondent was simply acting responsibly when letting the claimant know that matters might need to be looked at again. As Mr Potts says in his email:

> "*he [Mr Potts] completely understand[s] that providing you with all of this information at such time as you are in hospital is far from ideal, however the reason that I'm doing so is that I would not want you potentially reading about any of this in the press without any formal warning. I fully appreciate the impact that this may have on your health hence why I have asked John to conduct this face to face. Please make use of the support that is in place for you and I will update you in due course with any developments. Thank you for your text this morning, it is important that you focus on your health and wellbeing at this time and make me aware of any further requirements as necessary."*

62. The tribunal accepts that Mr Potts carefully considered whether to contact the claimant recognising that there were downsides to whichever option he took. Nevertheless, the tribunal can understand why he chose to update the claimant and why Mr Potts considered a personal visit from Mr O'Neill would be preferable to

simply sending an email. It was, as Mr Potts recognised, a difficult situation and the tribunal do not criticise Mr Potts in any way for either taking the decision he decided to take or for the way in which he expressed himself in his email. It was proactive support which the claimant came not to see in that way. It is also difficult to reconcile the claimant's depiction of this visit by Mr O'Neill with his complaint (which he has made on many occasions) that the lack of updates on the investigation which lasted 18 rather than four weeks was detrimentally affecting his mental health.

63. A further Occupational Health review was arranged for 15 May 2019. A strategy meeting was then arranged for 22 May 2019 once the Occupational Health Report had been received. The strategy meeting was to be attended by senior Trust managers: Debra Stephen, Deputy Director of Quality and Safety; Joanne Baxter, Director of Quality and Safety; Darren Green, Clinical Care Manager; Lesley Ellison, Occupational Health Manager; and Ms Horner, HR Adviser. Mr Potts was also present. The claimant was not. The purpose of this meeting was, with the benefit of the latest Occupational Health information, to ascertain whether the claimant would be able to return to a substantive role as an operational paramedic; or whether consideration needed to be made for an alternative role utilising the claimant's skills through redeployment. It was anticipated that a Case Review Meeting at which the claimant would attend would be scheduled for 19 June 2019 at which a decision could be made as to which role the claimant could return to. Much depended on the medical information.

64. On 24 May 2019, the claimant attended a further Sickness Absence Review Meeting. The claimant attended with his wife (who is also an employee of the respondent). This meeting had the benefit of the latest Occupational Health Report dated 15 May 2019 [228-229]. That report included the following opinion,

> "… Mr Wood can aim to return to work in the coming weeks"

65. It also noted that given the seizure that the claimant had experienced this would impact on the claimant's ability to drive to Group 1 and Group 2 DVLA standards. The notes of this meeting are at [453 – 456]. There were two disputed references in the notes relating to the 9 December 2018 incident. The tribunal did not find it necessary to resolve the difference in recollection between the claimant and Mr Potts on those matters because the question of responsibility for the 9 December 2018 incident was not germane to any of the issues in dispute in these proceedings. It was accepted by the claimant that the reason for dismissal was capability (and not conduct) so any question of attribution of responsibility or culpability in relation to the 9 December 2018 incident simply does not arise for this tribunal's determination. Similar considerations apply to the findings of the respondent's internal investigation into that incident and by extension to such further investigations as may have taken place into it. This was made all the more so because of the withdrawal by the claimant during these proceedings (before the claimant was cross-examined) of the harassment allegations which related to the claimant's alleged treatment by the respondent during the course Mr Potts internal investigation into the events of 9 December 2018.

66. Mr Potts confirmed the outcome of the 24 May 2019 sickness absence review meeting in his letter of the same date [457-458]. The outcome was that the claimant would need to extend his absence until 30 June 2019 to enable the rescheduled Case Review

Meeting to take place. The tribunal accepted this was a positive meeting certainly insofar as the claimant's health was concerned with the claimant expressing that he was feeling much better looking forward to returning to work. The meeting also noted that the claimant's recent "acute medical event", namely his seizure, meant that the nature of any return to work was unlikely to involve his usual role at least in the short-term. The claimant expressed his concern about that as he said that other paramedics were still working on the frontline whilst having their driving licences revoked for medical reasons.

67. The claimant says that the respondent's reluctance to return the claimant to a driving role is evidence that Mr Potts was actually working against him and that Mr Potts:

> *"was looking for a reason for the claimant not to return to work, whether that was because I could not drive or something that might occur at the coroner's inquest."*

68. However, the claimant ignores the efforts that the respondent, through Mr Potts himself, had already been making for an extended period to get the claimant back to work whether in a frontline or support role. The reason why the claimant had not already returned to work was because of the claimant's unfortunate medical conditions all of which were plainly genuine and recognised as such by Mr Potts. The fact that there may be other paramedics who were working in a frontline role whilst being unable to drive is not a sufficient reason (or indeed any reason) to conclude that Mr Potts was somehow reluctant to facilitate the claimant's return to work. Mr Potts had, as the tribunal has noted, been taking proactive steps to achieve that very purpose ever since the claimant commenced his period of sickness absence in December 2018.

69. Similarly, the tribunal rejects the claimant's assertion that Mr Potts was somehow reluctant to allow the claimant to return to work whether in a frontline or other role because of something that might occur at the coroner's inquest. That contention is belied by the evidence (given by the claimant himself in his own witness statement) that it was the respondent's position following its own enquiry that the claimant would <u>not</u> face disciplinary action, but rather, along with the respondent itself, take learning points from what had happened in the findings of the internal investigation.

70. The coroner's decision to require an independent review was not an outcomes sought by the respondent at the first inquest and was a decision taken by the coroner alone. There is simply no evidence at all to support the claimant's assertions of effectively bad faith on Mr Potts' part and there is a significant volume of evidence demonstrating unequivocally to the contrary in the form of multiple attempts to get the claimant back to work and including also considerable preparatory groundwork in order to do so. Furthermore, Mr Potts' was not at any stage ruling out a return to frontline activities, but rather a recognition that there would be an impact as a consequence of his seizure on the claimant's ability to drive in the short term and the clear advice from the Occupational Health Consultant to the same effect. To that extent, the claimant has also misconstrued what Mr Potts' position.

71. A further Case Review Meeting been arranged for 19 June 2019, but could not take place on that date. This was because the claimant was due to go on holiday to Corfu that week. The case review therefore took place on 10 July 2019. In the meantime, Mr Potts also made arrangements for the claimant to receive CBT funding to support the claimant's mental health. Mr Potts also explained to the claimant that he could not

update the claimant on matters insofar as the coronial inquest was concerned since the respondent was itself awaiting an update from the coroner.

72. The Case Review Meeting of 10 July 2019 duly went ahead. The claimant attended with his wife. Mr Potts was assisted by Annette Gibson, HR Business Partner. Dr McCarthy, Occupational Health Consultant, and Ms Lesley Ellison, Occupational Health Manager, were also in attendance. Ms Ellison prepared a letter to confirm the outcome of the meeting. That letter could not be sent out immediately as Ms Ellison was waiting consent from the claimant in order to do so [479 – 480; 539]. Once the claimant's consent had been received the letter was sent to Mr Potts and Mr Green on 24 July 2019.

73. Dr McCarthy's opinion was that the claimant was well enough to return to work provided he was supported by a number of adjustments which were similar to the recommendations made in the Occupational Health Report of April 2019. Those recommendations included:

    a. a phased return to work over six weeks

    b. time off medical appointments

    c. clean facilities for delivery of treatment

    d. mentorship, coaching, training as required

    e. regular meetings to offer on-going support

    f. the ability to take scheduled breaks.

