**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102009/2022**

**Held in Glasgow on 20 – 25 and 27 February 2023**

**Deliberations: 27 and 28 February and 7 March 2023**

**Employment Judge D Hoey**

**Members Gallacher and McPherson**

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| **Mr G Wishart** | **Claimant**<br>**Represented by:**<br>**Mr I Burke -**<br>**Solicitor** |
| **Scottish Ambulance Service Board** | **Respondent**<br>**Represented by:**<br>**Mr G Fletcher -**<br>**Solicitor** |

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the unanimous judgment of the Tribunal that the claims of discrimination because of something arising in consequence of disability (pursuant to section 15 of the Equality Act 2010) and disability harassment (pursuant to section 26 of the Equality Act 2010) are ill founded and they are dismissed. The remaining claims were withdrawn and are dismissed in terms of Rule 50.

## REASONS

1. In 2 claim forms the claimant raised a number of claims principally focussing upon disability discrimination and unfair dismissal. The respondent disputed the claims.

2. As the hearing progressed the claims being advanced became focussed and by the submissions stage the only claims the claimant wished to progress were claims in respect of section 15 and 26 of the Equality Act 2010.

3. The hearing was conducted in person with both parties being represented. The witnesses gave evidence orally.

**Case management**

4. The parties had worked together to focus the issues in dispute and had, by the conclusion of the Hearing, provided a statement of agreed facts and a list of issues. The Tribunal is grateful for the parties working together to assist the Tribunal deal with matters fairly and justly and thereby achieve the overriding objective.

5. The parties had worked together such that the hearing concluded within day 6 with day 7 being saved (and used for deliberation).

**Issues to be determined**

6. The parties had agreed the issues to be determined by the Tribunal which were as follows:

*Time limits*

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 17 November 2021 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010?

**Disability**

It was conceded that the claimant was disabled at all material times and known by the respondent.

**Discrimination arising from disability (Equality Act 2010 section 15)**

1.3 Did the respondent treat the claimant unfavourably by:

(i) By dealing with his case through the use of the NHS Scotland Workforce Capability Policy, rather than in terms of the

Guidance Document on the Recruitment and Employment of staff with Diabetes;

(ii) By deciding that constant attending as the clinician in an ambulance on each shift was the only option following the Stage 3 Meeting on 24/09/2021 and subsequently confirmed as the only option at the Appeal Hearing;

(iii) By instigating disciplinary proceedings against him in December 2021 when he still had an extant appeal against the Stage 3 outcome and had been in communication with management;

(iv) By refusing to accept his formal grievance in February 2022 by deeming it a capability issue rather than a grievance;

1.4 Did the following things arise in consequence of the claimant's disability:

1.4.1 The claimant having (temporarily) lost his C1 licence qualification.

1.4.2 Making the decision to restrict the claimant to attendant only duties (the background including having no regard to the claimant's disability and management attitude)

1.4.3 Not attending shifts, which the claimant said was because he believed the shift had been removed from him and he did not want to disadvantage colleagues.

1.4.4 Treating the claimant unfavourably by continuing the management line and attitude adopted by earlier employees (which is the background referred to above).

1.5 Was the unfavourable treatment because of any of those things?

1.6 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were the need to ensure his

duties (attending for patients) were carried out given the operational issues at the relevant time. The claimant was a highly qualified paramedic with the required skills and knowledge to treat a wide range of patients during a global pandemic. Driving constituted a small proportion of his role, and removing this requirement (which was done by operation of law when the DVLA removed his category C1 licence) permitted the claimant to use his specialist skills to support public health.

*Harassment related to disability (Equality Act 2010 section 26)*

1.7 Did the respondent do the following things:

1.7.1 Letter dated 7 June 2021 inviting claimant to a meeting on 29 June 2021 which may result in termination of his employment;

1.7.2 Telephone call from Mr Baird on 19 July 2021 when on a job, shouting at the claimant that he was not allowed to be on the PRU and should stop work immediately;

1.7.3 Telephone call, voicemail messages and 4 emails from Mr Baird, where the claimant advised his work had been approved by his managers with Mr Baird telling the claimant they were wrong and he was not allowed to do those shifts;

1.7.4 Mr Kerr failing to respond to the claimant's request for clarification on 2 August 2021;

1.7.5 Inviting the claimant on 23 August 2021 to a Stage 3 meeting in terms of the Capability Policy advising that a consequence of the meeting could be dismissal;

1.7.6 A further letter sent on 16 September 2021 inviting the claimant to a Stage 3 meeting where the consequences could be termination of employment;

1.7.7 A stage 3 meeting on 24 September 2021 where documentation produced in support was factually incorrect (an

SBAR), HR provided incorrect advice on application of Equality Act and the general manner and conduct of the meeting;

1.7.8 The stage 3 outcome letter dated 1 October 2021 confirming incorrect factual information;

1.7.9 On 28 October 2021 and beyond where Mr Baird forced the claimant to take annual leave during a period of phased return;

1.7.10 The respondent's system being changed to reflect the claimant's status as "unpaid leave/absent without consent" for the days he did not attend work in November and December 2021;

1.7.11 The invite to the disciplinary investigation on 19 December 2021 and the disciplinary investigation itself as instigated by Mr McAleer while the stage 3 appeal was extant;

1.7.12 The stage 3 appeal meeting on 17 January 2022 where Mr Robertson continued to assert that constant attending was the only option available for the claimant;

1.7.13 On 25 January 2022 the stage 3 Appeal outcome letter affirming the decision of the original meeting; and

1.7.14 Mr Robertson's refusal to involve himself in a redeployment request or accept the formal grievance.

1.8 If so, was that unwanted conduct?

1.9 Did it relate to disability?

1.10 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.11 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

1.12 If the claims were successful the parties had agreed the issues to be determined with regard to remedy.

**Productions and witnesses**

7. The parties had agreed productions running to 473 pages.

8. The Tribunal heard from the claimant, Mr Logan (the claimant's immediate line manager), Mr McLeod Kerr (Mr Logan's manager), Mr McFadzean (who heard the stage 3 meeting) and Mr Robertson (who heard the appeal).

9. The parties were able to agree a significant amount of facts and focus the matters in dispute, thereby assisting the Tribunal in resolving the issues in dispute.

**Facts**

10. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case. The Tribunal was assisted by the parties reaching agreement, in respect of some of the key facts. There were few material facts in dispute that were necessary to resolve the issues.

*Background*

11. The respondent dispatches medical assistance or clinical advice across Scotland, preserving life and promoting recovery.

12. The claimant was employed as a relief paramedic. He commenced his employment with the respondent on 10 January 2015. He was based out of the ambulance station in Biggar.

13. The claimant has type one diabetes which amounts to a disability for the material times of this case.

14. The claimant's principal duties as a relief paramedic was to treat patients. Often ambulances had 2 members of staff each shift (which could comprise 2 paramedics, as was common in Biggar where the claimant was based) or a paramedic and a technician. It was up to the teams to decide who would drive and who would attend to the patient in the vehicle. A paramedic would always be lead clinician. If specific treatment was needed, the ambulance would be stopped and both staff members would provide treatment.

15. In the course of a shift there would be a varying number of calls which would depend upon location and the nature of the call. The optimum crew is a paramedic and technician.

16. In some situations there is a paramedic and emergency driver. In such situations the paramedic provides attending duties for the entire shift. There are some situations where in a 2 crew ambulance one of the shift has spent 100% on attending duties with the other doing 100% of the driving. It is a matter for the crew to determine. It is not an optimum use of resources for paramedics to be spending time driving given their skill sets.

17. Paramedics can be shift based working to a fixed rota with shifts known in advance (subject to the respondent's instruction) or relief based (covering shifts as and when required). The claimant was contracted as a relief paramedic but he was shadowing (covering) a shift on the rota prior to his absence. The claimant had therefore been included in the rota on the shifts he would normally work (and not as relief as such). As his contracted position was relief paramedic, there was no entitlement to remain shadowing the shift he had shadowed.

18. The respondent discharges its responsibilities in different ways. The most common is via an ambulance with 2 crew members. It also offers PRU response which is a paramedic response unit, a high powered vehicle which is driven by a paramedic to provide a fast response. Usually an ambulance would follow an covey the patient to hospital. There were no PRU vacancies at the material times of this case and there was no need for a PRU to be based at the claimant's unit in Biggar.

19. At the latter stage of the claimant's employment the respondent was undertaking a review of staffing and operations. As a result no new roles were being created or filled. That included permanent paramedic roles and the PRU unit, which was under review itself. The PRU position had not been concluded as the relevant times, such that no changes were being introduced and no vacancies existed for PRU paramedics. The role of a PRU paramedic is substantively different from an accident and emergency ambulance paramedic (and a separate recruitment process exists for these roles). The stress levels involved in both roles are different due to the different nature of the roles.

20. As the claimant was based in a rural area the time taken to deliver patients to hospital could be longer than in cities but the return journey would allow the individual longer time to recover.

21. The impact of the claimant not being at work upon the respondent and its ability to provide a service to the local area was substantial. The rural area where the claimant worked had struggled to secure the amount of staff it needed and there were fewer applicants for the role. The claimant's absence from work had a material impact upon service delivery and delayed responses.

*The people*

22. The claimant was based in Biggar and his line manager was Mr Logan. His line manager was Mr McLeod Kerr who was area service manager. Mr McAleer was head of service for the local area to whom the area service manager reported. Mr McFadzean was Depute Director and Mr Robertson was regional director.

*Policy documents*

23. The respondent has a **capability policy** which exists to provide a clear process to support and manage employees in a fair and consistent way to improve their knowledge skill or ability to undertake their role. The policy will also be used to consider cases involving driving licence issues where that is

not considered a conduct matter or relates to matters outwith the employer scope of investigation. The policy recommends informal resolution which failing a formal meeting would be convened. A Stage 3 meeting will be convened where it has not been possible to resolve matters. That meeting would be convened with a manager who has delegated authority to dismiss. The aim is to support the employee, with an appeal process being set out.

24. The policy also states that if a grievance or bullying and harassment complaint is raised during the capability process it may be appropriate to suspend the capability process temporarily to deal with the issue or to deal with both issues concurrently.

25. The respondent also has a **grievance policy** which encourages matters to be raised and resolved informally. The employee should raise matters with the line manager in the first instance. Matters can also progress formally in which case a notification form should be completed. The employee would receive a reply to the notification within 14 calendar days. If the employee is dissatisfied the employee can refer matters to a second and final formal stage with a hearing being fixed. If a grievance is raised during a capability process that process may be temporarily suspended or both matters may be dealt with concurrently.

26. The respondent has a **guidance document** entitled “guidance on the recruitment and employment of staff with diabetes”. This appears to have been introduced around 2008 in response to developments (at that time) in the field of diabetes and then (then) Disability Discrimination Act 2005. The document is expressly stated to be a “guide to best practice”. It should support decision making to ensure staff are dealt with in a consistent manner. It also assists in setting out how staff with diabetes would be managed.

27. The guidance document sets out a number of key principles. The first one is that assumptions should not be made about what duties a member of staff with diabetes can do and it should not be assumed they present a risk to themselves or others. Each person varies in how they manage the condition. Restrictions on duties should only be made by applying a fair and open

process making reasonable adjustments to manage risk. The service would actively promote opportunities to staff with diabetes which may well require some creative thinking and some practical scenario testing to identify any necessary adjustments.

28. Another key principle is that individual medical assessments and case evaluations should always be based on the individual avoiding generalised assumptions. Case evaluations should involve different people and perspectives (and not just focus on a medical diagnosis) and individual medical assessments and case evaluations should only be made where appropriate. There should be a process for staff to use if they feel an unfair decision has been made and decisions should not be made by a medically qualified person alone.

29. The guidance document has a section entitled “driving duties” and states that “where an individual does not have the licence type required for the post, then consideration should be given to reasonable adjustments with the guidance of this document and reference to the capability policy”.