74. It was also suggested by Ms Gibson that the claimant should consider self-referring to his regulator, the Health and Care Professions Council (HCPC) on the basis that the claimant's fitness to practice was impaired due to his state of health. Mr Potts understood that the respondent was considering doing the same. The respondent also gave internal consideration as to whether a Strategy Meeting (an internal management review meeting) was required and it was decided by Mr Green, Clinical Care Manager, that such a meeting was required. Ms Stephen, Deputy Director of Quality and Safety, was in agreement with that assessment.

75. That Strategy Meeting took place the following day, 11 July 2019. It was attended by Mr Potts, Ms Gibson (HR Business Partner), Ms Gillian Hunter (Deputy Head of Human Resources), Mr Darren Green (Clinical Service Manager), Mr Douglas McDougall (Strategic Head of Operations (South Division)), and Ms Debra Stephen (Director of Quality and Safety). The handwritten notes of the meeting at **[481 – 484]** and an email was sent by Ms Gibson to Ms Ellison of Occupational Health on 12 July 2019 **[490 – 491]** which also records what was discussed.

76. The outcome of the meeting was that the claimant was to be placed on a period of "special leave" on full pay initially for up to a month in order to give the respondent more time to consider where the claimant might best return to work; for receipt of the further Occupational Health Report from Dr McCarthy; and to ensure that the

claimant was fit and able to return. This resulted in paid leave for the claimant from 11 July 2019 until 4 August 2019 with a period of paid annual leave from 5 August 2019 until 11 August 2019. Responsibility for the management of the claimant's sickness absence was passed from Mr Potts to Mr Green, both Clinical Care Managers at the time. Mr Potts was not directly involved with the claimant's return to work after that point.

77. The reason for Mr Potts removal from management responsibility for the claimant was because of the criticisms that the claimant had made towards Mr Potts' evidence at the first coroner's hearing. The claimant considered that Mr Potts had said certain things to the coroner which reflected badly on him, were not true and cast doubts on the claimant's practice. The claimant says that it was because of what Mr Potts had allegedly falsely said at the first coroner's inquest hearing which had raised concerns in the minds of the coroner and of the family of the Patient A which resulted in the coroner appointing an independent medical expert (Mr Kirby); and which directly led to formal complaints from the patient's family to the HCPC with regard to the claimant's fitness to practice as a Paramedic.

78. There is a lot wrong with the claimant's perception of events. It was Mr Potts evidence to this tribunal, which the tribunal accepted, that the evidence that Mr Potts gave at the first coroner's hearing was simply the truth as he understood it in relation to the 9 December 2018 incident. It is clearly not possible for the claimant to know what was or was not *"in the minds of the coroner [or] the family of patient A"* when either the coroner or the family made their respective decisions to appoint an independent expert or to complain to the HCPC. Mr Potts evidence to the coroner that there had been a failure to follow guidelines and that the claimant had given the respondent a rationale for his actions were not disputed as accurate by the claimant. The tribunal therefore concluded that whatever the claimant's perception of events, it was not a fair criticism of Mr Potts evidence to the first coroner, not least because Mr Potts was plainly under a legal obligation to tell the coroner to the best of his ability what he considered had or had not happened on 9 December 2018. The tribunal could see the sense of removing Mr Potts from management responsibility for the claimant's absence and more generally in these difficult circumstances.

79. On 22 May 2020, a final review hearing took place. This was managed by Douglas McDougall, the respondent's Strategic Head of Operations. Mr Douglas wrote to the claimant on 15 May 2020 [751-752]. This was the third and final stage of the respondent's Sickness Absence Policy [144-177]. This stage covers the possibility of dismissal of an employee on the grounds of ill-health. By this point, the claimant had been absent almost continuously since December 2018. The claimant was informed that one possible outcome of the stage 3 hearing might be his dismissal on the grounds of capability.

80. The notes of the stage 3 meeting on 22 May 2020 were taken by Ms Caroline Edwards, HR Business Partner [758 – 759]. Mr Green, who had taken over from Mr Potts, presented the management case. The claimant was not accompanied. Mr McDougall checked that the claimant was happy to proceed unaccompanied and the claimant confirmed that he was. Contrary to subsequent suggestion by the claimant, Mr Dougal says that he was not asked by the claimant for his wife to accompany him

to that meeting. Mr McDougall's evidence, which the tribunal accepted, was that Mr McDougall would have been happy to adjourn the meeting for that purpose had he been asked. Mr McDougall explained that in previous cases he had allowed partners and family members to accompany staff members at similar hearings. Mr McDougall says that the first that he learned the claimant wanted his wife to accompany him at the stage 3 meeting was when these current proceedings were brought to his attention.

81. Mr McDougall's account of that meeting and the notes of that meeting are in stark contrast to the claimant's evidence about the same meeting. However, the contemporaneous notes reflect that the claimant said that he was happy to proceed unaccompanied [758]. The tribunal accepted that the notes were accurate and that Mr McDougall's account of the meeting was truthful.

82. This meeting needs to be put in one very important context. Before the meeting, the claimant had made an application for ill-health retirement which had been supported by the respondent. The claimant had been returned to pay by virtue of the special paid leave the respondent had been paying since 19 July 2019. His driving licence had been revoked for 10 years. There was ongoing concern regarding clinical contact and ongoing processes with the HCPC and there was the ongoing coronial process.

83. As the Management Statement of Case at this stage 3 hearing makes clear, all parties, including crucially the claimant, had reached a common understanding of the claimant's inability to return to work. Mr Green's case history set out in the Management Statement of Case ("MSOC") case contains the following extract:

> *"The circumstances of this case are exceptional and are complicated. Gavin's medical conditions which include diabetes, chronic musculoskeletal issues, a mental health condition as well as epilepsy have enabled all those involved with Gavin's case to conclude he is unable to return to his role or any other role in the Trust* (emphasis added).
>
> *Following a series case management review meetings involving Gavin, his wife Susan, the Occupational Health Consultant, Occupational Health Manager, Annette and I,* ***everyone*** *was in agreement of supporting Gavin to apply to have his NHS Pension released under Ill-Health Retirement Terms.* ***Gavin is aware as part of such an arrangement****,* ***he would be invited to attend the stage 3 final review meeting being held today*** (emphasis added).
>
> *… an application was submitted to NHS Pensions on 21 April 2020 in support of ill-health retirement. No decision has been received from NHS Pensions regarding whether this application has been approved.*

84. The context to this stage 3 meeting is therefore of crucial importance. Contrary to much of the claimant's evidence to this tribunal, the claimant was at the time these events were unfolding in entire agreement with and aligned to the respondent's position that he was unable to return to **any employment within the respondent** . It is against that background that the notes of the stage 3 meeting on 22 May 2020

reflect a harmonious meeting with no material dispute. For example, the notes include the following passage:

> *"GW [the claimant] Happy c MSOC [Management Statement of Case] – no concerns.*
>
> *Acknowledge summary provided by DG [Darren Green, Clinical Care Manager].*
>
> *Support provided – second to none" [759]*

85. In other words, everyone was on the same page including the management, the claimant and Occupational Health. An application for ill-health retirement had been made the previous month the outcome of which was awaited. Given the respondent's support for what is after all the claimant's own application for release of his pension funds in circumstances of ill health, it is unsurprising that the claimant is recorded in the contemporaneous notes as being very satisfied with the support he has been receiving from the respondent.

86. That is in stark contrast to the case that the claimant put to this tribunal in which he (along with his wife) sought to persuade the tribunal that it was the respondent, not himself, that wanted him to take ill health retirement; and that the respondent had manipulated the claimant into making an application for ill health retirement that he apparently did not want. However, there is simply no contemporaneous record of the claimant's dissatisfaction whether in relation to the fairness of his dismissal or to his alleged unwillingness to apply for ill health retirement.

87. Again, in the claimant's own words during the meeting of 22 May 2022 when asked the following question by Mr McDougall the claimant gives the following answer:

> *"D Mc All options for all duties explored?*
>
> *GW Absolutely, very happy c level of support" [759]*

88. The meeting then ends with the decision taken by Mr McDougall to terminate the claimant's employment on the grounds of ill-health and with a note to update HCPC on the termination of the claimant's employment as well as a note that the claimant will continue to get support from Mr McDougall and Ms Gibson regarding the coronial and HCPC ongoing processes.

89. The content of the meeting and its conclusion is recorded in a letter of 4 June 2020 from Mr McDougall [789-791]. That letter contains the following paragraph:

> *"You stated that you were happy with everything which had been presented by the management team and confirmed that the summary provided by Darren was accurate. You stated that you have been fully supported by the management team, describing the support you received from Darren and Annette as "second to none" and understood the options available to the Trust, including consideration of terminating your employment. Caroline [Edwards HR Business Partner] asked what you would like to happen as an outcome of this meeting and you advised that you would like to remain on special paid leave until the outcome*

of **your** *ill-health retirement application is known, you would also like to return to work but* ***you*** *also accept that this is not possible.* ***You*** *acknowledge that there are a number of contributing factors preventing a return to work, but* ***you*** *have now reached the decision to proceed with ill health retirement." (emphasis added)*

90. The letter then went on to confirm that the respondent's decision was to terminate the claimant's employment on 12 weeks' notice and that his effective date of termination would therefore be 14 August 2020. The claimant was informed of his right to appeal against this decision to Karen O'Brien within 14 days of receipt of the letter. The claimant did not appeal.

91. It is obvious that for an application for ill-health retirement to proceed, the claimant's employment with the respondent must no longer be sustainable. If it were otherwise, an application for ill-health retirement would self-evidently fail. This is reflected in the NHS Business Services Authority (NHS BSA) Consideration of Entitlements to ill-health retirement benefits form at [760 – 786]. This is a comprehensive form requiring completion by the employing authority (the respondent NHS trust) the pension scheme member (the claimant); and the Occupational Health Doctor. NHS BSA are the administrating authority for the NHS Pension arrangements.

92. It is also obvious that only the claimant can make an application for ill health retirement and for access to early release of pension funds prior to normal retirement age. It is equally plain that the claimant (not the respondent) had to make (and did make) an application for ill health retirement. This was with the respondent's support not at the respondent's behest.

93. By letter of 3 June 2020 [783-786], the claimant was informed that his application for ill-health retirement had been unsuccessful.

94. By undated letter [826-827], the claimant appealed against the decision to decline his application for ill-health retirement. In simple terms, the claimant disagreed with the emphasis placed in the decision to reject his application on his alcohol misuse which the claimant thought had been misconstrued by the medical advisers to the NHS BSA. The medical advisers had considered the claimant's alcohol abuse to be an overriding factor in relation to his various health issues. The claimant (understandably) considered that not to be a fair assessment.

95. By a letter dated 24 September 2020 [828-834], the NHS BSA Dispute Officer informed the claimant that his appeal had been successful. The letter confirmed that the NHS BSA, as the health authority responsible for administering the NHS pension scheme, had accepted that the claimant has meet the Tier 1 criteria, specifically that the claimant was:

"*…permanently incapable of carrying out [his] NHS duties and therefore satisfies the conditions laid down in the NHS Pension Scheme Regulations for payment of ill-health retirement benefits."*

HPCP Referral

96. Dr Beattie, Medical Director, gave evidence about the respondent's obligations to HCPC. Dr Beattie, in his capacity as the respondent's Medical Director, was the person ultimately responsible and accountable for the fitness to practice of all of the respondent's clinical staff, including the claimant.

97. Dr Beattie also gave evidence on the claimant's allegations of harassment in relation to the referral by the respondent of the claimant to HCPC. Dr Beattie also gave evidence in relation to the claimant's allegations of harassment regarding the claimant's proposed attendance at meetings with the respondent's legal team at Ward Hadaway, solicitors to conduct a second investigation; the claimant's proposed attendance at the coroner's hearing; the alleged leaking of the claimant's personal information to the coroner without the claimant's consent and the alleged leaking of that information to Patient A's family also without the claimant's consent; and the alleged release of the claimant's medical records to the coroner, the respondent's legal team and to Patient A's family.

98. The respondent's fitness to practice policy [178-196] covers the professions and regulatory bodies of the clinical staff employed by the respondent. This includes HCPC. Dr Beattie explained that HCPC guidance indicates three sources of referrals to the regulator: a member of the public/patient/relative/carer; an employer; and the registrant (in this case the claimant) him/herself may also self-refer.

99. Dr Beattie further explained that the respondent has to consider referring clinical staff to their regulator if the clinician's health is affecting their fitness to practice. As is understandable, Dr Beattie said that this is not a course of action that the respondent takes lightly. The managers involved with the respondent's referral of the claimant to HCPC were Ms Baxter (former Director of Quality and Safety/Executive Nurse) and Mr Emerson (former Interim Director of People and Development) neither of whom are any longer employed by the respondent. The tribunal is nonetheless satisfied that Dr Beattie's overall responsibility put him in perfectly satisfactory position to explain the referral of the claimant by the respondent to HCPC.

100. The claimant was in fact subject to 3 separate referrals to HCPC:

    a. On or about 11 July 2019, the family of patient a involved in the 9 December 2018 incident referred the claimant because of their concerns about his handling of the incident [554];

    b. On 21 August 2019, the claimant self-referred to HCPC due to his own concerns about his mental health [553];

    c. On 10 December 2019, the respondent referred the claimant to HCPC due to concerns regarding his ill-health and capability [672 – 680].

101. In an email of 21 August 2019, following a telephone call with Mr Green, the claimant emailed Ms Gibson with details of Patient A's family's referral of the claimant to HCPC. Mr Green asked Mr Wood if he had self-referred as Mr Green

had been advised that the claimant had self-referred when Mr Green attended the Case Review Meeting on 10 July 2019. The claimant said that he had. In fact, the claimant emailed his self-referral to the HCPC later that day (21 August 2019). It follows that the claimant had not self-referred by 10 July 2019 and had not self-referred by 21 August 2019 despite the claimant telling Mr Green that he had done.

102. The respondent referred the claimant to HCPC on 10 December 2019 in a letter originally drafted by Ms Baxter on 14 November 2019. Dr Beattie gave evidence that he considered that the respondent's referral was a reasonable and appropriate decision to take in the circumstances. Dr Beattie says it was apparent that from July 2019 onwards that the claimant's health was having a significant impact on his ability to carry out his normal duties. Up to that point it was still possible that he might return to clinical work but after the case review that prospect appears increasingly unlikely.

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103. Indeed, as Dr Beattie said, the respondent's referral of the claimant to HCPC was for exactly the same reason as the claimant's own earlier self referral i.e. on mental health grounds. The respondent was fully aware of the claimant's self-referral on and the reasons for it, and had been so aware for some months when it made its own referral of the claimant to HCPC in December 2019. There was also no question of the respondent's referral being done covertly since the HCPC register is a public document accessible on the regulator's website. Dr Beattie also give evidence that the claimant was subject to an Interim Suspension Order from HCPC for a period of 18 months commencing on 12 October 2020.