30. Ambulance staff with diabetes should undergo induvial medical assessments only where the condition is likely to affect their ability to do their job and reasonable adjustments should be considered and reviewed annually. Case evaluations and medical assessments should only take place where diabetes affects their ability to do their job.

*Claimant’s health, driving and occupational health*

31. In March 2020 the claimant contracted COVID and spent time in intensive care. The claimant was absent from work until July 2020.The claimant was absent from work in October 2020 and underwent surgery. In December 2020 he received a diagnosis of type 1 diabetes.

32. As a result of the claimant’s health condition, from around February 2021 the DVLA removed the claimant’s C1 driving entitlement which resulted in him being unable to drive ambulances (or other vehicles over 3.5 ton). There was

no certainty such an entitlement would be returned and that was dependent upon DVLA. It could take 5 years (or less).

33. The claimant met with his line manager Mr Logan on 22 January 2021 and an occupational health report was instructed. The claimant explained that his recovery was going well and he was keen to return to work. He had been visiting the physio as a result of injury sustained out of work. The claimant believed that the only change to his working practices were to carry food and insulin in the vehicle on shift to manage his condition during the working day. The claimant had 140 hours annual leave to take some of which would be incorporated into a phased return to work which would be arranged following the occupational health appointment which would be discussed soon.

34. The report that was provided was dated 27 January 2021. The background to the referral stated that the claimant's diabetes had been discovered and the respondent wanted to understand what accommodations were required to allow the claimant to continue driving emergency vehicles. The referral stated that the claimant was extremely familiar with his condition which was well managed and had not raised any issues of concern. The questions asked were whether the claimant would confirm he would follow DVLA guidance, what amendments were needed to his working day, could he confirm there are no unforeseen diabetic events giving cause for concern and what further support is needed to assist the claimant with return to full duties.

35. The occupational health clinician stated that the claimant was fully aware of the DVLA stipulations and that there were no specific adjustments needed. The claimant needed to carry a supply of anti hypoglycaemic food sugar to avoid low sugar and there was no concern about any unforeseen events as the claimant had a very keen understanding of his condition and how to manage it. The claimant was therefore fit for work and his duties, the report noted that no specific adjustments were required for a typical working day.

*Meeting with claimant 18 February 2021*

36. The claimant met with Mr Kerr on 18 February 2021. The claimant's note of the meeting is on page 102. The respondent wanted to understand what the

claimant was able to drive given his condition and Mr Kerr was to investigate matters.

37. The claimant was keen to work on the PRU but Mr Kerr was unsure whether that could be accommodated given there was no PRU based at Biggar at that time. Other roles were discussed together with the redeployment register but it was agreed to see how matters developed.

*Meeting with claimant 5 March 2021*

38. A further meeting on 5 March 2021 with the claimant, Mr Kerr and Mr Logan.

39. The respondent had not received an update from their driving team as to how the claimant's conduction impacted his driving.

40. The respondent suggested the claimant could return to work and not drive the ambulance and carry out his duties. The claimant did not agree to this as he did not believe that followed the "letter or spirit" of the Equality Act.

41. The claimant expressed his preference to work on the PRU.

42. Mr Kerr was unsure if the claimant was covered by the Equality Act and made a further referral to OH seeking to ask more focused questions.

*Occupational health referral*

43. The claimant attended Occupational Health on 18 May 2021. The Report noted that "his condition is stable, well controlled optimised and critically well monitored. I am happy he is fit for practice in all areas of pre-hospital care". The Report also noted "His condition is optimised and well controlled and would permit him to undertake emergency blue light driving but only in appropriate vehicle categories consistent with DVLA recommendations." It also noted that there were no duty restrictions apart from driving (non C1) in accordance with DVLA restrictions.

*Capability report*

44. A report with regard to the management of capability of the claimant was produced by Mr McLeod Kerr on 21 May 2021. The report confirms that the claimant was a relief member of staff (which was his contracted position).

45. The claimant was shadowing a particular 5 shift at Biggar station at this time which resulted in him following that particular shift, even although he was a relief paramedic.

46. The report was dated 21 May 2021 and was intended to provide background to the meeting that was to convened to discuss next steps. The report stated that the claimant joined the respondent as a technician on 11 January 2015 and moved to the relief role on 18 June 2020. His most recent absence began on 22 October 2020 following a road traffic collision (which was outside work). In December the claimant had been diagnosed with type 1 diabetes and occupational health had been involved. The report noted that the claimant was unable to drive an ambulance which was said to be a key role for a paramedic. The claimant had been in effective communication.

47. The report stated that the claimant had been absent for 20 days with his last absence. He had been on relief and his absence created difficulty in maintaining full operational cover given the pandemic had taken hold of the country and there were significant pressures on the respondent.

48. Under the heading “reasonable adjustment” the report noted that the claimant was said to be fit for operational duties except the absence of C1 driving capability. The report stated that it was understood the claimant could drive under emergency conditions but monitoring may be needed and discretion may require to be exercised. The claimant had been keen to return to work and explore all options, including looking for an advanced role.

*Invite to discuss absence*

49. The claimant received a letter dated 7 June 2021 inviting him to a meeting on 29 June 2021 regarding his continued sickness absence. The letter stated that “the meeting is to discuss your continued sickness absence from work and may result in the termination of your employment on grounds of

incapability due to ill health". The letter noted the claimant could bring a trade union representative or fellow worker and he was asked to confirm his attendance.

50. The meeting on 29 June was cancelled via telephone call on the morning of 29 June 2021.

*Phased return to work*

51. The claimant commenced a phased return to work from 6 July 2021 and passed his PRU exam in August 2021. The claimant worked with his line manager to agree shifts he would work during his phased return.

52. His phased return to work was agreed with Mr Logan. This had identified particular shifts which the claimant would work and the claimant had been rostered to cover work on those days carrying out a variety of different things.

*Mr Baird covers for Mr Logan*

53. When the claimant's line manager was on leave, Mr Baird would act up and cover that position. Mr Baird did not have the full picture as to the claimant's position. On 19 July 2021 Mr Baird telephoned the claimant as he was concerned that the claimant had been doing something that could have been unsafe given his condition. That was due to a misunderstanding by Mr Baird. Mr Baird confirmed that the claimant was not to drive any vehicle during working hours, which was an instruction that the claimant had already received and one with which he had already agreed to follow. Mr Baird did not shout at the claimant but made it clear that the claimant was not to drive vehicles. Mr Baird was concerned the claimant had driven a vehicle which would place him and others at risk and it was more likely than not that Mr Baird spoke with the claimant in a robust manner given the concerns he had.

54. On 22 July 2021 the claimant sent Mr Baird an email saying that a flexible open ended phased return to work plan had been agreed with his line manager and was "currently working well". By that stage he had third manned a wagon, operational on a two manned wagon and supernumerary on a PRU

shift. He noted his next test was night shift work. He noted he would avoid any driving at work.

55. The claimant was unhappy that Mr Baird was asking about his shifts and plan as he had agreed matters with his line manager. However, Mr Baird was responsible for the claimant and others when the claimant's line manager was absent and Mr Baird was seeking to ensure he fully understand what had been agreed and what was to happen.

56. Mr Baird asked the claimant for more information about the phased return to work. The claimant explained that night shifts had been planned for the following week and he was seeing how his insulin regime copes. Mr Baird explained that he had misunderstood what the claimant was doing with regard to PRU, as he had understood the clamant was attending via PRU on his own, which he was not. The claimant explained that working on the PRU was his long term goal. The claimant was to continue with his phased return to work plan. While Mr Baird managed the claimant robustly, the Tribunal did not find that Mr Baird had told the claimant that the phased return to work plan that had been agreed with his line managers was "wrong" or that he could not do it. The claimant was able to continue to carry out the duties he had agreed. The interactions with Mr Baird were robust but not unreasonable. The claimant was not happy that Mr Baird was seeking to get involved in what the claimant had agreed, but Mr Baird was responsible for the claimant and required to familiarise himself with the position.

57. On or around 2 August 2021 the claimant had sought to speak with Mr McLeod Kerr but due to the operational challenges at that time, including the number of messages received and pressure of work, the claimant's call was not returned. That was due to an oversight.

58. On 28 October 2021 when Mr Baird was managing the claimant Mr Baird noted that the claimant had 85.3 hours of untaken accrued annual leave. Mr Baird asked the claimant to "start to select dates" and use his leave as only 12 hours could be carried forward. The claimant replied soon after the email with proposed dates to use his accrued leave.

59. The action of Mr Baird was reasonable and fair since he was the claimant's line manager at the time and was seeking to ensure the claimant used the leave that he had earned and was not placed at any detriment by losing his leave. The claimant did not raise any concerns about this at the time and took the leave he sought.

*SBAR drafted*

60. An SBAR is a document the respondent uses when dealing with situations, background, assessment and recommendations. It had not routinely been used when dealing with absences but Mr McAleer had instructed that it be used in a number of cases, including the claimant's. The document seeks to set out the issue arising and background, how it is proposed to deal with the situation and any recommendations going forward. While it was unusual to prepare an SBAR in capability situations, it was not unknown. The claimant believed there was a sinister purpose behind the instruction to prepare the document but in fact the purpose was to seek as much information as to the position as possible. There was no sinister purpose at play.

61. Mr McLeod Kerr drafted an SBAR on the instruction of Mr McAleer at the beginning of July 2021, before his July annual leave. The document noted that the claimant was a relief paramedic who was shadowing a vacant shift. It stated that the claimant was unable to drive category C1 vehicles and erroneously stated the claimant could not drive any vehicles under emergency conditions. That was Mr McLeod Kerr's belief but it was mistaken as the claimant's only restriction was the driving of vehicles that fell within category C1. The document noted the claimant had return to work in July 2021 with modifications. It was noted that occupational health had confirmed the claimant was fit for his role. The document repeated the error about being unable to drive in emergency conditions. It noted that the claimant could otherwise drive and that options included non driving duties as a relief paramedic, driving other vehicles or other roles.

62. The document contained errors but these were genuine errors Mr McLeod Kerr had made and arose from his misunderstanding as to the position. The errors related to the claimant's ability to drive and surrounding issues.

*Stage 3 capability meeting*

63. The claimant received a letter dated 23 August 2021 inviting him to a stage three capability meeting on 9 September 2021. This stated that, as had been discussed with the claimant, due to the withdrawal of his C1 licence a stage 3 meeting would take place. The claimant knew a "big meeting" was to take place and was waiting for details. The claimant had understood the respondent's policies and understood that at the relevant meetings dismissal was a last resort.

64. Mr Cooper was to chair the meeting which had been convened to discuss the timescales for reinstatement, the impact of not being able to drive and any adjustments, including the Equality Act. The claimant was given the opportunity to present any written material and he was reminded that dismissal was a possible outcome of the meeting.

65. On 8 September 2021 the claimant received a phone call cancelling the meeting scheduled for 9 September 2021. The reason the meeting was cancelled was the departure of Mr Cooper from the respondent's employment.

66. The claimant received a further letter dated 16 September 2021 for the rescheduled stage 3 capability hearing on 24 September 2021 from Mr McFadzean who would chair it. Dismissal was noted as a last resort at the meeting.

67. The claimant attended the stage 3 capability meeting on 24 September 2021. The meeting was recorded.

68. Present at the meeting was the claimant, Mr McFadzean, Mr Macleod Kerr, a representative from HR and a notetaker. Th claimant explained that his representative was to be Mr Macleod Kerr but as he was there on behalf of management and the claimant was comfortable not involving his trade union at that stage. Mr McFadzean noted that it was unusual for a SBAR to have

been prepared for a meeting such as this, albeit his line manager, Mr McAleer, had used the approach in other cases.

69. It was noted that the claimant was on a substantive relief role and he was shadowing a shift. He was capable of fulfilling all his clinical duties given the terms of the occupational health report which noted his condition was well managed and he was fit to carry out his role. The timescale for return of the full licence was not known.

70. It was noted that not having the claimant able to attend and drive impacted upon the service given the rural nature of the area and that it was difficult to recruit qualified staff. Not having qualified staff available had an impact upon service delivery and a number of complaints had been made because of the impact upon the local area.

71. The claimant set out the background and the inaccuracies in the SBAR. He took issue with being called a relief paramedic as he was on the core rota and he was "next for a shift" once the shift review was over. He considered it "slightly unfair" to call him a relief paramedic (although that was his contracted position). Mr McFadzean noted there were others in the claimant's position.

72. The claimant also explained that he is able to drive under blue light conditions. His condition was well managed and he was well motivated. He is able to drive all other vehicles apart from those covered by the category C1. The claimant was advised that the meeting would consider the up to date accurate position.

73. The claimant accepted that his condition had led to his being unable to carry out a requirement of his role, drive an ambulance but his clinical skills were not in doubt. The claimant noted that there are some who drive PRUs who do not have C1 entitlement and there had been staff whose licence had been suspended who had been temporarily redeployed to a non driving role.

74. The claimant noted that he had a "great relationship" with Mr McLeod Kerr who had been "massively supportive" throughout.

75. The claimant accepted that the meeting was not really about dismissal but noted that he had received 3 letters noting that dismissal was an option. The claimant also knew there were "vastly more important things" going on in the service at that time but he was nervous given the issues. The claimant was advised that no decisions had been taken and that the respondent wanted to work with the claimant to support him. The issues had occurred during the pandemic which had stretched the respondent's operational activity.

76. The claimant explained that he was able to drive on blue lights and had his PRU training. He said he believed he was covered by the Equality Act and wants to get the best he is legally entitled to. He wanted to be a front line accident and emergency driving paramedic. He believed he was good at what he does and was funding a masters course himself. The claimant suggested working as PRU was a reasonable adjustment.

77. The clamant referred to the diabetes guidance document and said he considered the stage 3 meeting his case evaluation as all the medical information had been obtained. He noted the occupational health reports ere clear, as was the DVLA doctor, his own GP and his consultant. They all said he could drive except C1 categories. As the claimant was in the honey moon phase it could take years, potentially up to 5 years. He wants to "protect himself" for that period of time. He believed that never driving was "too high an emotional burden." He was concerned about the emotional burden which "could be too high". The claimant accepted it may be that he is fit to return to his role sooner (potentially within months) but it could take years. He suggested a resolution, applying the guidance, would be "putting a guy with type1 diabetes on a PRU". He said he was an expert at managing his condition.

78. The claimant accepted his licence had been taken away for a short period of around 3 weeks as a result of the statements from his diabetic consultant. He needed to check his blood sugars every 2 hours. There was no guaranteed timescales as to when his licence would be returned. It was possible his C1 licence would never be returned. The claimant was told reasonable adjustments would be considered and the claimant was asked if he was

seeking a role on the PRU. He believed he could handle the PRU even if not in the back of an ambulance.

79. Mr McFadzean noted that he was aware of other paramedics who had been working in the back of the ambulance only, who had not had the ability to drive and that had not been an issue. It was the "fear of burn out" which the claimant had. The claimant believed such an adjustment would not be reasonable because if would disadvantage him. The claimant accepted if a colleague were to drive all the time that would disadvantage his colleague. Mr McFadzean noted that the adjustment has to be reasonable for the respondent also. The claimant noted that he was an advanced driver and he was passionate about driving. The meeting concluded, after over an hour, with the claimant feeling that he had been able to put forward all the points he wished to be considered.

*Outcome of stage 3 meeting*

80. The respondent wrote to the claimant regarding the outcome of the stage 3 capability meeting on 1 October 2021. The letter noted that the claimant had identified discrepancies with the SBAR and that he was managing his condition. As the C1 category in his licence had been withdrawn, he had been unable to perform the full duties within his contract. It could take up to 5 years to have that element returned. The claimant had sought redeployment to a PRU role as he was able to drive under those conditions but he did not want to carry out attendant only duties as that could be detrimental to his driving skills and unfair to his colleague (who would be driving). There was no guaranteed end point when his C1 category would be returned.

81. The outcome was that the claimant would be deployed as a relief paramedic at his home station for 12 months following which a further capability meeting would take place to review his position. He would retain his current base post and salary. He was offered the right of appeal.

82. The purpose of the outcome was to ensure the claimant retained his contracted position. He was permitted to continue with his duties, the only change being the requirement to drive an ambulance was removed. He was

able to treat patients and focus on clinical care, which was the aspect of the claimant's role that he said he was very good at and enjoyed.

83. Other staff within the respondent's service had, for a time, worked in the back of the ambulance only, with no driving duties. While ordinarily ambulance staff split the duties, there was no prohibition on driving only or attending only. For each shift one of the staff was the nominated driver but it was open to staff to agree between themselves who would drive.

84. It was reasonable for a paramedic in the position of the claimant to attend only given the safeguards that were in place. Given his shifts would vary, the person with whom he worked would also vary (ensuring they were not driving all the time and so they developed their skills). The claimant was prepared to work shifts (and had done so in his shadow role) but was also prepared to work shifts as a PRU driver.

85. Mr McFadzean knew of other situations within the respondent's organisation where individuals have spent all their shift attending (and no driving). In his experience that created no material issues and worked well. He saw the core role of a paramedic being to treat patients and believed removing the claimant's duties was a reasonable way to remove the disadvantage the claimant had and allowed him to focus on his core duties. Mr McFadzean knew the claimant was skilled at what he did and was studying for a masters degree. The solution he identified would allow the claimant to maximise his ability to deliver patient care. Driving was not key for the role. Given the rural nature of the claimant's base while the trip to hospital could be longer, the return trip from the hospital provided a longer time to decompress and prepare for the next job. There were no other relevant vacancies at the time and the ongoing review resulted in no change to existing roles.

86. Mr McFadzean was aware of the claimant's disability and sought to manage the claimant's situation in line with his understanding of the obligations incumbent upon him. He dealt with the claimant in a different way than someone who had lost their licence due to breach of the law or misconduct. Mr McFadzean understood the medical position underpinning the claimant's

position and sought to find a reasonable solution that was suitable for the claimant and worked operationally. He believed a 12 month review was reasonable but if the position changed sooner the claimant's full duties could be returned sooner.

*Claimant contacts CEO*

87. On 7 October the claimant emailed the CEO. He explained his diagnosis in December 2020. He asked that his concerns be taken into account as he believes his concerns had not been fully taken into account. The claimant believed the guidance document should be applied to him, albeit was not clear in precisely what he sought, other than an outcome that differed from that following the stage 3, in respect of which there was an extant appeal.

88. The response to the claimant's letter was that the relevant policies would be taken into account in dealing with the claimant's appeal.

*Claimant appeals against the stage 3 outcome*

89. On 8 October 2021 the claimant emailed Mr Robertson notifying him of his intention to appeal. He believed that he has robust coping mechanisms and is based at a busy and remote station which leads to greater transfer times. He said full time attendant duties would be unsustainable and it would impact on his mental health. He understood it was a workaround used in the past, such as in relation to staff who had lost their licence but he did not consider that to be comparable. The medical evidence showed he was fit to drive and it was just the licence category he could not follow. His proposal was to work on PRU which was the best workaround in his view. He accepted a full time driving role for a crew mate would be unfair to his colleague but he was concerned about not working a specific shift

90. The claimant provided further more detailed grounds of appeal. There were broken into 6 issues. The first was removal of shift. He said removing his shift pattern was direct discrimination. The second was permanent attending which he said would double the emotional burden. He did not consider a comparison to those who lost their licence to be comparable. Thirdly he believed there

was a duty of care for his mental health. Fourthly he considered it legally unsafe as he believed the failure to resolve matters to be a breach of the Equality Act. Fifthly he believed the guidance document was not being followed. He believed there needed to be creative thinking and scenarios testing for him. Finally, he said there had been a change in tone in management with the SBAR having been maliciously prepared, in his view. He believed the Equality Act had been breached and he had been subject to emotional stress. This was, he said, an informal notification of grievance.

91. The claimant stopped attending shifts from 29 November 2021 (even although he knew he was rostered to attend such shifts). He did not attend any shifts thereafter until his employment ended. The claimant was concerned about attending work as he believed it could "embolden" the outcome of stage 3 when he was concerned doing such shifts could adversely affect his mental health at some point. That was the claimant's perception (but the occupational health physician's report had stated the claimant had his condition under control and was fit and able to attend to his duties).

92. On 23 November 2021 the claimant sent an email to his line manager offering to return to work as a PRU paramedic. The claimant considered that to suit him best. He said he worried that accepting the outcome of the stage 3 meeting would "embolden the management position that this temporary workaround is an acceptable long term outcome". He said he believed the outcome of stage 3 did not comply with the spirit or letter of the Equality Act.

93. Mr McLeod Kerr tried to contact the claimant on 30 November 2021 by telephone but missed the claimant. The claimant sent an email in reply and reiterated that he was "still not willing to embolden the stage 3 outcome position". He offered to work elsewhere and said showing him as on shift was frustrating and misleading.

94. The claimant refused to accept the outcome of the stage 3 meeting as he believed it broke the Equality Act 2010 and ignored service guidelines. This was a belief the claimant had and he was not prepared to see whether or not it would work for him. It was based on the claimant's perception.

*Disciplinary investigation commenced*

95. Ms Kielty was instructed by Mr McAleer to conduct an investigation into the claimant's absence in December 2021.

96. Mr McLeod Kerr was instructed by Mr McAleer to mark the claimant as on "unpaid leave/absent without consent" on the internal system. This was because the claimant had not attended the shifts for which he was rostered. The claimant had advised the respondent in advance that he did not intend to work such shifts as he believed doing so could create a risk at some point in the future to his mental health. The reason why the system was altered was to reflect what the correct factual position appeared to be (which could be altered once the matter had been investigated and the facts ascertained).

97. The respondent commenced a disciplinary investigation into the claimant's absence in December 2021 and a number of meetings took place at which the reasons for the claimant's failure to attend shifts was discussed. A report was issued on 14 June 2022.

*Stage 3 appeal meeting*

98. The stage three appeal meeting took place on 17 January 2022. The meeting was chaired by Mr Robertson and the claimant attended along with his trade union representative and Mr McFadzean. The claimant was able to focus on the issues he wished and Mr Robertson understood the issues the claimant was raising and undertook to consider all the information in his possession before reaching a conclusion.

99. The decision was issued via letter on 25 January 2022. Mr Robertson considered each of the points the claimant had raised.

100. In relation to his first ground, he found that the claimant was covering or shadowing a shift but that he was contracted to the permanent role of relief paramedic. As such he had no contractual right to remain on the shift he was shadowing. That was the correct legal position.

101. The claimant's second ground related to permanent attending. That was the core part of the claimant's role, to attend to patients. Mr Robertson considered it to be reasonable to require the claimant to carry out that aspect of his role, having removed driving duties from him. It was not possible to redeploy the claimant to a PRU role. Any impact upon colleagues who would be driving all the time could be resolved by proper shift planning. Mr Robertson had experience in managing other staff and in carrying out the role himself. He was able to conclude from his experience and in light of the medical information available that the decision to adjust the claimant's duties to attending only was fair and reasonable. He had also sought to ensure measures were in place if the claimant felt his mental health was put at risk.

102. The third issue related to the impact upon the claimant's mental health. Mr Robertson noted that local mechanisms would be put in place to assist the claimant. In that regard he had a discussion with the claimant as to ensuring any concerns about the impact of constant attending were managed properly.

103. The fourth issue amounted to what a reasonable adjustment was. He concluded that the removal of driving duties was itself a reasonable adjustment protecting the claimant's continued employment and avoided the need to redeploy the claimant elsewhere.

104. The fifth point related to the guidance document which Mr Robertson had taken into account. That document signposted the capability policy as being relevant when a licence issue arose. A reasonable adjustment had been identified that allowed the claimant to retain his position. The claimant could apply for any PRU position that became available in the normal way. As a reasonable adjustment had been identified which allowed the claimant to retain his role and place of work, no further adjustments were needed.

105. The final point related to alleged failures in management. Mr Robertson had asked that management review matters upon conclusion of the process.