104. Dr Beattie explained that as far as cooperation with the trust's legal team was concerned, it was obvious that since the claimant had attended the 9 December 2018 incident he would have highly relevant evidence to give both to the respondent's own investigation into the incident and the coroner's inquest into the death of Patient A. Dr Beattie therefore helped to coordinate possible meetings between the claimant and the respondent's solicitors. For the same reasons, it was also obvious to Dr Beattie (and should have been obvious to the claimant) that as one of the attending paramedics he would be expected to attend the inquest if at all possible. Mr Alan Gallagher (Head of Risk and Regulatory Services/Quality and Safety) contacted Occupational Health in advance of the first coroner's hearing on 30 March 2020 to see whether or not the claimant was well enough to attend. Mr Gallagher emailed Ms Alison on 19 March 2020 to seek the claimant's consent to the disclosure of his Occupational Health reports to the coroner to confirm that he was not well enough to attend the inquest [746-747]. The claimant agreed to that disclosure later the same day [742]. The claimant was not required to attend the inquest.

105. It follows, that the only personal information in relation to the claimant that was forwarded to the coroner was pursuant to a request for information which was to confirm that the claimant was not well enough to attend the inquest. This was in circumstances where the claimant did not wish to attend it. This was the only occasion on which the claimant's personal information was disclosed to the coroner and it was done with the claimant's express written consent further to the claimant's own express wishes.

106. After the claimant's dismissal with effect from 14 August 2020, there was further contact with the claimant in relation to the preparation for the reconvened coroner's hearing. Dr Beattie wrote to the claimant by email 31 July 2020 [792] in order to arrange a meeting between the claimant and the respondent's legal advisers. The terms of that letter are highly sympathetic to the claimant. As Dr Beattie says in that email, he did not wish to put the claimant under too much pressure and would understand if the claimant was not well enough. Indeed, the claimant's response made clear that the claimant did not consider himself well enough to meet with the respondent's legal advisers at that time and that response was respected by the respondent.

107. Dr Beattie made a subsequent attempt to arrange contact between the claimant and the respondent's legal advisers. He emailed the claimant between 3 and 4 August 2020 [793], hoping to arrange a telephone call or meeting on 5 or 6 August 2020. Again, Dr Beattie emphasised that there was no pressure on the claimant to attend the meeting or the call. In the event, a meeting was agreed at the claimant's local station for 1 PM on 5 August 2020. However, on the morning of the meeting, the claimant sent email to Dr Beattie to say that he was unable to attend and the meeting was accordingly cancelled [794]. Again, the claimant's wishes were respected.

108. On 19 August 2020, Ms Horner and the claimant exchanged emails regarding consent forms [795 – 797]. Ms Horner was seeking consent from the claimant for the release of his Occupational Health Records to see if he was yet well enough to meet the respondent solicitors or to attend the inquest. By letter from the claimant's GP of 21 August 2020 [802], the claimant's GP confirmed that there would be a significant risk of a relapse of the claimant's mental health symptoms if he should attend the coroner's court. This was sent by the claimant to Ms Horner on 27 August 2020.

109. On 1 September 2020, Ms Horner again emailed the claimant [821] seeking his consent to release the claimant's GP's letter to the coroner for the purposes of explaining to the coroner why the claimant was not well enough to attend the second coroner's hearing. The claimant responded on 2 September 2020, refusing access to his medical records for the either the respondent, the coroner, or patient A's family [821] (who would not need to see those records in any event). The claimant also said in his email of 2 September 2020 that he would consider "any further requests to myself is harassment".

110. On 4 September 2020, the claimants sent a further email stating that the only document he agreed to disclose would be his GPs letter of 21 August 2020 which is attached to that email [823]. He agreed that letter could be disclosed to the respondent's legal team, to the coroner, to the respondent and to the family. On 3 October 2020, Ms Horner confirmed that the claimant's letter from his GP had been shared with the coroner and that he was not expected to attend the second inquest hearing on 5 and 6 October 2020. The respondent did not engage in any further correspondence with the claimant about his attendance at the inquest and the claimant did not attend the inquest.

111. Dr Beattie explained, and the tribunal accepted, that the respondent was in a difficult position. It owed public law duties to the coroner's inquest and also private

contractual duties (including convention rights) to the claimant. The tribunal felt that the respondent balanced those competing and diametrically opposed interests professionally Insofar as the claimant's contention that information personal to him was leaked to the respondent or Patient A's family, the tribunal found no evidence of that at all. On the contrary, the respondent acted cautiously and carefully and ultimately disclosed information relating to the claimant only to the coroner. That disclosure of information was with the claimant's explicit consent [823] and for the purpose that the claimant wished, namely in order not to attend the reconvened inquest.

Statements to coroner on retraining

112. Karen O'Brien, the respondent's Director of People and Development, gave evidence to the tribunal regarding a specific claim made by the claimant which alleged that the claimant was harassed in relation to his disability in a number of additional ways. In particular, an allegation that Ms O'Brien made an untrue statement to the coroner that the claimant had received full re-training and a risk assessment which was carried out on 23 November 2018 before the claimant's return to work on 4 December 2018.

113. Ms O'Brien's evidence, which the tribunal accepted, was that she gave a written statement to the coroner's court on 23 September 2020. In the statement to the coroner's court, Ms O'Brien referred to the risk assessment at paragraph 9 and at paragraph 12 stated,

> "*[The claimant] worked 10 AM to 6 PM on 23 November 2018 and underwent a stress risk assessment with John O'Neill, [the respondent's] Clinical Care Manager, which [Ms O'Brien] noted was exhibited to Mr Emerson statement. This was undertaken on the first day that [the claimant] was physically back in the workplace. [Ms O'Brien] can confirm that no specific work-related concerns were raised."*

114. In so doing, Ms O'Brien was simply relying upon the respondent's records which had been made prior to her appointment. The tribunal could not see what else she could do in these circumstances.

115. Ms O'Brien also referred to the fact that the claimant received retraining on 23 November 2018 before his return to work on 4 December 2018. At paragraph 13 of Ms O'Brien statement to the inquest she stated that:

> *"The claimant also underwent training on 23 November 2018, including Trust Patient Care Updates and Zoll Defibrillator training, together with controlled drug audits. I can again confirm that no concerns were raised. This was part of Mr Wood's phased return to work."*

116. Again, Ms O'Brien was taking information from the respondent's records. Ms O'Brien stated, and the tribunal again accepted, that she did not at any time refer to "full retraining" as the claimant alleges. The training was in three specific areas: Patient Care Updates, Zoll Defibrillator training, and controlled drug audits.

The claimant's work lockers

117. Mr Potts also give evidence around allegations made by the claimant in connection with the claimant's possessions and his work locker. The allegations are that Mr Potts interfered with the claimant's personal property in a work locker in the form of personal possessions, prescription drugs and a controlled drugs audit book which the claimant says were removed and destroyed [81].

118. Mr Potts explained that, as with all paramedics, the claimant had a specific locker known as a "controlled drugs locker" often referred to as a "CD" locker. This was in addition to a separate locker for a Paramedics to keep their own personal belongings.

119. The controlled drugs were provided to paramedics to carry out their role. They are required to be stored securely in the CD locker when the paramedic is not on duty. The CD lockers were quite small at that time. No personal possessions were meant to be stored in the CD locker and similarly no controlled drugs or the audit book should be stored in the personal locker.

120. Mr Potts described the standard process when a Paramedic leaves the employment of the respondent regarding the CD locker and the personal locker. Mr Potts explained that when a person is removed from Clinical Lead typically the Paramedic's access to controlled drugs is removed. In the case of the claimant, he was removed as Clinical Lead on 10 December 2018. At that point Mr Potts kept the claimant's key to his CD locker in his own locked office stored in a locked drawer so that it could be accessed when the claimant required it again. Mr Potts described this as a standard approach in respect of which the claimant was not treated any differently than any other clinical lead who was removed temporarily. The claimant would not need access to the CD locker until his return upon which event (had it occurred) it would have been returned to him.