106. Mr Robertson took into account the claimant's disability and the role he was contracted to carry out. He considered it was possible to adjust his role to retain his position at the place he was employed. There were significant

recruitment challenges and few individuals available to work in the area the claimant was based. He also wished the impact upon the claimant to be minimal and retain his potion. With regard to attending 100%. Mr Robertson believed that created no issue given the claimant's skills and the role he was employed to carry out. He noted that driving can cause fatigue but there was no reason why paramedics could not attend 100% of their shift given the nature of the work and the breaks involved.

107. Mr Robertson was keen to ensure the claimant was not placed at a disadvantage and informally discussed ways of breaking up the claimant's role if focussing on attending was difficult. His desire was to find a way to return the claimant to his contracted role and seek to help the claimant back to work given the operational demands. Redeployment was not necessary. While the claimant wanted to work in a different role, as a PRU driver, there was a reasonable way in which the claimant's role could be adjusted to facilitate his return to work. The core requirement is to undertake clinical activity which was retained for the claimant. There were no other roles available and the claimant's role was required.

108. The appeal was dismissed but Mr Robertson emphasised the desire was to return the claimant to his full duties as quickly as practical. To assist in that regard he reduced the capability review meeting from 12 months to 6 months or sooner, if the claimant received notification from the DVLA prior to that period.

109. Mr Robertson noted that the claimant had indicated he wished the matter dealt with as a grievance but noted that he should consider how he wished that dealt with and would send him the grievance process to allow him to consider how he wished to progress. He noted that his decision was the final stage in the process.

*Grievance*

110. By email of 3 February 2022 the claimant noted that a review as to management practices had been ordered and that he could raise a grievance

in the usual way. The claimant said that he wished to formalise it. Mr Robertson sent the claimant the grievance documentation.

111. The claimant was unhappy that the disciplinary investigation was being progressed when he wished to raise a grievance. By email of 5 February 2022 the claimant asked for the disciplinary investigation to be suspended to deal with his grievance. The claimant was unhappy that Mr McAleer had instructed the disciplinary investigation when he wanted to raise a grievance.

112. The grievance the claimant raised was headed "management bullying, stigmatisation and supplying of false documentation to a stage 3 hearing to influence its decision". The claimant then set out a large paragraph noting the alleged shift in management tone and content with the alleged malicious SBAR and alleged disregard of the guidance. He argued this amounted to a management attempt to effect a stage 3 meeting contrary to the Equality Act with letters threatening his dismissal. He referred to the capability meeting having been cancelled and false comments in the SBAR which he said stated false opinion as fact and was written in a way to bully intimate and undermine affected staff. The way questions were asked at the stage 3 meeting increased feelings of stigma. He said the treatment was consistently below professionally expected levels. That included progressing with a disciplinary investigation when the commissioning manager was subject to an informal grievance and withholding wages.

113. Mr Robertson replied stating that he was unable to progress the concerns the claimant had as a grievance because the issues he raised fell within the capability policy (which had been progressed and in respect of which an appeal had taken place). He noted that the claimant had exhausted the process and while he may have had a preference to carry out the PRU role, decisions are made on the basis of reasonableness rather than personal preference. Redeployment would only be considered where it was not possible to adjust an individual's contracted role. Mr Robertson noted that upon conclusion of matters he would instruct an independent investigation into the matter. There were no grounds to pause the disciplinary investigation at that time.

*Other work and ending of employment*

114. The claimant applied for a post with another employer on 13 February 2022. He was offered and accepted the post on 2 March 2022, subject to satisfactory references.

115. The Claimant commenced ACAS early conciliation on 16 February 2022, and a certificate was issued on 9 March 2022.

116. The claimant resigned with immediate effect on 10 March 2022. The claimant was given the opportunity to reconsider his position with an Executive Director reviewing the claimant's case to make sure nothing had been missed. The claimant did not take that opportunity.

117. The claimant commenced his new employment on 1 April 2022.

**Observations on the evidence**

118. This parties did their best to recollect matters as best they could. On occasions the claimant focused upon his belief that the respondent had failed to make reasonable adjustments rather than upon the objective issues at hand. The claimant felt strongly that he had specific rights under the Equality Act and as a result on occasion was unable to focus upon the specific question or issue. It was clear that this was a major issue for the claimant who was clearly an intelligent and articulate individual who was a good paramedic. He did his best to focus upon the issues arising. On occasion his focus upon his fervent belief that the Equality Act had not been followed clouded his approach to the issues. An example of this was in relation to the claimant's status as a relief paramedic. That was his contracted position albeit he was shadowing a permanent shift. The claimant was unable to accept the position during cross examination.

119. On occasion the claimant was focussed upon the position as he understood it to be, which was entirely understandable. There were occasions when the Tribunal did not accept the full extent of what was narrated which arose in some cases where the claimant was focussed on what he believed to have occurred consistent with his position rather than objectively what had

happened. An example of this was in relation to the claimant's interactions with Mr Baird. The Tribunal considered the limited evidence the Tribunal had in this regard and made an assessment on the balance of probabilities as to what happened.

120. The only real factual dispute in relation to the issues to be determined was in relation to Mr Baird and what Mr Baird had told the claimant. While Mr Baird did not give evidence the claimant was able to recall what happened and reference was made to contemporaneous documents. The Tribunal accepted that Mr Baird had telephoned the claimant to tell him to stop driving but did not accept that Mr Baird had shouted in an offensive way. It was more likely than not, from the documents presented and context, that Mr Baird was concerned the claimant had driven a PRU which could have placed the claimant and others at risk and consequently Mr Baird was concerned to ensure the claimant cease driving immediately. Mr Baird recognised he had made a mistake and misunderstood the position in correspondence. The Tribunal was satisfied Mr Baird told the claimant to cease driving, that being Mr Baird's responsibility, to manage the claimant which was done in a robust but fair way.

121. The Tribunal did not find that the claimant had been told by Mr Baird (as alleged in the list of issues) that the phased return to work which had been agreed with his line manager was "wrong" and he was not allowed to do those shifts. There was very limited evidence in relation to this specific point but the Tribunal concluded that it was more likely than not that Mr Baird was concerned to ensure the claimant was only working shifts and roles that protected his and other's health and safety. The claimant was extremely keen to perform his duties, which was commendable and Mr Baird wanted to ensure when he was in charge, in the absence of the claimant's day to day line managers, Mr Baird understood what had been agreed.

122. The claimant also believed that the instruction by Mr Baird to utilise his leave was in some way nefarious. In fact Mr Baird noted that the claimant had 85 hours of accrued leave and recommended that the claimant use his leave as otherwise he was at risk of losing the leave he had earned. Objectively viewed

Mr Baird was seeking to assist the claimant, as his then line manager, to ensure the claimant was not placed at any detriment. The claimant did not challenge Mr Baird or raise any concerns at the time. There was no basis for believing such an instruction (which was in reality a suggestion) was for any purpose other than to assist the claimant in a constructive and reasonable way.

123. The claimant had believed that as Mr Baird was contacting him, it amounted to harassment. At one stage the claimant said in evidence "Even him getting in touch with me was harassment" but this was at a point when Mr Baird was his line manager and was reminding the claimant of the need to use his accrued leave (which would otherwise be lost). It was, objectively, a supportive management action. This stemmed from the claimant's perception that Mr Baird and McAleer were trying to treat the claimant negatively. The claimant candidly accepted that was his belief and there was no evidential basis for it. In fact Mr McAleer and the other managers who worked with the claimant were seeking to work with the claimant.

124. Mr McLeod Kerr did his best to recall matters but given the operational context and time that had passed struggled on occasion to recall issues. That was not surprising given the impact the pandemic had upon the work he was undertaking at the time.

125. Mr McFadzean and Mr Robertson were able to recall matters clearly. Mr Robertson in particular set out the position with regard to the claimant's case with clarity.

126. The claimant's agent had argued in submissions that there was a sinister purpose behind how the claimant was treated such that a number of individuals in managing the claimant were seeking to harass the claimant and treat him adversely by reason of his disability. The Tribunal did not accept that submission. Having carefully considered the evidence the Tribunal found that while that was the claimant's belief and perception, on the facts the respondent's staff were seeking in fact to support the claimant during a challenging time within a difficult period.

127. The respondent's staff had sought to be flexible and work with the claimant to find a suitable alternative that allowed him to retain his position. It was not possible to grant the claimant his principal wish which was to drive a PRU. That was because it was possible to keep the claimant in his contracted role by adjusting his duties. The claimant did not like that outcome but it was a fair and reasonable one on the evidence and information before the respondent, including specifically the occupational health reports, the information from the claimant's GP and consultant. It also aligned with the claimant's approach, in that he had managed his condition and fully understood how to deal with it given his expertise. Further the respondent's staff fully understood the work the claimant was contracted to do and how it could be done notwithstanding the claimant's disability.

128. The claimant believed that the respondent's staff were ignoring the guidance and seeking to place barriers to him returning to work. On the facts the Tribunal found that the managers were in fact seeking to work with the claimant to allow him to return to work and carry out his contracted duties. It was possible and reasonable to do so by adjusting the claimant's driving. The failure of the respondent to adjust their position galvanised the claimant's position such that he considered the respondent to be seeking to inhibit his return when in fact the respondent sought to facilitate a return and put in place measures that allowed the claimant a return to the key aspect of his role, a role that the claimant had excelled in.

**Law**

*Time limits*

129. The time limit for Equality Act claims appears in section 123 as follows:

> *"(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".*

130. A continuing course of conduct might amount to conduct extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis** 2003 IRLR 96 which deals with circumstances in which there will be an act extending over a period. In dealing with a case of alleged race and sex discrimination over a period, Mummery LJ said this at paragraph 52: "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

131. The focus in this area is on the substance of the complaints in question — as opposed to the existence of a policy or regime — to determine whether they can be said to be part of one continuing act by the employer.

132. **Robinson v Surrey** 2015 UKEAT 311 is authority for the proposition that separate types of discrimination claims can potentially be considered together as constituting conduct extending over a time.

133. The Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust** 2006 EWCA Civ 1548 confirmed that the correct test in determining whether there is a continuing act of discrimination is that set out in **Hendricks**. Thus tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

134. In **South Western Ambulance Service NHS Foundation Trust v King** EAT 0056/19, the Employment Appeal Tribunal observed that when a claimant wishes to show that there has been 'conduct extending over a period' if any of the acts relied upon are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act.

*Extending the time limit*

135. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

136. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should "have regard to" the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

    a. The Tribunal should have regard to the prejudice to each party.

    b. The Tribunal should have regard to all the circumstances of the case which would include:

        i. Length and reason for any delay

ii. The extent to which cogency of evidence is likely to be affected

iii. The cooperation of the respondent in the provision of information requested

iv. The promptness with which the claimant acted once he knew of facts giving rise to the cause of action

v. Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

137. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

138. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. This is a matter which is in the Tribunal's discretion. The Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

139. In **Rathakrishnan v Pizza Express (Restaurants) Ltd** 2016 ICR 283 the Employment Appeal Tribunal held that in that case the balance of prejudice and potential merits of the reasonable adjustments claim were both relevant considerations and it was wrong of the Tribunal not to weigh those factors in the balance before reaching its conclusion on whether to extend time.

140. The Tribunal considered and applied the judgment of Underhill LJ in **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 and in particular at paragraph 14. Ultimately the Tribunal requires to make a judicial assessment

from all the facts to determine whether to allow the claims to proceed and in particular assess the respective prejudice.

141. The Tribunal also applied the principles set out by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 ICR D5. The Court emphasised that it would be wrong to rigidly apply the "Keeble factors" since that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The correct approach in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay.

*Burden of proof*

142. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> *"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

143. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

144. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

145. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v**

**Nomura International Plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

146. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

147. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a prima facie case.

148. The Tribunal was also able to take into account **Field v Steve Pye & Co** EAT2021-000357 and **Klonowska v Falck** EAT-2020-000901.