121. The claimants also allege that there had been interference with his personal belongings. Mr Potts confirmed he was the only person to hold a key to the claimant's lockers at Hartlepool South Station. Mr Potts explained that on 17 August 2020, when either the claimant or his wife came to collect any personal effects from the station, it would have been apparent to Ms Stevenson, the claimant's wife and fellow Paramedic, that all station lockers had been upgraded during the claimant's absence.

122. Although Mr Potts does not have any direct knowledge about how personal lockers were managed in respect of absent colleagues, when the upgrade took place, Mr Potts believes that it would be likely that the Clinical Care Management Team would have arranged for the claimant's personal things to be moved to one of the new lockers. The only practical issue would be that the claimant may not be able to access the new lock immediately because the key was not available at the time he attended to collect his things. However, Mr Potts says that it would have been a straightforward matter of requesting the new key from the Clinical Care Management

Team. Mr Potts says, and the tribunal accepts, that there is nothing out of the ordinary about managing the situation in that way.

Applicable Law

Unfair dismissal: sections 94 & 98 ERA

The reason for the dismissal

123. In a claim of unfair dismissal within the meaning of section 98 of the ERA 1996, it is for the employer to prove ("show") the reason, or the principal reason, for the dismissal. That is the result of section 98(1)(a). In order to be a fair reason, the reason must be one which falls within section 98(2) (which include "conduct" and "capability") or is some other substantial reason within the meaning of section 98(1)(b). What is the "reason" for the dismissal is the subject of some helpful case law.

124. It is often the case that an employer dismisses an employee for what could be regarded as several "reasons". In Abernethy v Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

125. Paragraph DI[821] of Harvey on Industrial Relations and Employment Law ("Harvey") helpfully (and in our view accurately; if we refer below to any other passage in Harvey, we do so on the basis that we agree with it as a description of the applicable case law) states the manner in which those words have been approved and applied in subsequent case law:

"These words, widely cited in case law ever since, were approved by the House of Lords in W Devis & Sons Ltd v Atkins [1977] AC 931, [1977] 3 All ER 40 and again in West Midlands Co-operative Society v Tipton [1986] AC 536, [1986] IRLR 112, HL where the rider (important in later cases) was added that the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. In Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401, [2017] IRLR 748, Underhill LJ observed that Cairns LJ's precise wording in Abernethy was directed to the particular issue before the court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do what they do."

126. In paragraph DI[824] of Harvey, this is said:

"[I]n cases of alleged mixed motivations, once the employee has put in issue with proper evidence a basis for contending that the employer has dismissed for some extraneous reason such as out of pique or antagonism, it is for the employer to rebut

this showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so. Evidence that others would not have been dismissed in similar circumstances would be powerful evidence against the employer, but it is open to the tribunal to find the dismissal unfair even in the absence of such strong evidence. In a case of mixed motives such as malice and misconduct, the principal reason may be malice even although the misconduct would have justified the dismissal had it been the principal reason: ASLEF v Brady [2006] IRLR 576, EAT."

127. Similarly, in paragraph Q[722] of Harvey, this is said:

"The reason must be that of 'the employer'; in the case of a corporate employer that will usually mean the reason motivating the dismissing manager but if that manager (acting in good faith) is in fact manipulated by another manager who acts for another reason (which may well be unfair) that second manager's reason can be attributed to 'the employer', at least if that manager is higher in the organisation's hierarchy than the claimant: Royal Mail Group Ltd v Jhuti [2019] UKSC 55, [2020] IRLR 129, [2020] ICR 731 (a whistleblowing dismissal case, but the principle is applicable across unfair dismissal law). In Uddin v London Borough of Ealing [2020] IRLR 332, EAT, Jhuti was extended to allow an ET to take into account that second manager's knowledge of facts, not just his or her motivation."

The fairness of the dismissal

128. Where the employer has satisfied the tribunal that the reason is a potentially fair one, the question of the fairness of the dismissal falls to be determined under section 98(4) of the ERA 1996, which provides this:

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

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

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

Section 98 ERA in capability cases

129. Section 98 of the ERA 1996 has been the subject of much case law, the effect of which can be summarised by saying that the key question when the fairness of a dismissal is in issue is whether or not it was within the range of reasonable responses of a reasonable employer to dismiss the employee for the reason for which the employee was in fact dismissed. However, particular considerations arise in relation to the different reasons falling within subsections (1) and (2).

130. In BS v Dundee City Council [2014] SC 254 the Court of Session emphasised that in the capability dismissal three important themes exist:

a. the question of whether the employer can be expected to wait longer for the employee to return to work;

b. the views of the employee brackets which can account for all against brackets; and

c. whether steps have been taken to obtain proper medical advice brackets which does not entail the employer pursuing detailed medical examination brackets.

Failure to make reasonable adjustments: sections 20 & 21 EQA

131. Under section 39(5) EqA a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination: EqA section 21.

132. Section 20 EqA provides that the duty to make reasonable adjustments comprises three requirements, set out in sections 20(3), (4) and (5). This case is concerned with the first of those requirements, which provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

133. In considering whether the duty to make reasonable adjustments arises, a Tribunal must consider the following:

(1) Whether there was a provision, criterion or practice ("PCP") applied by or on behalf of an employer;

(2) The identity of the non-disabled comparators (where appropriate); and

(3) The nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee: Environment Agency v Rowan [2008] IRLR 20.

134. The concept of a PCP is one which is not to be construed narrowly or technically. Nevertheless, as the Court of Appeal said in Ishola v Transport for London [2020] EWCA Civ 112 IRLR 368:

"[To] test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantaged caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. However widely and purposively the concept of a PCP is to be interpreted, it does

not apply to every act of unfair treatment of a particular employee. That is not the mischief that the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP. In context, and having regard to the function and purpose of the PCP in the 2020 Act, all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises."

135. A duty to make reasonable adjustments does not arise unless the PCP in question places the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial (i.e. more than minor or trivial) and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

136. In Doran v DWP UKEATS/0017/14 the EAT upheld a finding that a duty to make reasonable adjustments was not triggered as the employee was off sick with fit notes confirming that she remained unfit for any type of work, and she was therefore not fit to work under reasonable adjustments, meaning that the duty did not arise .

137. Simler P in Sheikholeslami v Edinburgh University [2018] IRLR 1090 held:

"The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP…

The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see section 212(1). The EHRC Code of Practice states that the requirement that an effect must be substantial 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 App 1. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

138. The substantial disadvantage must be *"in relation to a relevant matter".* Schedule 8 of the EqA makes it clear that, in this context, a *"relevant matter"* means employment by the respondent.

139. An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the employee is likely to (i.e. could well) be placed at the substantial disadvantage.

140. The predecessor to the EqA, the Disability Discrimination Act 1995, contained guidance as to the kind of considerations which are relevant in deciding whether it is reasonable for someone to have to take a particular step to comply with the duty. Although those provisions are not repeated in the EqA, the EAT has held that the same approach applies to the 2010 Act: Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, [2015] ICR 169. It is also apparent from Chapter 6 of the Code of Practice on Employment (2011), issued by the Equality and Human Rights Commission, which repeats, and expands upon, the provisions of the 1995 Act. The 1995 Act provided, as does the Code of Practice, that in determining whether it is reasonable for an employer to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had in particular to:

(1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;

(2) The practicability of the step;

(3) The financial and other costs of making the adjustment and the extent of any disruption caused;

(4) The extent of the employer's financial and other resources;

(5) The availability to the employer of financial or other assistance to help make an adjustment; and

(6) The type and size of the employer.