*Discrimination arising from disability*

149. Section 39(2)(c) of the Equality Act 2010 prohibits discrimination against an employee by dismissing him. Section 15 of the Act reads as follows:-

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

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

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

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

150. Paragraph 5.6 of the Equality and Human Rights Commission Code of Practice ("the Code") provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

151. To succeed under section 15, the following must be made out:

a. there must be unfavourable treatment (which the Code interprets widely saying it means that the disabled person 'must have been put at a disadvantage' (see para 5.7)).

b. there must be "something" that arises in consequence of the claimant's disability;

c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and

d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

152. Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** 2016 IRLR 170:

*"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. No question of comparison arises. 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 s.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."*

153. As to justification, in paragraph 4.27 the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages: is the aim legal and non-discriminatory, and one that represents a real, objective consideration? If so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

154. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31: *"although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."*

155. The Code at paragraph 4.26 states that *"it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."*

156. In **Chief Constable v Homer** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real

need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

157. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

158. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer's decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

159. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure must be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate. The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

160. Chapter 5 of the Code contains useful guidance in applying the law in this area and the Tribunal has had regard to that guidance.

*Harassment*

161. In terms of section 26 of the Equality Act 2010:

*"(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."*

162. It is important to consider the conduct with regard to each element of the statutory test. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** EAT 0039/19). The fact that the claimant considers the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in the manner alleged in the claim. In that case the Employment Appeal Tribunal held it is a matter for the Tribunal to determine making a finding of fact drawing on all the evidence before it. There must be some feature of the factual matrix identified by the Tribunal which leads it to the conclusion conduct is related to the protected characteristic and the Tribunal should articulate clearly what feature of the evidence leads it to that conclusion. The Tribunal should consider the matter objectively.

163. For example in **Hartley v Foreign and Commonwealth Office Services** 2016 ICR D17 the Employment Appeal Tribunal held that an Employment Tribunal had failed to carry out the necessary analysis to see whether comments made by the claimant's managers during a performance improvement meeting — accusing her of rudeness and apparently questioning her intelligence when she failed to understand a spreadsheet of comments concerning her performance — were related to her Asperger's syndrome. The Employment Appeal Tribunal emphasised that an Employment Tribunal considering the question posed by section 26(1)(a)

must evaluate the evidence in the round, recognising that witnesses "will not readily volunteer" that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic *"cannot be conclusive of that question".*

164. **Warby v Wunda Group Plc** EAT 0434/11 is authority for the proposition that the conduct should be viewed in context in assessing whether the conduct is related to the protected characteristic. The then President of the Employment Appeal Tribunal, Mr Justice Langstaff, upheld a Tribunal's decision that an employee accused by her superior of having lied about a miscarriage was not subjected to conduct *"related to"* her sex within the meaning of the sex discrimination provisions then in force. Langstaff P held that context was important and that the tribunal had been entitled to find that the accusation was made in the context of a dispute over a work matter, about which the employer believed that the employee was lying. Thus the conduct complained of was an emphatic complaint about alleged lying; it was not made because of the employee's sex, because she was pregnant or because she had had a miscarriage. While that case considered the predecessor legislation, the issue was whether the conduct was *"related to"* the protected characteristic.

165. In **Kelly v Covance Laboratories Ltd** [2016] IRLR 338 an instruction not to speak Russian at work, so that any conversations could be understood by English speaking managers was not related to race or national origins, even though it potentially could have been. The conduct was because the employer was suspicious about what was being said and could not understand. Viewed in the context of the company's business and risks the employer's explanation for the conduct was accepted and the conduct was not related to race or national origins.

166. In **UNITE the Union v Nailard** [2018] IRLR 730 the Tribunal had held that a failure to address a sexual harassment complaint made against elected officials of the union could amount to harassment related to sex *"because of the background of harassment related to sex".* The Court of Appeal

considered that went too far. There had been no findings as to the mental processes of the (employed) officials of the union dealing with the complaint and whether they had been motivated by sex discrimination. The Court of Appeal noted that the previous potential liability for third party harassment under the Equality Act 2010, section 40 had been repealed and there was no automatic liability on the part of the union for harassment by third parties (if that was how the elected officials were to be characterised). The union could be (vicariously) liable for acts of discrimination by its employees but there would need to be a finding that the employees in question were themselves guilty of discrimination. An important point of this case was the reminder that Tribunals should focus on the conduct of the person who carried out the act and determine whether that conduct is related to the protected characteristic (not whether the conduct of someone else or some other conduct is related to the protected characteristic). If the action (or inaction) is because of illness or incompetence it may not relate to the protected characteristic.

167. At paragraph 7.10 of the Code the breadth of the words "related to" is noted and some examples are provided. It gives the example of a female worker who has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

168. At paragraph 7.11 the Code states that in the examples there was *"a connection with the protected characteristic".*

169. The question of whether the conduct in question *"relates to"* the protected characteristic requires a consideration of the mental processes of the putative harasser (**GMB v Henderson** 2017 IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see **Bakkali v Greater Manchester** 2018 IRLR 906). In **Bakkali** the question was whether a comment as to whether an individual was said to be still promoting ISIS/Daesh was related to race. The Tribunal found it was

not as it related to a previous conversation. The Employment Appeal Tribunal emphasised that context is important and the words used must be seen in context. In considering whether the conduct is related to the protected characteristic there should be an intense focus on the context of the offending words or behaviour. The mental processes of the perpetrator are relevant in assessing the issue.

170. In **Raj v Capita** 2019 UKEAT 0074/2019 the Employment Appeal Tribunal upheld a Tribunal which had found that the massage at his desk by a manager was not conduct related to sex. The conduct was misguided encouragement by a manager. It was an isolated incident and the context was key: a standing manager over a sitting team member in a gender neutral part of the body within an open plan office. In that case the Tribunal did not expressly consider the burden of proof provisions but had found that the conduct was in no sense whatsoever related to sex.

171. Section 26(4) of the Act provides that:

*"(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."*

172. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in **Pemberton v Inwood** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill: *"In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective*

*question). It must also take into account all the other circumstances (subsection 4(b)).”*

173. The Code states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant’s perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus, something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

174. In relation to the effect of the conduct, intention is not a prerequisite and the effect is to be considered from the perception of the claimant. The Code (at paragraph 8.20) gives the example of a club manager at a meeting making derogatory comments and jokes about women to a mixed sex audience. It is not that person’s intention to offend or humiliate anyone, however the conduct may amount to harassment if the effect of it is to create a humiliating or offensive environment for a man or woman in the audience.

175. Relevant circumstances include the claimant’s personal circumstances, cultural norms and previous experience of harassment. The perpetrator being in a position of trust or seniority over the recipient is also a relevant factor.

176. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant’s dignity or creating the relevant environment) the claimant’s perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (Lindsay v LSE 2014 IRLR 218). Elias LJ in **Land Registry v Grant** 2011 IRLR 748 focused on the words *“intimidating, hostile, degrading, humiliating and offensive” and said “Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught”.*

177. Chapter 7 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

**Submissions**

178. Both parties produced detailed written submissions and the parties were able to comment upon each other submissions. The Tribunal deals with the parties' submissions as relevant below, but does not repeat them in detail. The parties' full submissions were taken into account in reaching a unanimous decision.

*Decision and reasons*

179. The Tribunal spent a very substantial amount of time considering the evidence that had been led, both in writing and orally and the full submissions of both parties and was able to reach a unanimous decision on each of the issues. The Tribunal deals with issues arising in turn.

180. The Tribunal decided that it would be appropriate to determine the substance of the claims first rather than time limits, given whether or not there was an act extending over a period would depend on what claims had been upheld, since acts which are not unlawful cannot form part of any act extending over a period.

***Discrimination arising from disability (Equality Act 2010, section 15)***

*Unfavourable treatment*

181. Given disability was conceded the first issue was whether the respondent treated the claimant unfavourably. The Tribunal considers these in turn.

182. The **first act** was dealing with his case via the Capability Policy rather than in terms of the Guidance document. The Tribunal did not consider this to amount to unfavourable treatment. As a matter of fact the respondent did consider the respondent's policy. As was made clear in evidence the respondent sought to protect the claimant's employment and explore an option that allowed him to retain his base and role. He was contracted to carry out the role of relief paramedic. While he was shadowing a particular shift there was no requirement that such a position continue or be protected.

183. The claimant himself noted during the stage 3 meeting that in fact the terms of the guidance document had in essence been followed since the respondent had sought medical input from various sources. The occupational health position was clear and supplemented by the claimants GP and diabetic consultant. The respondent took into account the claimant's position and preference but also looked at the bigger picture.

184. As a matter of fact, the Tribunal did not find that the guidance document was ignored. It was considered. In any event the respondent's approach in progressing matters via the capability document was not unfavourable treatment. It was the treatment to which the claimant was entitled. A reasonable adjustment was identified that retained the claimant's position. It was innovative thinking to the extent that it allowed the claimant to focus on the key area of his role, that he enjoyed and said he did best. It avoided the need to move to another location or otherwise inconvenience the claimant.

185. While he desired a different outcome, such an outcome could have been achieved via the capability policy as much as the guidance document. The claimant's issue was that he considered the adjustment that was proposed not to be reasonable. This issue has not been established.

186. The **second act** said to be unfavourable was allegedly saying constantly attending (and removing driving duties) was the only option at the stage 3 meeting and upon appeal. Strictly speaking from the evidence the Tribunal did not consider this to be an accurate representation of the position. The respondent's position was that it had identified a reasonable adjustment and as such there was no requirement to consider further adjustments. That is different from saying constant attendance is the only option. Nevertheless the Tribunal is prepared to accept that the decision to remove the claimant's driving duties and thereby require him to attend 100% of the time was unfavourable treatment.

187. That was not an obvious decision since being the attending clinician was the key part of the claimant's role (and the part he said he enjoyed the most and was good at). The issue was, however, the removing the driving duties. While

driving could themselves be considered stressful, the claimant believed that 100% attending would increase the emotional impact upon him. The evidence the Tribunal heard suggested that the claimant's belief may have been misplaced. That could be because the claimant would have longer periods of time to de-stress (the longer return journey from a longer trip to hospital from a rural location) and the fact others do vary the swap between driving duties and attending. Although the claimant's behalf may have been misplaced, requiring him to constantly attend was at least in principle capable of being unfavourable treatment.

188. The **third matter** was instigating disciplinary proceedings when his appeal was ongoing. While instigating an investigation could be considered unfavourable, the claimant had, by his own admission, failed to attend work. His duties were to work during the shifts for which he was rostered. He did not do so. Conducting a disciplinary investigation was not itself unfavourable treatment. It was entirely possible that the claimant's explanation would be accepted and no action taken. The investigating of matters on the facts of this case was not itself unfavourable. It was an attempt to obtain the full factual position and then decide what, if any, action was needed. The claimant had an explanation for not attending work. The purpose of the investigation was to seek that information from the claimant. The process of so doing was not unfavourable. On the facts of this case such action did not amount to unfavourable treatment.

189. The **final treatment** relied upon was the refusal to treat his grievance as a grievance. Viewing the grievance carefully and objectively his complaints were essentially about how he had been treated at the stage 3 meeting. His words mirrored the words he used during that process. He was unhappy in not getting the outcome be believed he was entitled to under the Equality Act and having failed to achieve his desired outcome via stage 3 sought to raise a grievance. However, the substance of the grievance was essentially the same as the capability process. The respondent's actions in that regard did not amount to unfavourable treatment. The issues the claimant had raised had been dealt with via the stage 3 process and while the claimant did not like

the approach the respondent took, the decision was not unfavourable on the facts.

190. The respondent did consider all options and the treatment the claimant received following upon the appeal process was not unfavourable. He was able to retain his role, his position and salary and continue to work, with safeguards in place if matters did become challenging for him.

*Something arising in consequence of disability*

191. The **first matter** was the claimant losing his C1 licence qualification as a consequence of developing type 1 diabetes. There was no dispute that the claimant lost his C1 classification due to his disability.

192. The **second matter** was that "Mr McFadzean did not have any particular regard to the claimant's disability". This issue was something that had not been foreshadowed in the pleadings and at the commencement of submissions the claimant's agent clarified that the focus was on the outcome of the stage 3 meeting rather than upon the content of it. In other words this was background to the decision which is relied upon in the foregoing matter and not a separate action.

193. The **third matter** was that the claimant did not attend shifts because he believed the shift had been removed from him and he did not want to disadvantage colleagues. The Tribunal found that the reason for not attending his shifts was because the claimant did not consider the adjustment that had been proposed to be reasonable. That arose in consequence of disability.

194. The **fourth matter** was Mr Robertson "treating the claimant unfavourably by continuing the management line and attitude adopted by earlier employees". This was essentially background to the decisions that were taken. The claimant's agent indicated that the focus was on the outcome of the process, the decision to refuse to redeploy the claimant or allow him to do something other than attend (the substantive aspect of the claimant's case).

*Was the unfavourable treatment because of any of those things?*

195. The Tribunal took each of the acts in turn to assess whether the treatment was because of any of the matters that arose in consequence of disability.

196. The Tribunal found that the **first unfavourable treatment** relied upon had not been made out on the facts, The respondent had taken the capability policy into account. If the Tribunal was wrong on that matter, the Tribunal would have found that this had arisen because the claimant had lost his licence which was something arising in consequence of his disability.

197. The **second matter** was deciding the claimant would constantly attend (and not drive). This arose in consequence of the claimant losing his class C1 which stemmed from the claimant's disability.

198. The **third matter** was instigating disciplinary proceedings which arose because the claimant was not at work. The claimant was not at work because he had lost his C1 entitlement and so this arose because of something arising in consequence of disability.

199. **Finally**, the Tribunal considered why the respondent refused to accept his grievance. The Tribunal found this was not because of anything arising in consequence of disability as set out above. The only reason the respondent refused to treat the claimant's grievance as a grievance was because of their position that the substantive matters covered by the grievance had already been determined via the capability process. There was no connection with the matters relied upon by the claimant in this regard. The reason for not dealing with the grievance was not because the claimant had lost his C1 entitlement. It was not because of a disregard for the claimant's disability, non attendance at work or the attitude of staff. The only reason the grievance was not progressed was because it had (in the respondent's assessment) been substantively dealt with via the other processes.

*Justification*

200. The next issue was whether the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were that the claimant is a highly qualified paramedic with the required skills and knowledge to treat a

wide range of patients during a global pandemic. Driving constituted only a small proportion of his role, and removing this requirement (which was done by operation of law when the DVLA removed his category C1 licence) permitted the claimant to use his specialist skills to support public health.

201. Had it been necessary to do so, the Tribunal considered each of the actions of the respondent and whether the justification had been established.

*Legitimate aim*

202. In respect of each of the matters the aim relied upon was the need to utilise the claimant and his skills during a challenging situation. That was in principle a legitimate aim

*Proportionate means of achieving the legitimate aim*

203. The next question was whether the treatment relied upon had been objectively justified (a proportionate means of a legitimate aim). In considering these issues the Tribunal requires to intensely analyse the reason, compare the impact upon the claimant with the impact upon the respondent both qualitatively and quantitively, applying the authorities to assess the impact of the means to determine whether it was a proportionate means of achieving a legitimate aim.

204. The **first act** relied upon was the alleged dealing of the claimant via the capability policy (rather than the guidance document). Had this been shown to be unfavourable treatment because of something arising in consequence of disability the Tribunal would have been satisfied that the treatment, the dealing with matters via the capability policy, was a proportionate means of achieving a legitimate aim.

205. The impact upon the claimant was in fact minor and could well have been neutral in that had the policy been fully followed it is entirely possible the outcome would have been identical. The purpose of the guidance is to ensure individuals with diabetes are retained in their role. That was exactly what the respondent sought to do in this case, find a way to ensure he could remain in his contracted position with adjustments. That was the innovation in this case,

the removal of the requirement that the claimant undertake driving duties and allow him instead to focus on treating patients, which was the most important part of his role, and one the claimant said he enjoyed and was extremely good at.

206. The decision to follow the capability policy was necessitated because the claimant was unable to drive and as such the policy, in terms, was applicable It was supplemented by the guidance document but that did not require any additional steps. The duty was to make reasonable adjustments, based upon the claimant's position which is what the respondent did. While the claimant disagreed with the outcome (and wished other adjustments) in fact the respondent had carried out what was required of them and identified a reasonable adjustment. The respondent's actions in relation to this act were a proportionate means of achieving a legitimate aim.

207. The **second act** relied upon was the decision that the claimant constantly attend rather than drive. The Tribunal had to balance the impact of so doing upon the claimant with the effect on the respondent and intensely analyse the position.

208. The Tribunal was satisfied having carried out the intense analysis and the balancing exercise required that the treatment was a proportionate means of achieving a legitimate aim. The evidence before the respondent was such that the claimant was fit and able to carry out his role. The issue in this case was the claimant's perception that constantly attending might have upon his mental health. There was no medical basis for that assertion, which flatly contradicted the position set out by occupational health physician who knew the claimant's impairment and the role he was contracted to undertake. There was no evidence of any actual or likely adverse impact upon the claimant's mental health. It was a perception of the claimant that was unsupported by any medical basis.

209. The clear evidence of Mr McFadzean and Mr Robertson, which the Tribunal accepted, was that it was entirely possible for paramedics to spend 100% of their shift attending and that removing driving duties was not unreasonable. It

had occurred in other cases and the nature of the work and location resulted in the position in this case being reasonable. There were lengthy periods where the claimant would be able to de-stress and prepare for the next job and steps would have been put in place to assist the claimant if he personally found it too challenging. The claimant believed he was an excellent paramedic and the adjustment allowed him to focus on patient care with appropriate safeguards in place. The impact on the claimant could be minimal on the facts. The concern the claimant had was the potential for it being difficult or impacting adversely on his mental health but he was not prepared to try it.

210. The operational requirements of the respondent was such that they required to utilise the claimant's skills. The facility to do so was present at the claimant's place of work. It was difficult to recruit people to work in the area the claimant was based and there was no available PRU unit. There was a strong need for the claimant to undertake his contractual duties, which he was fit to do (albeit did not wish to do so given the potential impact upon his health). The absence of the claimant had a material impact upon service delivery in the local area.

211. There was no other way in which the respondent could have achieved their objective on the facts in a less burdensome manner. There were no other vacancies that existed. There were no specific roles which the claimant could have undertaken at the time in question that would not have had an impact upon the respondent. In carrying out the balancing the Tribunal takes account of the evidence and the impact upon the claimant and effect upon the respondent.

212. The impact upon the claimant was that he believed there could be a detrimental effect upon his mental health. This was a perception. The claimant was not prepared to try the proposal even where the respondent had put in place measures to assist the claimant if he were to find any issues while working. The respondent had found a reasonable solution to assist the claimant in managing his condition and continuing to carry out the role he loved with minimal impact upon him and safeguards in place, ensuring local residents had the operational cover in place. The respondent had a

compelling and cogent need and reason to secure the claimant's skills as an accident and emergency paramedic within the ambulance.

213. The Tribunal carried out the balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. The Tribunal was satisfied the evidence provided by the respondent established the necessary justification in this case. The measure in this case was an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. It corresponded to a real need and the means used were appropriate with a view to achieving the objective and necessary to that end. In reaching its decision the Tribunal reached its own judgment as to whether the measure is reasonably necessary from the evidence.

214. The Tribunal critically evaluated the justification set out by the respondent and having intensely analysed the impact upon the parties in light of the authorities, the Tribunal finds that the treatment (insisting the claimant spend 100% of his shift attending) was a proportionate means of achieving a legitimate aim on the facts.

215. The **third act** was instigating an investigation against the claimant with an extant appeal. The Tribunal was satisfied this was a proportionate means of achieving a legitimate aim. The respondent was in the midst of a pandemic. The claimant had not attended shifts for which he was rostered. The effect of not working was major given the absence of other staff to cover the claimant and the lack of recruits. The impact upon the claimant was his perception that working as directed could have upon him. That was not something the claimant had established. It was his belief and he decided not to attend those shifts (for which he knew he had been rostered, believing himself to be fit for work). The failure of the claimant to attend his shifts required to be investigated to ensure the respondent had a proper understanding of the claimant's position. The decision to investigate it was a proportionate means of achieving a legitimate aim. It was necessary to formally and properly understand why the claimant was not attending work and determine next steps notwithstanding the context in which this occurred.

216. The impact upon the claimant was that he was unhappy in facing an investigation. Equally, however, the investigation gave him the opportunity to set the record straight in a formal way and ensure the respondent fully and properly understood his rational for not attending work when he ought to have been present. The impact upon the claimant was in contrast to the impact upon the respondent in not having the claimant at work where the formal position had not been understood. That had an impact upon the operational delivery and it was necessary and reasonable to undertake a formal investigation on the facts and in context. While the claimant had set out his position in writing and orally in advance, it was necessary for the matter to be considered formally and fairly.

217. The way in which the respondent acted with regard to the investigation was proportionate. There was no other reasonable way of formally determining the position given the operational context. The approach the respondent took was, objectively viewed, reasonable. The investigation and approach was in pursuit of a legitimate aim and was done so in a proportionate manner having intensely analysed the impact on the claimant and respondent.

218. The **final act** was the decision to refuse to accept the claimant's grievance as a grievance. The Tribunal would not have found the justification relied upon in this regard as applicable. The reason for treating the claimant's grievance as pertaining to matters already being dealt with was in no way connected with the pandemic or operational issues. The justification relied upon would not have been upheld had it been necessary to consider it given it did not apply to this issue.

219. The Tribunal noted that there was a suggestion within the list of issues that argued Mr Robertson's treatment of the claimant was, as alleged, a continuation of previous treatment that arose as a consequence of the claimant's disability. While this was under the section "something arising in consequence of disability" it suggested that Mr Robertson's approach was unfavourable treatment. Even if the treatment was unfavourable and because of something arising in consequence of disability. the Tribunal would have had no hesitation in finding that Mr Robertson's treatment of the claimant was a

proportionate means of achieving the legitimate aim set out by the respondent. His justification for his approach was compelling and the Tribunal would have accepted the reasons he gave as supporting the position that his actions proportionately achieved a legitimate aim and were justified.

220. Mr Robertson carefully listened to the claimant and balanced the impact of the claimant's perception upon the operational needs of the respondent. The Tribunal considered the necessary intense analysis and balancing exercise and found that the way in which Mr Robertson approached matters was a proportionate means of achieving a legitimate aim. He found a fair way to resolve the issues taking account of the claimant's position. He balanced the impact upon the claimant and the respondent and reached a conclusion that the Tribunal would have found itself.

221. The Tribunal was satisfied from the facts before it that the decision to require the claimant to spend his shift attending patients was a proportionate means of achieving a legitimate aim. The respondent required the claimant's skills and experience and his inability to attend to patients where he was engaged caused significant adverse operational issues. The impact on the claimant was minimal as it was the claimant's perception of risk that prevented him from complying (which perception did not align with the medical evidence). Steps were put in place to safeguard against things becoming too much. The approach the respondent took was a proportionate way of achieving their aim since the claimant did not need to drive and was able to raise any concerns that arose in carrying out his attending duties.

222. On the facts of this case having applied the legal principles the claims are ill founded and dismissed.

*Taking a step back*

223. The Tribunal took a step back and considered each of the claims. The Tribunal was satisfied applying the legal tests that each of the section 15 claims is ill founded. The Tribunal was careful to assess the treatment in assessing whether it was unfavourable and whether it was because of something arising in consequence of disability. If it were, the Tribunal carefully

balanced the impact of the treatment upon the claimant with the effect on the respondent and intensely analysed the position.

224. When assessing the justification of the actions said to amount to a breach of section 15 the Tribunal took great care to balance the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. The Tribunal considered whether the measures were an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. Where justified the Tribunal found them to correspond to a real need and the means used appropriate with a view to achieving the objective and be necessary to that end having weighed the need against the seriousness of the detriment.