141. It is clear from the cases of O'Hanlon v Commissioners for H M Revenue & Customs [2007] EWCA Civ 283 and Meikle v Nottingham County Council [2004] EWCA Civ 859, that paying money, such as enhanced sick pay, to an employee who is absent sick is, in principle, capable of falling within the duty to make adjustments. However, as the EAT made clear in O'Hanlon, it would be a rare and exceptional case in which an employer would be expected to enhance an employee's sick pay entitlement. As Elias P said in that case:

"First, the implications of this argument are that Tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Of course we recognise that Tribunals will often have to have regard to financial factors and the financial standing of the employer, and indeed

section 18B(1) requires that they should. But there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is per force relatively limited, and a claim which if successful will inevitably apply to many others and have very significant financial as well as policy implications for the employer. On what basis can the Tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which per force the Tribunal will know precious little about? The Tribunals would be entering into a form of wage fixing for the disabled sick.

Second, … the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce."

142. Following these cases, in G4S Cash Solutions (UK) Ltd v Powell [2016] IRLR 820 EAT, HHJ Richardson held that, whilst not anticipated to be *"an everyday event for an Employment Tribunal to conclude that an employer was required to make up an employee's pay long-term to any significant extent",* there could be cases where this may be a reasonable adjustment for an employer to have to make as part of a package of adjustments to get an employee back to work or keep an employee in work.

143. In Tameside Hospital NHS Foundation Trust v Mylott UKEAT/0352/09 (11 March 2011, unreported), the EAT observed:

"The whole concept of an adjustment seems to us to involve a step or steps which make it possible for the employee to remain in employment and does not extend to, in effect, compensation for being unable to do so. This is consistent with the fact that the duty to make adjustments only arises if a PCP puts an employee at a substantial disadvantage in relation to employment with the respondent."

Burden of Proof: section 136 EQA

144. The burden of proof in relation to allegations of discrimination is dealt with in section 136 of the Equality Act 2010, which sets out a two-stage process:

a. First, the Tribunal must consider whether there are facts from which the Tribunal could conclude (in the absence of an adequate explanation) that the respondent has committed an unlawful act of discrimination against the claimant. In deciding whether the claimant has proved such facts, it will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.

b. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed, that act.

Harassment related to disability: section 26(1) EQA

145. Section 26 EqA provides as follows:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) …

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:

(a) The perception of B;

(b) The other circumstances of the case;

(c) Whether it is reasonable for the conduct to have that effect.

146. The Tribunal has had regard to the guidance given by the EAT in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 as reviewed by the Court of Appeal in Pemberton v Inwood [2018] EWCA Civ 564 per Underhill LJ at [85-88].

Discrimination arising in consequence of disability: section 15 EQA

147. Section 15(1) EqA concerns discrimination arising out of disability and provides:

"A person (A) discriminates against a disabled person (B) if –

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

(b) A cannot show that it did not know, and could not reasonably have been expected to know, that the employee had the disability; or

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

148. "Unfavourably" must be interpreted and applied in its normal meaning; it is not the same as "detriment" which is used elsewhere in the EqA, but a claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable: Williams v Trustees of Swansea University Pension and Assurance Society [2018] UKSC 65. The effect of that decision of the Supreme Court says that

there is probably little difference between "unfavourable" treatment and other phrases such as "disadvantage" or "detriment" found in other provisions.

149. Guidance on the correct approach to a claim under section 15 EqA was provided by Simler P in Pnaiser v NHS England [2016] IRLR 170. The EAT gave the following guidance:

- A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B.

- The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

- The Tribunal must determine whether the reason/cause (or, if more than one, a reason or cause) is "something arising in consequence of B's disability". The causal link between the "something" that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of a disability may require consideration, and it would be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

150. Where a disability case is concerned with attendance management, it is the treatment that requires justification, not the underlying policy, save in rare instances: Buchanan v Commissioner of Police of the Metropolis [2017] ICR 184.

151. A respondent may objectively justify unfavourable treatment if it can establish that the treatment was a proportionate means of achieving a legitimate aim. To be proportionate, the treatment must be an appropriate means of achieving the legitimate aim and also reasonably necessary in order to do so: Homer v Chief Constable of West Yorkshire [2012] UKSC 15 at [20-25].

152. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. It is for the Tribunal to conduct that balancing exercise and make its own assessment of whether the latter outweighs the former; there is no range of reasonable responses test. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys and Hansons plc v Lax [2005] EWCA Civ 846 Pill LJ at [19-

34], and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

Limitation: section 123 EQA

153. Section 123 of the EqA sets out the relevant provisions relating to time limitation of claims under the 2010 Act.

154. Section 123 of the EqA provides:

(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable.

(2) ..

(3) For the purposes of this section –

(a) Conduct extending over a period is to be treated as done at the end of the period;

(b) Failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it; or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

155. Where it is contended that there is conduct extending over a period, if any of the acts in the period are not established factually or not found to be discriminatory they cannot form part of the continuing act: South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19.

156. A failure to act is not the same as an act. Under section 123(3)(b) of the EqA failure to do something is to be treated as occurring when the person in question decided on it. The Tribunal needs to determine the point in time at which either a decision was made or the end of the period in which the employer might reasonably have been expected to comply with the relevant duty to make adjustments: Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194; and Hull City Council v Matuszowicz [2009] ICR 1170.

Conclusions

157. Following the agreed list of issues.

Unfair dismissal

158. The claimant accepts that the reason for his dismissal was capability and therefore for a prima facie fair reason under section 98(2)(a) ERA.

159. Turning to the question of fairness, the tribunal considered that there was a fundamental contradiction between the claimant's claim for unfair dismissal on capability grounds and his (ultimately) successful application for ill-health retirement and early release of pension funds.

160. The claimant qualified under the NHS Pension Scheme Rules to an ill-health because he met the requirements of Tier 1 ill health retirement, namely the claimant was permanently incapable of carrying out NHS duties. Tier 1 is in unequivocal terms which is understandable given that it provides access to the early release of pension benefits. The fundamental irreducible difficulty that the claimant faces is that he is running conflicting arguments at the same time. On the one hand, the claimant argues that his dismissal was unfair because he may have been able to return to work and on the other hand he has applied successfully for access to early release of pension benefits predicated on precisely the contrary circumstances.

161. The tribunal has rejected the argument that the claimant was somehow forced into a position of applying for ill-health retirement. The decision to make that application was uniquely and exclusively that of the claimant and the claimant alone. The fact that the respondent was supportive of his application is beside the point and would normally be welcomed by an employee applying for ill health retirement.

162. The respondent appears to be pursuing the somewhat subtle argument that the respondent gave support to the claimant's application for ill-health retirement as a devious means of achieving an objective that the respondent wanted but the claimant did not. The tribunal rejects that argument and finds that the claimant sought ill health retirement and the respondent supported him in doing so. It is as it appears to be and there is nothing more involved to it than that.

163. From December 2019 onwards, it is clear that the Occupational Health Consultant is giving options of ill-health retirement or redeployment. The claimant takes the option of ill-health retirement. It was his choice to pursue that option rather than continue to be considered for alternative employment.

164. There was a suggestion that the respondent did not follow stage 2 of its sickness absence management procedure, although it was not pursued particularly proactively in cross examination, where Mr Mann appeared to agree with the respondent's witness, Mr Potts, that a number of the meetings in between stage 1 and stage 3 were stage 2 meetings in all but name. There is no requirement for stages to be labelled in any particular way. The claimant's wife, Ms Stevenson, accepted in her evidence that the meetings on 11 April 2019 and 24 May 2019 were

both formal meetings. The process was exhaustive and included many review meetings, Occupational Health referrals, Strategy Review Meetings, other internal meetings to arrange training and redeployment; and so on. The tribunal is therefore satisfied both that the proper absence management procedure was followed and that the matter was given not just reasonable but exhaustive consideration.