225. The claims pursuant to section 15 of the Equality Act 2010 are accordingly ill founded and they are dismissed.

*Harassment related to disability (Equality Act 2010, section 26)*

226. The Tribunal took each incident in turn and assessed the matter in light of the statutory requirements.

227. The **first act** was the letter dated 7 June 2021 inviting the claimant to a meeting which may result in the termination of his employment due to his continued sickness absence. It was not disputed that this letter was sent. It was inviting the claimant to discuss his continued position. The letter was headed “attendance management review – management of health meeting” and was to discuss the claimant’s continued absence. The letter stated that termination of his employment was a possibility.

228. The next issue was whether or not the sending of the letter was unwanted conduct. This was not straightforward since the claimant knew the meeting was to happen. He understood that it was necessary to meet and discuss matters. He also knew that he was unable to drive an ambulance which was part of his role and he wanted the chance to set out his preference to deal with the challenges presented. The Tribunal concluded that it was not unwanted conduct to send a letter of this type, a letter foreshadowed in the

capability process inviting the claimant to a meeting he wanted. Most staff find it stressful undergoing a capability process and the claimant was no different. It is, however, important that an employer makes the formal process clear and technically dismissal is a potential outcome of such a meeting and it is necessary to include this in correspondence. The letter (whether the sending of it or the content) was not unwanted conduct in terms of the legislation.

229. If the sending of the letter was unwanted conduct, the next question would be whether it was related to disability. The letter was about the meeting. Viewed in context the letter adopted the template for these meetings. The letter would be almost identical for whatever the reason for the meeting was. The conduct, the sending of the letter, was, in light of the context of this case not related to disability. The letter was sent because the respondent wanted to meet the claimant to discuss his return to work. The sending of the letter inviting the claimant to a meeting was not conduct related to disability.

230. Had it been necessary to consider the next issue, the Tribunal would not have been satisfied that the conduct had as its purpose the violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The purpose was to meet with the claimant to explore the options. That was the correct way of managing matters bearing in mind the terms of the guidance, relied upon by the claimant, that required the individual position to be taken into account. While the claimant's agent argued there was a sinister purpose behind the respondent's actions, this was not accepted by the Tribunal from the evidence. The respondent was seeking to manage the claimant's issues during a challenging time and in the face of the claimant's disagreement as to the position.

231. The Tribunal also considered whether the effect of sending the letter was to violate the claimant's dignity or create an intimidating hostile degrading humiliating or offensive environment. The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. While the claimant was not happy about receiving the letter, he understood it was part of a process. The process was to understand what the respondent could do to help the claimant

return to work in some capacity. Dismissal was but one option and it was clear that this was not something the respondent was focussing upon. It was not reasonable for the conduct relied upon to have the effects set out in this section. The conduct did not therefore have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. This claim is ill founded.

232. The **second act** relied upon was the telephone call from Mr Baird when he was alleged to have shouted at the claimant telling him to stop driving work immediately. The Tribunal was satisfied that Mr Baird did have a call with the claimant. The Tribunal was prepared to accept that Mr Baird was concerned about what the claimant was doing but the Tribunal was not satisfied that Mr Baird had shouted at the claimant. It was more likely than not that Mr Baird was extremely concerned the claimant was working solo on PRU, doing something which could place himself and others at risk Mr Baird accepted in correspondence that he had misunderstood the position but it was entirely reasonable of him to be concerned if his understanding was correct. The Tribunal found that Mr Baird was concerned the claimant was driving a vehicle which could put himself and others at risk and the claimant was instructed by him, his then manager, not to do so.

233. The Tribunal was not satisfied the conduct relied upon as found by the Tribunal was unwanted conduct. The claimant had agreed that he would not drive any vehicles and that he was following the instructions he had been given. The instruction he was given by Mr Baird was not therefore unwanted. While the claimant may have been unhappy with the way in which Mr Baird dealt with the issue, on the facts it was an error Mr Baird had made and thereafter a reasonable instruction not to drive any vehicle. The instruction to cease driving immediately, which was the key aspect of the conduct relied upon, was not unwanted conduct. The claimant had reasonably already agreed not to drive during working hours.

234. If the conduct had been unwanted, it related to the claimant's disability since it was directly because of the claimant's disability which prevented him from driving. The conduct therefore related to the claimant's disability.

235. The Tribunal would not have found the conduct to have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The sole purpose of the conduct was to ensure the claimant was not placing himself or others at risk. It was no way intended to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment.

236. The Tribunal would also not have found that the conduct had that effect. The claimant may have been upset that Mr Baird was getting involved but it was not reasonable for him to consider that. The upset of the claimant was not such as to amount to the conduct having the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

237. Even if the conduct did have the effect the Tribunal would have concluded that it was not reasonable for it to be so. The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. The instruction was to cease driving by the claimant's then line manager. That was a reasonable instruction. Mr Baird had made an error as to his belief that the claimant was driving, but he was doing his job of ensuring the safety of those under his control. This claim is ill founded.

238. The **third act** relied upon was telephone call, voicemail messages and emails from Mr Baird, where the claimant advised his work had been approved and Mr Baird told the claimant he was not allowed to do the shifts in question. The Tribunal did not find this to have been established in evidence that had been led. Mr Baird had been seeking to understand what had been agreed with the claimant's line managers. The Tribunal was not satisfied from the evidence that there was anything untoward in the way in which Mr Baird had acted in relation to the claimant given the context and importance in ensuring health and safety of the claimant and others was preserved.

239. The action relied upon is Mr Baird managing the claimant in the way he did which the Tribunal considered carefully from the evidence before it. Those

actions did not amount to unwanted conduct. The claimant was being managed by his then line manager. While he may not have liked the way in which he was being managed and Mr Baird's involvement (since it differed to his normal line management), it was necessary and reasonable for Mr Baird to step into the shoes of the claimant's line manager (in their absence) and ensure matters were appropriate and safe. On the facts Mr Baird's actions did not amount to unwanted conduct.

240. Had it been unwanted, as the conduct related to the claimant's working conditions consequent upon his disability the act did relate to disability. The conduct related to the claimant's working pattern which arose because of his disability.

241. The Tribunal would have been satisfied that the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The sole purpose was to ensure the safety of those reporting to Mr Baird and that the claimant's working pattern was appropriate, in Mr Baird's view. The Tribunal was satisfied there was no sinister motive or purpose as alleged by the claimant.

242. The Tribunal was also satisfied the conduct did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. While the claimant was unhappy, he knew he had reached agreement with his line managers as to his return to work. He was not happy another manager was asking about what had been agreed but that was their job. It was not reasonable for the claimant to find the way in which Mr Baird managed the situation in light of the calls and messages to consider the conduct to have the effects necessary to amount to harassment. This claim is ill founded.

243. The **fourth act** was the omission of Mr McLeod Kerr in failing to respond to the claimant's request for clarification on 2 august 2021. The Tribunal found that the claimant's call was not responded to due to the number of messages and pressure of business given the context in which the respondent was operating. While the conduct was unwanted (as the claimant sought a

response) it did not relate to disability in any way. The conduct was solely because of the pressure of business and the matter was missed. The claimant's disability was in no sense related to the conduct.

244. Had it been necessary to do so the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The conduct, the omission, was due to pressure of business and an oversight. There was no other purpose.

245. While the claimant was upset in not receiving a response, the effect of the omission was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. The claimant's perception was taken into account but objectively viewed it would not have been reasonable given the context. While the claimant was understandably keen to progress matters, the operational circumstances were such that not every call or message could be returned. This claim is ill founded.

246. The **fifth act** was the first invite to a stage 3 meeting in terms of the Capability Policy advising that a consequence of the meeting could be dismissal. This was not disputed.

247. The Tribunal was not satisfied this was unwanted conduct. The claimant knew that a "big meeting" was happening. While he was nervous about it, the meeting presented his opportunity to set out his position. It was wanted by him in an attempt to persuade the respondent to find him a PRU role. The letter stated that a consequence could be dismissal. That was a necessary consequence to ensure the worst case scenario was set out but it was not unwanted conduct in the sense required by the legislation.

248. If the conduct was unwanted, it was a standard letter that was issued (in standard terms) irrespective of whether the claimant was disabled or not. The act of sending an invite letter in the terms in this case was not conduct related to disability.

249. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The only purpose was to arrange to meet the claimant to discuss matters, with the last resort being dismissal. There was no sinister background as believed by the claimant.

250. Had it been necessary to consider matters, the act did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The claimant was unhappy about being told there was a risk he could be dismissed but he understood the meeting was to explore all options (and dismissal was a last resort). Having understood the respondent's policies, this was not a new fact unknown to the claimant.

251. The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. The claimant wanted to meet with the respondent to seek to secure the adjustment which he considered reasonable. Being told dismissal was an option was a necessary step in the process but it was background given the purpose was to explore all the options. It was not reasonable for the claimant to consider the actions to amount to harassment. This claim is ill founded.

252. The **sixth act** was on a further letter inviting to a stage 3 meeting being sent where the consequences could be termination of employment. This was accepted as having happened. The Tribunal did not consider the sending of this letter to be unwanted conduct. The first meeting had been cancelled due to the chair moving on. It was necessary and known by the claimant to be necessary to convene another meeting. It was not unwanted conduct to invite the claimant to a meeting to explore his absence and to seek to find a solution. The claimant had already seen the terms of the letter before and it was not unreasonable for another letter to be issued with the revised meeting date.

253. If the conduct was unwanted, for the same reasons as the above letters, the sending of the template capability letter was not related to disability. It was the

sending of a standard letter to arrange a meeting to discuss return to work. The wording would have been the same irrespective of disability.

254. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The purpose was to ensure the claimant knew when the meeting was and that a consequence could be dismissal but that was a last resort.

255. The Tribunal was satisfied it did not have that effect. The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. The claimant knew a further meeting was to be convened and knew that the procedures led to a formal meeting being convened, after which dismissal was an option. This claim was ill founded.

256. The **seventh act** relied upon was the stage 3 meeting where documentation produced in support was factually incorrect, HR provided incorrect advice on application of Equality Act and manner of conduct of meeting as alleged by claimant. This was, by and large, not disputed as having occurred. It was also not disputed that the conduct was unwanted since the claimant was unhappy with the errors and approach taken which did not align with his position or understanding.

257. The Tribunal also considered that the conduct did relate to disability since it related to the claimant's absence from work which stemmed from his disability. The conduct was clearly expressly focussed upon the claimant's disability and so related to disability.

258. The key issue in this claim was whether the conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The Tribunal considered the evidence led carefully in light of the statutory test.

259. Having analysed the evidence the Tribunal was satisfied the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating,

hostile, degrading, humiliating or offensive environment for the claimant. The purpose was to set out the background as understood and to explain to the clamant the respondent's position.

260. The SBAR had errors contained. These were genuine errors. The approach at the meeting was to set out the respondent's understanding as to how the Equality Act worked. It was necessary to explain that reasonable adjustments require a consideration of both the perspective of the employee but also the impact upon the employer. The purpose was solely to explain the respondent's position. There was no sinister purpose as alleged by the claimant. The documents were prepared and meeting conducted in a way that was intended to set out the respondent's position and believed at the time (even if that did not align with the claimant's understanding of the position or obligations). There was no other purpose.

261. The Tribunal was satisfied that the acts relied upon did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The Tribunal took into account the claimant's perception. The claimant was upset that there had been errors in the paperwork and the respondent ensured that the claimant was given the time and space to correct those errors. The errors were genuine. The claimant was satisfied he had been given a fair chance to set out his position at the meeting. While his understanding of the Equality Act and position contradicted the respondent in places, the approach taken by the respondent was not unfair. It was their position. While other employers may have conducted matters differently, the approach taken was reasonable. The claimant was upset but the Tribunal has to take into account all the other circumstances of the case and whether it is reasonable for the conduct to have that effect. The way in which the meeting was conducted was fair and reasonable. The claimant's concerns were listened to and a fair approach identified. The claimant accepted he had been given the chance to set out his position and correct the errors that had been made and the decision going forward would be based upon the correct position.

262. The claimant was unhappy that his position had not been accepted and that he had not secured the adjustment he wished. He was unhappy that there were errors in the SBAR and in how the respondent understood matters. The errors were genuine and the respondent's explanation reasonable with regard to their understanding. It was not objectively reasonable for the claimant to conclude the conduct in question amounted to harassment. The respondent had done its best to set out its position and understanding. This claim is ill founded.

263. The **eighth act** was the stage 3 outcome letter which the claimant believed contained incorrect factual information. The Tribunal found that the outcome letter was based upon the respondent's understanding. Errors were genuine. The claimant was unhappy with the outcome (and appealed). On the facts it was unwanted conduct (since he did not want such an outcome) and it related to disability since it was the outcome of a review based on the claimant's absence because of his disability and expressly focussed upon the claimant's disability.

264. The purpose was, however, solely to narrate the facts as understood. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The sole purpose was to explain the position as understood and give the claimant an outcome which the respondent believed would accommodate the claimant and retain his position and overcome the challenges his disability created for his employment.

265. The Tribunal would also have been satisfied the conduct did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

266. The claimant was unhappy he did not secure the outcome he wished. He was unable to accept that the respondent wished him to carry out his duties but without the need for driving. The claimant believed that created a risk to his

mental health. He was unhappy with the letter given its content but it was not such as to create the necessary effects. It was not reasonable for it to be so. The respondent did its best to set out the conclusion of the process. Each of the points the claimant raised had been considered. A solution was identified that allowed the claimant to focus on the key aspect of his role. That solution had operated elsewhere without difficulty. It was not reasonable for the claimant to conclude that the conduct in question had the proscribed effect. This claim is ill founded.

267. The **ninth act** was the allegation that Mr Baird forced the claimant to take annual leave during his phased return. From the evidence before the Tribunal, Mr Baird noted that the claimant had a significant amount of accrued leave and suggested the claimant take it to avoid losing it.

268. The Tribunal did not find that taking annual leave on the facts was unwanted conduct. The respondent wanted to ensure the claimant did not have an inordinate amount of leave accruing and required to take care of the claimant's health and safety. Insisting he use accrued leave was not unwanted. While the claimant may not initially have liked to take his leave then, there was no evidence of any challenge by the claimant of the instruction (or more accurately, observation). It was a reasonable observation by the claimant's then line manager and the claimant used the leave.

269. The Tribunal was also satisfied requiring the claimant to take unused leave was not related to disability. It was due to the claimant having accrued leave that required to be used up. The claimant's disability was a secondary issue, the key point being the claimant had accrued leave that had to be used, for the claimant's benefit.

270. The Tribunal was also satisfied that the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The only purpose was to protect the claimant and ensure he had taken leave to which he was entitled. The Tribunal did not accept the claimant's suggestion of there being

a sinister motive at play. Mr Baird was seeking to ensure those under his control used their accrued leave in a sensible way.

271. The request did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. The claimant was in the midst of a return to work but it was important accrued leave be utilised and not lost. It was reasonable for the respondent to do so (and he did so without raising any issues or concerns at the time). This claim is ill founded.

272. The **tenth act** was the claimant's status on the respondent's system being changed to "unpaid leave/absent without consent" when he did not attend work. This was accepted as having happened and was unwanted conduct as the claimant wished to be paid for his absence. The conduct stemmed from the claimant's absence due to disability related reasons. It was related to disability.

273. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant had not attended shifts for which he was rostered and which he understood he had been rostered. The sole purpose in changing his status was to set out what the respondent understood the position to be. The claimant may have had reasons for not attending work but until an investigation had been carried out, the position was unclear. On that basis the claimant's attendance was unauthorised. The purpose in recording the claimant's absence as unpaid leave/absent without consent was to accurately record what the respondent understood the position to be. The matter would be investigated and if the actual position differed the record may have been altered but the sole purpose in making the change was to ensure the recording system accurately reflected the position (irrespective of the claimant's position).

274. The conduct also did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. The effect upon the claimant in this regard was minimal. He had not attended work to carry out his shift. He was therefore not entitled to be paid. Registering the absence as unpaid/without consent was reasonable as it accurately reflected the position even taking account of the context and emails. The claimant had been instructed to attend work and he decided he would not do so (as he believed doing so could affect his mental health in the future). This claim was ill founded.

275. The **eleventh act** was the invite to disciplinary investigation and the disciplinary investigation itself which was commissioned by Mr McAleer while the stage 3 appeal was extant with the hearing date fixed and investigation meetings taking place.

276. This had occurred and was unwanted conduct as the claimant did not want the investigation to proceed. The conduct related to the claimant's absence from work which related to disability. This was a finely balanced issue since the investigation could have been commissioned irrespective of disability. As the claimant had specifically raised the issue of his disability the Tribunal concluded that it was on the facts conduct related to disability on balance.

277. The Tribunal carefully considered the evidence and was satisfied that the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant was unhappy about having to explain himself particularly when the other matters were progressing but it was fair and reasonable for the employer to seek to understand, properly and in a formal context, why the claimant had decided not to attend work (even when the other processes were ongoing). The sole purpose was to formally give the claimant the opportunity to explain his position. There was no other purpose of the conduct.

278. The Tribunal was satisfied the treatment did not have that effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. The claimant was able to give full answers during the process and set out his position. It would not have been reasonable for him to have found the act to be harassment given the context and the reasonable approach the respondent took. While other employers might have acted in a different way, the approach of the respondent was reasonable on the facts. Given the context and operational restrictions it was reasonable to progress the investigation into why the claimant had not attended work. The fact other processes were ongoing did not alter the fact. Mr McAleer was not the investigator but it was his decision to instruct an investigation, which was not unreasonable. This claim is ill founded.

279. The **twelfth act** was the stage 3 appeal meeting where it was alleged Mr Robertson continued to assert that constant attending is the only option and refused to consider any other options despite the Guidance Document. While it was not entirely accurate to say other options were ignored, the respondent did conclude that their approach was reasonable and as a result it was not necessary to look at other options and the guidance document does not require further action. Mr Robertson concluded that as it was possible to retain the claimant in his contracted role with an adjustment, a reasonable adjustment had been identified and it was not necessary to look at other solutions (which was necessary given the local recruitment issues and the nature of the role).

280. The outcome was unwanted and did relate to disability given the nature of the issues but the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The purpose was solely to secure the claimant's return to work and to identify reasonable adjustments. The purpose of the appeal meeting was to fairly allow the claimant to set out why he considered

his position to be preferred. The respondent took his position into account but had to do so alongside the operational restrictions and knowledge of how the work would impact upon the claimant. There was no sinister purpose as alleged.

281. The effect of the appeal meeting was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

282. The claimant was unhappy but understood he had been able to set out his position. He was satisfied the respondent had listened to what he had to say and while the respondent did not accept it, they considered the full factual matrix and reached a decision that was open to them. The respondent explained their position. It was entirely reasonable for the respondent to seek to accommodate the claimant within the working environment and in his contracted role. While some other equally reasonable employers might have sought to find other reasonable adjustments, the approach of the respondent was entirely fair and reasonable. They had identified what they considered, from an informed position, an adjustment that was reasonable. While the claimant disagreed and wished another option (as he was concerned due to a perceived risk to his mental health if the position persisted) the respondent acted reasonably and sought to accommodate the claimant. Measures were to be put in place to ensure the claimant could raise any concerns, if attending only created any issues. This claim is ill founded.

283. The **thirteenth act** was the stage 3 appeal outcome letter affirming the decision of original meeting. The Tribunal found this was unwanted conduct in the sense that it did not give the claimant what he wanted. It related to disability as it stemmed from the claimant's disability and expressly dealt with disability issues.

284. The conduct did in no way have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive

environment for the claimant. The purpose was to retain the claimant and seek to facilitate his return to work in a measured way. The outcome letter had its sole purpose seeking to facilitate the claimant's return to work in a way that was fair and reasonable, taking account of both the claimant's position but also the operational context. The sinister purpose alleged by the claimant was not present on the facts.

285. The conduct did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The Tribunal took into account the claimant's perception and all the circumstances. The claimant was unhappy but the respondent had acted reasonably and sought to allow the claimant space to return to work and raise any concerns he had. The claimant refused to implement what was agreed, for fear of emboldening the outcome. In other words the claimant did not want to try a return to work in the manner alleged. While it may have been reasonable for him to do so, it was entirely reasonable for the respondent to instruct the claimant to return to work in the manner alleged. They had put in place measures to assist the claimant and ensure he could revert to doing what he said he always wanted to do and do that which he said he excelled at. This claim is ill founded.

286. The **fourteenth act** was Mr Robertson's refusal to involve himself in the redeployment request or accept the formal grievance. That conduct occurred and was unwanted conduct as the claimant wanted Mr Robertson to progress matters and get involved. The Tribunal found on balance that the conduct did not relate to disability because it was Mr Robertson applying the rules as he understood it. He could not get involved in the process as he was likely to be involved at a later stage. Disability was entirely irrelevant to the issue as to whether Mr Robertson gets involved in the process from the facts. Similarly the decision not to accept the grievance was again because the extant processes dealt with the substance of the complaint. On balance on the facts of this case the conduct was in no sense related to disability.

287. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive

environment for the claimant. The purpose was to ensure the respondent's policies had been followed. Mr Robertson's purpose was to ensure the claimant understood the stage 3 process and disciplinary process were separate issues which dealt with the substance of the claimant's grievance. The respondent had identified a solution that allowed the claimant to retain his contracted role. That was, in fact the purpose of the guidance document. The claimant retained his contracted role and could revert to doing what he did best. Mr Robertson had done his best to assist the claimant in this regard and Mr Robertson's only purpose was to find a solution that worked and was consistent with the respondent's policies. Redeploying the claimant created a risk for him given the uncertainty in the other roles. There was no sinister purpose.

288. The effect of the conduct was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

289. The claimant wanted matters progressed. In short the claimant wanted an adjustment that allowed him to operate a PRU or return to work in a way that did not have him working 100% in the back of an ambulance. That was the substance of his grievance. It was reasonable for Mr Robertson to conclude on balance the grievance had been dealt with via the other processes and entirely reasonable for him to avoid becoming involved given his likely involvement if matters were to progress. Mr Robertson's approach was entirely reasonable. This claim is ill founded.

*Taking a step back*

290. Taking a step back the Tribunal considered the facts and the submissions of the parties. The Tribunal was not satisfied that there was a sinister purpose behind each of the respondent's agent's actions in this case in dealing with the claimant. The claimant had wanted a different outcome. He viewed the Equality Act in a particular way which resulted in him being unable to see it from the respondent's perspective. The respondent had sought to find a

solution that retained the claimant in his contracted role and allowed him to focus on doing what he was employed to do and what he had done well. In no way was any of the respondent's actions designed to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

291. Similarly the conduct as found was not such, when viewed objectively, taking account of the claimant's perception to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The claimant may have been unhappy with the outcome but the respondent's approach was reasonable and fair. They reasonably took account of the claimant's position and belief but also the operational issues and needs of the respondent. Having balanced those matters and in particular having taken into account the medical evidence and having ensured measures were put in place to assist the claimant if things became difficult, the respondent acted fairly and reasonably. Their approach was reasonable and the acts relied upon by the claimant in this claim did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

*Time limits*

292. As the Tribunal did not find any of the claims to be founded, it was not necessary to consider time limits. The Tribunal notes that there was a lack of evidence as to the reason why the claims were not lodged sooner which would have been a significant hurdle had this been an issue to consider. As the claims have not been established, the Tribunal does not require to consider this issue.

*Observation*

293. The Tribunal thanks both parties for working together to assist the Tribunal in dealing with matters fairly and justly.

**Employment Judge:** **D Hoey**
**Date of Judgment:** **15 March 2023**
**Entered in register:** **17 March 2023**
**and copied to parties**

5