165. The claimant's dismissal was not unfair because the claimant was placed on special paid leave from 12 July 2019 rather than be placed on sick leave during that period. The claimant had exhausted his entitlement to contractual sick pay. It was the claimant's position that he was not capable of work at the time. Special paid leave was the exercise by the respondent of its discretion to ensure that it removed one of the stressors on the claimant's working and personal life at the time, namely his pay situation. The only reason that the claimant was not off work on account of sickness at the time of his dismissal was because the respondent made special arrangements to pay him. That cannot then amounts to a circumstance rendering the dismissal unfair. The claimant plainly was off work on account of sickness but had the benefit of being paid. In reality, the claimant is simply trying to turn what was an act of significant support into a ground of unfairness. That plainly does not work.

166. The claimant went off work in late December 2018. This was an understandable stress reaction to the incident on 9 December 2018 and during the necessary investigation that had to be carried out, the respondent tried to get the claimant back to work twice. First, in February 2019 when the only reason that attempt did not succeed was because of the claimant's further ill-health. The next attempt to get the claimant back to work was in April 2019. Unfortunately, the claimant did not get to the stage where he could return to work following the Occupational Health Report of 10 July 2019. This was because of the claimant's hospitalisation which meant that the further case review meeting intended for 4 September 2019 did not take place. After that, the claimant was never in a position of being well enough to return to work.

167. The claimant applied for ill-health retirement in February 2020 and appealed in July 2020. The final absence review meetings took place in between the two. At that time it was the claimant's case that he was permanently incapable of carrying out his NHS duties. As we have also referred to above, during that final absence review meeting on 22 May 2020 the claimant was perfectly happy to proceed; expressed gratitude for the support he had received whilst absent; and confirmed that all return to work options have been explored. The claimant therefore took his decision with the support of the respondent's management and in order to achieve the outcome that he wanted. The claimant knew full well that stage 3 of the sickness absence management procedure had to be gone through and was content for it to do so as it was consistent with his ill health retirement application. The claimant did not appeal against his dismissal despite being informed of his right to do so in the letter of dismissal. This is again entirely consistent with the fact that he was content for it to proceed in the way that it did. The criticisms that the claimant now makes of his dismissal have all been developed in hindsight.

168. Finally, it was not necessary for the respondent to consider discounting disability-related absence in circumstances where the claimant considered himself to be permanently incapable of work and enlisted the support of his employer and his employer's Occupational Health Consultant to support his application for ill-health

retirement. It was common ground between the claimant and the respondent that his NHS employment had reached the end of the road for medical reasons.

169. In the circumstances, the claimant's claim for unfair dismissal is not well-founded and fails.

Reasonable adjustments

170. The respondent accepted that it had the PCPs identified in the list of issues and that those PCPs apply both to the claimant and to other Paramedics. The respondent also conceded that the PCPs would cause a substantial disadvantage to someone in the claimant's position.

171. The claimant says that the reasonable adjustments he identifies should have been made in April and/or July 2019. In April 2019, the claimant was booked on statutory and mandatory training to take place on 23-25 April 2019 as part of his phased return to work. On 22 April 2019, the claimant was hospitalised. As a consequence, the planned return to work for the claimant could not happen. Put simply, the respondent put in place a phased return to work but due to ill health the claimant was unable to take advantage of it.

172. It must follow that if the claimant is not at work that the PCPs cannot cause any substantial disadvantage. In this case, the claimant never returned to work and the closest he got to doing so was the statutory and mandatory training which the claimant was twice unable to attend work to complete due to sickness. In the circumstances, no duty to make a reasonable adjustment arose. The fact of the matter is that the claimant was unable to return to work and that adjustments had been made and were in place to facilitate that return had the claimant been able to do so. It was common ground that he was not and no duty therefore arose.

173. The claimant's claims for failure to make reasonable adjustments are not well-founded and fail.

Harassment

174. As has already been noted in the list of issues set out above, during the course of the hearing the following allegations of harassment related to disability were withdrawn by the claimant: the allegation at 20 (b), allegation at 20 (c), allegation at 20 (f), allegation at 201 (g) and allegation at 20 (i).

175. The Tribunal's conclusions in relation to the allegations of harassment related to disability which were not withdrawn are set out below.

Craig Fox and John O'Neill stage I absence meeting written warning requiring 100% attendance for December 2018;

176. The claimant accepted in evidence that this warning was perfectly reasonable. It came after a substantial period of absence; disability-related absences were discounted; it fell within the agreed procedure; the claimant was reminded of his right

of appeal which he did not action; and it was unrelated to any of the matters that led to the termination of his employment.

177. In the light of that evidence, even if the warning was unwanted it did not on the claimant's own evidence have the purpose or effect required under section 26 (2) EQA. It was accepted by the claimant that the purpose was to manage sickness absence and that he perceived it in that way.

178. It is striking that the claimant did not appeal this warning and accepted when he gave his evidence that the respondent's treatment of him had been reasonable. However, in his witness statement the claimant makes a number of references to equality and diversity failures, none of which he appeared to be concerned about when he gave his evidence before the tribunal.

179. This allegation of harassment is therefore not well-founded and fails.

Darren Green and Lesley Ellison's referral of the claimant to HCPC 15 January 2020;

180. The fundamental difficulty with this allegation of harassment is that the claimant referred himself to his regulatory body, the HCPC, in August 2019 for much the same reason (ill-health) as he criticises Mr Green and Ms Ellison doing subsequently on 15 January 2020. Furthermore, it was the respondent that referred the claimant to his regulatory body not individuals. That referral was done in accordance with the respondent's statutory obligations. The claimant accepted in cross-examination that the respondent was under a duty to report someone in his position to HCPC just as was the claimant was under a duty to self-refer.

181. To the extent that it was unwanted, this allegation it did not have the prescribed purpose or effect.

182. This allegation of harassment is therefore not well-founded and fails.

Alan Potts harassment and sickness absence meetings and letters to attend meetings during a period when the claimant was diagnosed with serious physical and severe mental ill-health 4 April 2019, 10 May 2019 and 24 May 2019;

183. The claimant and his representative to give an example of harassment in the letters referred to in this allegation. None was identified because there were none.

184. On the contrary, in cross-examination the claimant accepted that the various letters were supportive of his position. For example, the claimant said it came as a relief to be told in one meeting that that he was not going to be subject to disciplinary action for anything arising out of the 9 December 2018 incident. Far from amounting to harassment, the letters and meetings were caring, balanced, thorough and professional. The tribunal has very serious doubts as to whether the claimant ever perceived the sickness absence meeting to be matters to be harassment and certainly the tribunal finds that any such perception was wholly unreasonable.

185. The respondent was balancing a number of competing interests as it navigated its way through its duty to cooperate with the coroner and complying with its employment responsibilities to the claimant. The tribunal finds that the respondent did so without in any way harassing the claimant.

186. This allegation of harassment is therefore not well-founded and fails.

Karen O'Brien, Dr Matthew Beattie and Jane Horner's harassment with regard to meeting the respondent's legal team, attendance at the second coroner's inquest and to consent to the release of medical records to the coroner, legal team and patient A's family between 19 August 2020 and 3 October 2020;

187. This allegation goes against the factual reality of the respondent's conduct in relation to the attendance and participation by the claimant in meetings with the respondent's legal team and attendance at the second inquest. It was obvious that the respondent had to liaise with and cooperate with the coroner who was looking into the circumstances of a tragic suicide of a teenage girl. The coroner wanted the claimant to attend and it is easy to see why the coroner would do so given that the claimant was one of the paramedics who attended at the scene of the 9 December 2018 incident.

188. Indeed, the claimant allegation was difficult to understand. The claimant confirmed that he did not feel harassed before he sent his email on 12:07 on 2 September 2020. In that email, the claimant said that he would treat any further requests as harassment. The reference to requests can only sensibly be understood as requests for medical information. However, the only email of substance that came after that was from the claimant himself on 2 September 2020 authorising the release of his GP letter to (amongst others) the coroner. This was actioned by the respondent with the express consent of the claimant with the result that it was confirmed that the claimant did not need to attend the inquest. It is difficult to see how confirming something that the claimant wanted could even begin to be considered to be harassment.

189. The allegation that the letter dated 1 September 2020 [825] was harassment is misconceived. This letter would have been posted before the claimant's email of 2 September 2020 and was accordingly produced a time when the claimant accepts that he was not being harassed.

190. This allegation of harassment is therefore not well-founded and fails.

Alan Potts, Karen O'Brien, Dr Matthew Beattie leaking of the claimant's personal information to the coroner without consent and then to patient A's family on 23 April 2019, 5 and 6 October 2020;

191. This allegation related to the coroner reading out the claimant's own GP letter. There are a number of difficulties with that allegation. First, it was the coroner that read out the GP letter and the respondent cannot be liable for the actions of the coroner. Secondly, the claimant had already agreed that his occupational health report dated 18 March 2020 to be provided to the coroner and for his GP letter dated

21 August 2020 to be provided to the coroner. This was for he purpose of ensuring that the claimant did not have to attend the hearing. Again, the provision of information to which the claimant not only explicitly consented but which were designed to remove a stressor from which the claimant suffered cannot sensibly be considered harassment. The claimant did not identify anything else he says provided to the coroner or which was provided without his consent. There is no unwanted conduct in these circumstances which is capable of having the prescribed purpose or effect.

192. This allegation of harassment is therefore not well-founded and fails.

Douglas McDougall calling a final review meeting when the claimant was not in a fit mental or physical state to attend such a meeting 15 May 2020;

193. This allegation appears to go behind the position that the claimant adopted at the time of the meeting, 22 May 2020. At that time, the claimant confirmed that he was happy for the meeting to proceed as planned [758]. The meeting took place on 22 May 2020. The relevance of the date of 15 May 2020 is the date of the letter inviting the claimant to that meeting. The claimant was very complimentary about the respondent's handling of his absence at that meeting. The claimant explicitly agreed with the Management statement of Case which, as the claimant knew, was an integral step towards ill-health retirement. This was also the meeting at which the claimant confirmed that the support he had received from the respondent had been "second to none" and confirmed that all options for alternative duties had been explored. The claimant's attempts to retrospectively cast that meeting in a completely different light does him little credit.

194. This allegation of harassment is therefore not well-founded and fails.

Douglas McDougall, Darren Green and Annette Gibson's final review document for stage 3 hearing no hard copy provided and no appendices attached to email version 14 and 15 May 2020;

195. This allegation was not put to Mr McDougall by the claimant. In any event, it was the claimant's position at the time that he was in agreement with the management statement of case at the hearing. It's difficult to see how he could have been harassed by matters that he actively supported or by not receiving copies of documents listed as appendices when the claimant already had in his possession the very documents to which he refers.

196. This allegation of harassment is therefore not well-founded and fails.

Douglas McDougall's refusal to allow Susan Wood claimant's wife and paramedic employee of the respondent time off to attend the stage III capability hearing 22 May 2020;

197. The tribunal has already found that Mr McDougall did not refuse to allow the claimant's wife to attend the meeting on 22 May 2020. As the notes record, the claimant confirmed that he was happy to proceed unaccompanied. The tribunal also accepted the evidence of Mr McDougall that had the claimant wished to be

accompanied by his wife, he would have adjourned the meeting for that purpose. Mr McDougall referred to previous cases when he had allowed family members to be present and the tribunal accepts that this would have been no exception. This appears to be another example of the claimant adopting in litigation a position diametrically opposed to the position that he held at the time.

198. This allegation of harassment is therefore not well-founded and fails.

Karen O'Brien is untrue statement to coroner on 5 and 6 October 2020 that the claimant had received full re-training and a risk assessment was carried out by John O'Neill before his return to work on 4 December 2018;

199. The tribunal has found that Ms O'Brien did not make any untrue statements to the coroner either on 5/6 October 2020 or at all. The claimant was, of course, not present at the coroner's first or second hearing. The tribunal accepted that Ms O'Brien was simply basing her evidence on the documents that she had found on the respondent's files which she reviewed before attending the coronial hearing. Given that Ms O'Brien joined the respondent after the incidents to which she was giving evidence related, it is difficult to see what else she could do.

200. This allegation of harassment is therefore not well-founded and fails.

Caroline Edwards untrue statement to HCPC that the claimant was dismissed after a disciplinary meeting there were adverse findings made regarding his practice leading to a suspension of his registration for 18 months on 9 October 2020;

201. The evidence relating to this alleged untrue statement is at [848]. It is not a statement made by Caroline Edwards at all. It is a note of a telephone conversation that Ms Edwards had with someone else at HCPC. The claimant was not present and did not hear the call. The tribunal find this is nothing more than an inaccuracy and that the reference to disciplinary hearing was simply misspoken by the other party to the call and recorded by Ms Edwards. In a case involving over 1,000 pages of disclosed documents, it is perfectly plain that the respondent consistently managed the matter as one of capability not conduct, a fact reflected in the claimant's concession that capability was the reason for his dismissal and also reflected in the respondent's referral of the claimant to HCPC which is equally plainly on the grounds of ill health.

202. To the extent that the claimant did feel harassed by learning of these words some time later, it was wholly unreasonable for it to have that effect.

John O'Neill and Alan Potts interference with the claimant's personal property in a work locker – personal possessions, prescription drugs and controlled drugs audit book removed and destroyed 17 August 2020.

203. There is no evidence that any of the claimants possessions were interfered with in any way. As is to be expected, there is a process to be followed when controlled drugs are being recovered from the CD locker. This is standard procedure when paramedics leaves the respondent. If there were any personal items in the claimant's

CD locker, they ought not to have been there. In so far as the claimant's personal locker was concerned, the claimant's wife was provided with access to his personal locker to collect the claimant's personal possessions. There is nothing remarkable in these events to the extent that no unwanted conduct is discernible let alone such conduct as might have the prescribed purpose or effect.

204. Did that conduct have the purpose or effect of

a. Violating the claimant's dignity section 26 (1) (b) (i) EQA or

b. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant section 26 (1) (b) (ii) EQA?

205. This issue has been dealt with in the section immediately above. There are no cases in which any of the alleged conduct that did happen could be said to have had the prescribed purpose or effect.

206. Was that conduct related to the claimant's disability?

207. In the light of the above conclusions, this issue does not arise for consideration.

Section 15 Discrimination arising from disability

208. The respondent accepts that the claimant was dismissed. The respondent accepts that this could be unfavourable treatment. The respondent accepts that the dismissal was due to the claimant's absence. The respondent accepts that the claimant's absence arose from his disability. However, the respondent relies upon objective justification in the circumstances of the claimant's dismissal.

209. The tribunal has little difficulty in accepting that the respondent was objectively justified. The respondent's aim was to ensure that it had a workforce capable of discharging the important functions that it has a statutory duty to carry out. Both the respondent and the claimant understood the claimant to be permanently incapable of doing his job. That was supported by the respondent's Occupational Health Consultants opinion. It was also validated by the decision on appeal of the NHS BSA Dispute Officer who allowed the claimant access to early retirement benefits.

210. The claimant had been away from the workplace for some 18 months before his dismissal. The claimant also wanted to be retired on ill-health grounds and was had aligned his position to that of the respondent for the purposes of his dismissal. In all those circumstances, the aim was legitimate and the means of achieving that aim were proportionate.

211. In the circumstances, the claimant's claim for discrimination arising from disability contrary to section 15 EQA is not well-founded and fails.

Employment Judge Loy
13 June 2023